

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

ANTICIPATORY BAIL APPLICATION NO.464 OF 2022

Rupesh Rajgopal Zawar,
Age : 38 years, Occu. Business,
R/o Oppo. Central Bank, Vambori,
Tq. Rahuri, Dist. Ahmednagar. ... Applicant.

Versus

The State of Maharashtra ... Respondent

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Advocate for Applicant : Mr. Satej S. Jadhav.
APP for Respondent-State : Mr. S. B. Narwade.
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CORAM : S. G. MEHARE, J.

**RESERVED ON : 21.07.2022
PRONOUNCED ON : 02.08.2022**

ORDER :-

1. The applicant is a Food Business Operator and owner of M/s Ganesh Agencies and M/s Ganesh Foods. His plants are at M.I.D.C., Ahmednagar.

2. The Food Safety Officer, Mr. Kute, and others visited the Ganesh Agency of the applicant on 13.07.2021. They drew samples of whey powder (DMO40 Milky Ocean) for analysis. After collecting the sample, the procedure of dividing the samples into four parts and sealing each as per the Food Safety and Standards Act, 2006 was done. The Safety Officer and his

team seized the whey powder as per the procedure and delivered the remaining 48 bags into the custody of the applicant. After taking the samples, one of the samples was sent to the Food Analysis, Food and Drug, Mumbai, on 14.07.2021 for analysis. The Officers received the analysis report on 06.09.2021 with an expressed opinion that "the sample of whey powder conforms to the Standards of Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 with respect to the above parameters". Later on, the Officer was changed. He has sent the sample to the Referral Food Laboratory at Mysore for test/analysis of the said powder by a letter dated 06.10.2021. The Referral Food Laboratory, Mysore by its opinion dated 06.12.2021 has opined that, "the sample was 'substandard' as defined under Section 3(1)(zx) of Food Safety and Standards Act 2006, as it does not conform to the standards laid down for whey powder under the provisions of Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 thereof, in that : (a) Milk Fat content exceeds the maximum permissible limit. (b) Lactose content falls below the minimum standard limit. After that, the Assistant Commissioner-cum-Food and Drug Administration, Ahmednagar, wrote a letter dated 23.12.2021 to the Food

Safety Commissioner declaring that the Food Products was unsafe as per Section 3(1)(zz)(v), and made the recommendation for filing the criminal case against the applicant. A copy of this report of Referral Food Laboratory, Mysore was sent to the applicant by letter dated 23.12.2021. On 27.10.2021 by letter, the applicant was called upon to submit the accounts of purchase bills, stock transfer notes, bill of selling whey powder etc., within eight (8) days. The applicant has complied with the said letter belatedly contending that the Officer has no right to call for the record so demanded and still has supplied. On 19.01.2012, the designated Officer again wrote a letter to the Director of Referral Lab, Mysore, as regards its report dated 06.10.2021, raising three questions with his own opinion. He has expressed the opinion that "there might be the addition of such substance in the said whey powder due to which there is a false increase in protein value, and lastly, he requested to analyze the product. It has also been contended in the said letter that, "if the Director come to the conclusion that in fact there is any addition of substance then report with the name of that substance (Adulterant) so that it will be possible for him to take the correct action under the Act". In response to the said letter, the Director of Referral of Food Laboratory, Mysore, has

sent one more analysis report dated 08.02.2022 and opined that the sample is 'unsafe' as defined under Section 3(1)(zz) (xii) of Food Safety and Standards Act, 2006 and does not conform to the standards laid down for whey powder under the provisions of Food Safety to the Standards (Food Products Standards and Food Additives) Regulations, 2011 and Food Safety and Standards (Contaminants, Toxins and Residues) Regulations, 2011 thereof, in that : (a) Milk Fat content exceeds in the maximum permissible limit (b) Lactose content falls below the minimum standard limit and (c) melamine content exceeds the maximum tolerance limit.

3. Having three analytical reports, the prosecution has come up with the case that the melamine contents were added by the applicant to the milk product. Melamine is harmful to human life. Therefore, the applicant has committed a serious offence. On the basis of the material collected by the Designated Officer, a crime has been registered against the applicant with M.I.D.C. Police Station, Ahmednagar, for the offences punishable under Section 328, 420, 273 of the IPC, under Section 26, 26(2)(ii) of the Food Safety and Standards Act, 2006 read with Section 27(2)(c) and Section 59 of the said Act.

4. On the backdrop of the allegations levelled against the applicant, the learned counsel for the applicant has vehemently argued that the samples were tampered with and referred to all these three analytical reports and vehemently argued that even the colours of the whey powder were shown changed. He would submit that in a sample referred to the Food and Drugs Administration Laboratory, Mumbai the physical appearance of product was pale yellow whey powder. In a second report, the physical appearance of the product was shown as the creamy white colour of whey powder. In the first report, the sample was in a loose plastic container in a sealed condition. In the second report, a sample was received in a sub-sampled poly bottle without label declaration. Referring to the three reports, he submitted that the sample description and physical appearance were the same in the second and third reports. However, in the second and third reports, the label was shown as 'nil', and it contradicted the label mentioned in the first report that whey powder (Demineralised) DM-40. He has vehemently argued that no fresh sample was sent after the third analysis report. A sample that was used earlier has been re-used, which is not permissible in the law. He has vehemently argued that the analyst should test melamine first

as it is harmful. The analyst would not mistake in ignoring such a material analysis.

5. He has also argued that the applicant has filed various petitions against the Food and Drugs Safety Department. Due to his writ petitions, the Government has mass transferred the various officers. Since the applicant is fighting against the Department, the entire Department came together to see the applicant behind bars. He has submitted that to date, the Food and Drugs Department has visited his firms about 30 times. By referring to the various provisions of the Food Safety and Standards Act and rules framed thereunder. He has also argued that the prosecution has no case at all that when the Safety Officer visited the firms of the applicant the first time, they did find the melamine present there. Till the report of substandard, there was no issue. The punishment for the substandard product was lesser. However, the Officers were not satisfied with the said reports. Hence, the Designated Officer, with his own opinion, called the third report suitable for them. In the light of these facts, he has prayed that anticipatory bail may be granted to the applicant.

6. The learned APP has strongly opposed the application contending that the samples have not been tampered with. The

action has been taken within the four corners of the law. The Designated Officer has the power to call for one more report if he has some suspicion. In whey powder, melamine was found to be added, which is harmful to life. The Writ Petitions filed by the applicant are on the different issues having no concern with the present action. The evidence collected against the applicant is sufficient. His custodial interrogation is essential to seize the melamine powder and know the source who has supplied the melamine powder to him.

7. The facts discussed above reveal that after receiving the first analysis report, which was unsuitable for the Department. Then the Department changed the Officer. The new Officer sent the sample to the Referral Food Laboratory, Mysore. It was received with the opinion of 'substandard'. The Department had some doubts over the second report also. Therefore, the Designated Officer wrote a letter with his opinion and thereafter, the third report of 'unsafe sample and exceed the melamine contents' was received. The offence under the Food Safety and Standards Act, 2006 is a technical offence. The analysis report is the best evidence to find the truth whether the Food product samples are up to the standard or unsafe. It has also been alleged against the applicant that he was

unauthorizedly repacking and applying the shelf life labels. The entries of batch number, warranty etc., were not taken. There were discrepancies in the tax invoices, and it was not mentioned whether the whey powder was sold in retail or wholesale.

8. It is not in dispute that the procedure was not followed while collecting the sample as prescribed under the Food Safety and Standard Rules, 2011. After collecting the sample of the requisite quantity, the Officer collecting such sample has to divide such sample into four parts in the presence of witnesses and should label and seal it. The procedure has also been laid in the Food Safety and Standards Rules, 2011, regarding dispatching the samples to various authorities under 2.4.1(10).

9. The detailed arguments have been advanced by the learned counsel for the applicant and the learned APP for the State and referred to the various procedures regarding collecting samples and the power of the concerned Officer.

10. The Court has gone through the papers submitted by the learned Prosecutor as well as the applicant along with the application. It seems that there are three inconsistent food analysis reports. The first was in favour of the applicant, the

second was substandard, and the third was that the sample was unsafe and had excess melamine. The prosecution has no case that when the Officers visited the firm of the applicant, they found melamine. It is not disputed that the applicant is fighting against the Department by various writ petitions in the Court of Law. The Food business operator has to follow the Regulations and basic sanitary measures. Section 19 of the Act stipulates that no food article shall contain any food additive or processing aid unless it is in accordance with the provisions of the Act and Regulations made thereunder. The authority competent to inspect the food product has done it as prescribed in the Act and Rules. It must be noted here that two consecutive reports were not affecting the applicant seriously. The reason best known to Designated Officer why he was not satisfied with the second report. Why did he call for a third analysis report by giving hints to the Director of the Referral Food Laboratory Mysore when the same person analyzed the sample and gave his express opinion? A strict procedure has been laid in the Rules for sending the samples to the laboratory. Utmost care has to be taken to maintain the seal and labels. The learned counsel for the applicant has pointed out the difference in the description of the samples sent every time. The explanation of the prosecution in this regard was not

satisfactory. The applicant has a ground to believe that since he is fighting against the Department; therefore the Department is bent on taking stringent action against him.

11. Considering the facts of the case and the way of the proceedings initiated by the Department, this Court is of the view that the applicant is entitled for anticipatory bail. Hence, the following order :

ORDER

- (i) The application is allowed.
- (ii) The interim protection granted to the applicant by order dated 21.04.2022 is confirmed on the same terms and conditions of bail bonds and other conditions.
- (iii) Needless to state, the observations recorded in this application are restricted to the bail application only.

(S. G. MEHARE, J.)

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