

(1989) 12 OHC CK 0023
In the Orissa High Court
Case No : Criminal Revision No. 390 of 1985

Abhimanyu Dash

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 01-12-1989

Acts Referred:

Prevention of Food Adulteration (Amendment) Act, 1976 — Section 20
Prevention of Food Adulteration Act, 1954 — Section 10, 10(4), 10(7), 11, 12
Prevention of Food Adulteration Rules, 1955 — Rule 15, 16

Citation : (1990) 69 CLT 589

Hon'ble Judges : J. Das, J

Bench : Single Bench

Advocate : S.K. Mund, for the Appellant; P.K. Mohanty, Additional Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

J. Das, J.—This criminal revision arises out of the Appellant judgment dated 28-8-1985 passed by Sri B. Panigrahi, Sessions Judge, Keonjhar in Criminal Appeal No. 10 of 1985 upholding the conviction and sentence dated 29-1-1985 passed by Sri G.C. Chopdar, Chief Judicial Magistrate, Keonjhar, in 2(c) C.C. No. 1 of 1984 convicting the Petitioner under Sections 16(1)(a)(i) and (ii) of the Prevention of Food Adulteration Act and sentencing him to undergo R.I. for six months and to pay a fine of Rs. 1,000/-, in default to undergo R.I. for one month u/s 16(1)(a)(i) of the P.F.A. Act and awarding no sentence for the offence u/s 16(1)(a)(ii) of the P.F.A. Act.

2. The prosecution case, briefly stated is that the accused (Petitioner) Abhimanyu Dash was having a grocery shop at Patna Bazar and he was selling articles of food including mustard oil. On 23-11-1983 at about 3.00 p. m. Niranjan Behera (P.W. 2). Food Inspector, Keonjhar visited the grocery shop of the Petitioner and gave his identity to the accused and demanded his food licence for check. The Petitioner did not have the food licence. The food Inspector (P.W. 2) suspected

the mustard oil exposed for sale to be adulterated and after giving due notice purchased 750 grams of mustard oil on payment of Rs. 13/- for food analysis. After purchasing the mustard oil, P.W. 2 divided the same into three equal parts and kept the same in clean dry glass bottles and one part was sent to the Public Analyst to Government of Orissa for analysis along with memorandum of specimen impression of seal by registered post. The remaining two parts were made over to the C.D.M.O., Keonjhar. Vide his report marked Ext. 6, the Public Analyst found the sample of mustard oil to be adulterated. After receiving the report of the Public Analyst, P.W. 2 prepared the prosecution report and got the sanction of the C.D.M.O. The prosecution report was ultimately submitted by the C.D.M.O. on 30-1-1984 and on the same day the Court took the cognizance under Sections 16(1)(a)(i) and 16(1)(a)(ii). Thus, the Petitioner stood his trial and was convicted and sentenced as stated above.

3. The defence plea is that he purchased a tin of mustard oil on the previous day from one Babul Ram of Karanjia and he had no idea that the said mustard oil was adulterated. The accused also took the plea that he had food licence but as it was lost, he could not show the same on demand by P.W. 2.

4. The lower Courts have the finding that the formalities contained in Section 10(7) of the P.F.A. Act have been complied with and hence, the collection of the sample is in accordance with law. It was also held by the lower Courts that the mustard oil was proved to be adulterated and that the prosecution allegation that the Petitioner did not have the valid licence for the year 1983 has been established.

5. In this criminal revision two petitions have been filed along with two documents. In one petition prayer has been made to allow the Petitioner to adduce additional evidence to the effect that on the relevant date i.e. 23-11-1983 P.W. 2 was not validly appointed as the Food Inspector in accordance with law and that the Public Analyst did not possess the requisite qualification to be appointed as Public Analyst.

The two documents filed in the case for acceptance of the same as additional evidence are the deposition of Sri S.C. Patnaik, Public Analyst in another case of another Court (Case No. 2 (c) CC 366 of 1982 of the Court of the Chief Judicial Magistrate, Cuttack) and the notification published in the Orissa Gazette dated 16-12-1983 whereby the appointment of the Food Inspector in this case (P.W. 2) was notified.

The petition for accepting the additional evidence was registered and numbered as Misc. Case No. 544 of 1989, but that Misc. Case was dismissed for default on 1-8-1989. Subsequently, another petition has been filed and the same is numbered and registered as Misc. Case No. 545 of 1989. This Misc. Case was heard along with the revision.

In the other petition prayer has been made to allow the Petitioner to take additional grounds to the effect that the Public Analyst did not have the statutory

qualification to be eligible for appointment as Public Analyst and that P.W. 2 had not been validly appointed as the Food Inspector in accordance with law on the relevant date and hence, he had no jurisdiction to take action u/s 11 of the P.F.A. Act and as a result of that the entire prosecution is vitiated.

The prayer to take additional ground stated above, will arise, provided the Petitioner is permitted to adduce additional evidence, which he seeks to adduce. Thus, in a main question is whether the Petitioner should be permitted to adduce additional evidence at this stage.

6. The learned Additional Government Advocate vehemently objected to the admitting of Additional evidence at this stage. He argued that the Petitioner prayed for admitting additional evidence at a very belated stage, although he did not challenge the eligibility of the appointment of the Public Analyst or the validity of the appointment of the Food Inspector either at the time of trial or in the appeal and hence, the prayer to adduce additional evidence should be rejected.

The contention of the learned Additional Government Advocate has substance. It is the established principles of law that the power to take additional evidence should be exercised very sparingly even by the appellate Court and in suitable case, when the Court feels that without additional evidence there would be failure of justice and I am fortified in this view by a decision reported in AIR 1965 SC 1887 (Rajeswar Prasad Misra v. The State of West Bengal and Anr.).

In view of the above principles of law, the revisional Court, which is not a Court of fact has to exercise the power of admitting additional evidence only in very exceptional cases provided the materials on record provide a compelling basis for admitting additional evidence, without which failure of justice must be necessary consequence.

7. In this case it is found that no attempt was made on behalf of the accused either in the trial or at the stage of appeal to challenge validity of the appointment of the Food Inspector or eligibility of the appointment of the Public Analyst. Hence, there is absolutely no compelling basis for admitting the additional evidence, as the validity of appointment of the Food Inspector and the eligibility of the Public Analyst is a question of fact.

8. In a decision reported in 1979 F.A.J. 173 (M/s. Rameshwar Das Chotey Lal and Ors. v. Union of India and Anr.), it has been held by the Supreme Court that the validity of the appointment of the Public Analyst and the Food Inspectors under the Prevention of Food Adulteration Act should be more appropriately, raised if available before the trial Court and be decided by that Court on the material that may be placed before it.

In a decision reported in 1973 F.A.C. 148 (I.M. Nayak v. Kantilal Ambalal Shah and Ors.) the Gujarat High Court held that validity of the appointment of Food Inspector cannot be questioned at the appellate stage, when such a contention is

taken for the First time in the appeal and there is absence of any serious challenge of the validity of the appointment at the trial stage.

In a decision reported in AIR 1968 Gau 88 (Manka Hari v. The State of Gujarat), it has been held that the question whether the Food Inspector was qualified and validly appointed is a question of fact and it has no connection with the ingredients of the offence and unless such a question is raised in the trial Court, it cannot be considered in appeal.

The High Court of Allahabad also took the view in a decision reported in 1981 F.A.I. 648 (Lalta Prasad alias Radhika v. State) that the contention that the Food Inspector did not have the authority to collect sample must be raised before the trial Court and such a contention cannot be allowed to be raised before the High Court in criminal revision.

In view of the above judicial decisions including a decision of the Supreme Court, it must be held that the prayer made on behalf of the Petitioner to admit additional evidence regarding the validity of the appointment of the food Inspector and the Public Analyst and the prayer to add additional grounds in the revision in the revision petition in that regard must be rejected, as neither at the trial stage nor at the appellate stage an attempt was made on behalf of the Petitioner to challenge the validity of the appointment of the Public Analyst and the Food Inspector.

9. The learned advocate for the Petitioner argued that the prosecution is vitiated, as the Food Inspector was not validly appointed on the relevant date i.e. 23-11-1983 by notification in the Official Gazette.

In support of his contention the learned advocate for the Petitioner cites two decisions of the Punjab and Haryana High Court reported in 1984 (1) F.A.C. 140 (State of Punjab v. Sher Singh), and 1982 (1) P.F.A. Cases 311 (Vinod Kumar v. The State of Punjab).

The above contention of the learned advocate for the Petitioner is quite academical specially when in the preceding paragraph the prayer to admit additional evidence regarding the validity of the appointment of the Public Analyst and the Food Inspector and the prayer to take additional grounds in the revision petition to that) effect has been rejected.

I may, however, observe that as per the facts of the above decisions of the Punjab and Haryana High Court the accused took the plea from the very beginning that the Officer, who acted as the Food Inspector was not validly appointed as such and this point was decided by both the trial Courts. The facts of this case are quite distinguishable from the decisions of the Punjab and Haryana High Court.

10. In a decision reported in The State of Gujarat Vs. Natwarlal Pitamberdas Shah, a Division Bench of the Gujarat High Court took a view which is contrary to the views expressed by the Punjab and Haryana High Court (supra).

In the above decision, the Gujarat High Court observed:

... Even assuming for the sake of argument that Patel's appointment as Food Inspector is invalid or defective, the prosecution launched by him would not necessarily be illegal. Valid appointment as Food Inspector is not a pre-requisite for valid institution of prosecution u/s 20. What we have to see is whether the Conditions laid down by Section 20 are satisfied. If these conditions are satisfied, the prosecution launched must be held to be valid, irrespective of the fact whether or not appointment of Patel as Food Inspector was valid. Prosecution would not be ex facie invalid as sought to be urged on behalf of the accused even if appointment of Patel as Food Inspector is not valid....

It was submitted on behalf of the accused that Food Inspector is appointed for taking samples of any article of food and to send such samples for analysis to the Public Analyst and in case the sample was found to be adulterated to launch prosecution u/s 20 of the Act. It was contended that the power which the Food Inspector derives for launching prosecution is on account of the fact that he is a Food Inspector. Therefore, once it is shown that the person who launches prosecution is not validly appointed as Food Inspector all the steps taken by him as Food Inspector must be held to be illegal and invalid. We do not agree with this proposition. The Food Inspector as is seen from remaining Section 10 is not merely appointed for taking samples, sending them to Public Analyst and launching prosecution as sought to be urged on behalf of the accused. Power to take samples and to send them for analysis to the Public Analyst is one of the powers conferred on the Food Inspector and not the only power. Under Sub-section (4) of Section 10, Food Inspector has also power to seize any food article if he finds the said article to be adulterated or misbranded. Further, it is not correct to say that it is the Food Inspector who is conferred with the power of launching prosecution under the provisions of the Act. As pointed out above, any person authorised by the Municipal Corporation or the Central Government or State Government u/s 20 can launch prosecution for the offences under the Act. The power to launch prosecution is not confined to Food Inspector as urged on behalf of the accused. Food Inspector can launch prosecution u/s 20, only if he is authorised to do so u/s 20. As a matter of fact, a person who is authorised to launch prosecution u/s 20 need not be a Food Inspector. It is by virtue of the authority conferred u/s 20 by the local authority, Central Government or the State Government that Food Inspector or any other person gets authority to launch prosecution for the offences under the Act. Therefore, whether a person who is duly authorised to launch prosecution u/s 20 of the Act is or is not validly appointed as Food Inspector, is an entirely irrelevant factor. In our opinion, prosecution will not fail even if appointment of complainant Patel as Food Inspector is invalid.

The view which we have taken above finds support from the decision of the Supreme Court in *Dhian Singh v. Saharanpur Municipality* (1979 Cri.L.J. 492 (supra)). In that case it was urged on behalf of the accused that a permission u/s

20 of the Act to file a complaint is a condition precedent for validly instituting a complaint under the provisions of the Act. The fulfilment of that condition must be satisfactorily proved by the complainant before a Court can entertain the complaint. It was urged that without such a proof, the Court will have no jurisdiction to try the case. In support of the above contention, the learned Counsel for the accused sought to take assistance from the decision of the Judicial Committee in *Gokulchand Dwarkadas v. The King* AIR (1948) P.C. 82 : (49 Cri.L.J. 261) and *Madan Mohan Singh Vs. State of Uttar Pradesh*, . Both these decisions deal with the question of the validity of sanction given for the institution of certain criminal proceedings. The provisions under which sanction was sought in these cases required the sanctioning authority to apply its mind and find out whether there was any justification for instituting the prosecution. The Judicial Committee as well as the Supreme Court have laid down that in such cases, the Court must be satisfied either from the order of sanction or from the other evidence that all the relevant facts had been placed before the sanctioning authority and that authority had granted the sanction after applying its mind to these facts. The Supreme Court observed that the ratio of these decisions had no bearing on the facts of the case before it. u/s 20 of the Act no question of applying one's mind to the facts of the case before the institution of the complaint arises as the authority to be conferred under that provision can be conferred long before a particular defence has taken place. It is a conferment on an authority to institute a particular case or even a class of case. That sanction merely prescribed that persons of authorities designated in that section are alone competent to file complaint under the statute. Therefore, as observed by the Supreme Court, the Municipal Corporation of City of Ahmedabad or the person authorised by it was competent to file complaint under the Act. As already pointed out above, complainant Patel was duly authorised to file complaint under the Act... That being so the prosecution launched by him cannot be held to be bad in law even if his appointment as Food Inspector is defective or not.

It may be stated that after amendment of Section 20 of the P.F.A. Act with effect from 1-2-1976, the institution of prosecution "by or with the written consent of the local authority or a person authorised in that behalf by general or special order by such a local authority" has been omitted and hence, the local authority ceases to have any power u/s 20 after that amendment.

11. The Gujarat High Court also took the view that assuming that there was any irregularity in the appointment of the Food Inspector, the purchase made by him is covered by the provisions of Section 12 of the Act and there was no illegality in the prosecution instituted by the proper authority, or authorised person, specially when there was nothing to show that there is any legal defect in taking of the sample or the institution of the prosecution against the accused which can vitiate the proceedings or which may have caused prejudice to the accused.

In a decision reported in 1973 P.F.A. Cases 356 (*Municipal Corporation of Delhi and Anr. v. Darshan Lal Sharma*), a Division Bench of the High Court of Delhi took

the same view and held that even if there was a defect in the appointment of the Food Inspector the purchase of sweet made by him for purposes of analysis can be regarded as the purchase by a person other than a Food Inspector in terms of Section 12 of the P.F.A. Act and there is no legal-bar for the proper authority or authorised person to institute the prosecution.

12. The views expressed by the High Court of Gujarat (supra) is preferable as the view is not only well reasoned, but is also supported by a decision of the Supreme Court. In the light of the view of the Supreme Court relied upon by the High Court of Gujarat High Court (supra) the views appear to be inconsistent with the view expressed by the Supreme Court. Hence, I accept the views expressed by the High Court of Gujarat (supra) and in that view of the matter the contention of the learned advocate for the Petitioner that the prosecution is vitiated as the appointment of the Food Inspector is not valid cannot be sustained.

13. It may also be mentioned, that this case is distinguish able from the facts of the Punjab and Haryana High Court cases (supra). As per the fact of the cases of the Punjab and Haryana High Court, the prosecution report was filed by the authority in the capacity of Food Inspector. In this case although prosecution report has been written by the Food Inspector (P.W. 2), the P.R. was actually submitted by the C.D.M.O. in the Court. This has also been proved by P.W. 2. Hence, virtually the C.D.M.O. has filed the P.R. in the Court and there is nothing to show that he is not the authorised officer. In a decision reported in Municipal Board, Mainpuri Vs. Raja Ram, it has been held that when the Food Inspector filed the complaint under the authority of the Municipal Board he filed the complaint not on his own behalf, but on behalf of the Municipal Board and hence, the real complainant was the Municipal Board and so the complainant was validly filed. In his case, the C.D.M.O. himself filed the complaint and his authority is not under challenge and so the complaint has been filed validly and there is no illegality In taking cognizance u/s 20 of the P.F.A. Act and consequently the contention that the prosecution is vitiated has absolutely no basis.

14. The learned advocate for the Petitioner also raised a contention that the Food Inspector, Niranjana Behera (P.W. 2) has stated that he seized the bottles as per the provisions under P.F.A. Rules and that is not sufficient proof as it is required of the Food Inspector to prove the acts performed by him.

Section 11 of the P.F.A. Act provides the practice and procedure to be followed by the Food Inspector at the time of taking sample for analysis. According to the provision, the Food Inspector is required to give notice in writing of his intention to take sample for analysis and after taking the sample he shall divide the sample then and there into three parts and mark and seal or fasten up each part in such a manner as its nature permits and take the signature or thumb impression of the person from whom the sample is taken.

Rules 15 and 16 also provide as to how the bottles or containers are to be

labelled and addressed and how the same are to be packed and sealed.

Although the Food Inspector (P.W. 2) has stated that he sealed the bottles as per the provisions of the P.F.A. Rules, he has also clearly stated as to how he sealed. He has stated:

... I affixed paper seal issued by the C.D.M.O., Keonjhar around the sample bottles. Again tied the bottles" and sealed. I obtained signature of the accused on each sample bottle.

Thus, the Food Inspector has clearly proved the action taken by him in sealing and packing the sample. The proper sealing and packing are necessary with a view to prevent leakage and avoid deterioration of the sample. There is nothing in the cross-examination to show that either the Food Inspector did not pack and seal the bottles in accordance with law or that there was any leakage or deterioration. The Food Inspector has substantially proved his acts regarding the sealing and packing of the samples and that has not been challenged in cross-examination. Hence, the contention of the learned advocate for the Petitioner cannot be sustained, specially when there is nothing to show that any prejudice has been caused to the accused.

15. The learned advocate for the Petitioner also argued that the Food Inspector (P.W. 2) has not complied with Section 10(7) of the P.F.A. Act, as no independent witness has been examined.

Section 10(7) does not contemplate that there must be independent witnesses to the taking of the sample and they must be examined in the Court. All that is necessary is that the Food Inspector shall call independent witnesses and if they refused to be cited as witnesses, the onus of the prosecution is discharged and it must be held that the provisions of Section 10(7) have been sufficiently complied with.

In a decision reported in 67 (1989) C.L.T. 77 (Laxmidhar Sahu v. State of Orissa), it has been held following a decision of the Supreme Court reported in AIR 1974 SC 769 (Ram Labhaya v. Municipal Corporation of Delhi and Anr.):

The categorical evidence of P.W. 1 was that some of the outsiders, who were present at the spot and were observing the occurrence, refused to be cited as witnesses and went away without giving their identity. P.W. 2 who was the Peon accompanying P.W. 1 also corroborated him on the question stating that the outsiders present at the time of occurrence when asked refused to be witnesses and did not disclose their identity. No cross-examination has been directed at P.W. 1 in that respect. In view of the evidence, it is amply clear that prosecution had been taken to observe the provisions of Section 10(7) of the Act and P.W. 1 had not failed in calling independent witnesses. Since the persons present refused to be cited as witnesses, following the principles laid down in Ram Labhaya v. Municipal Corporation of Delhi and Anr. (supra) it must be held that the onus upon the Food Inspector had been discharged.

The above decision of this Court clearly applies to the facts of this case. In this case P.W. 2 has clearly stated that the operations of taking sample sealing and packing etc. were carried in presence of the witnesses and the outsiders present denied to be witnesses. P.W. 2 has also stated even in the P.R. that the operations were carried out in presence of the accused, vendor and the witnesses and the outsiders and neighbouring shop-keepers refused to be cited as witnesses. Thus, the statement of P.W. 2 that the outsiders declined to be witnesses is not an after thought, as it has also been mentioned in the P.R. Added to this, Narayan Pagal (P.W. 1) is the Peon in the office of the C.D.M.O., Keonjhar and he accompanied P.W. 2 at the time of taking sample and he has also stated that the Food Inspector called some outsiders to be witnesses, but they refused. Thus, P.W. 1 amply corroborates P.W. 2 in this respect. There is nothing in the cross-examination of either P.W. 1 or P.W. 2 to discredit the testimony that at the time of taking sample and packing and sealing of the same outsiders were called as witnesses, but they declined to be witnesses. Hence, the contention of Mr. Mund, the learned advocate for the Petitioner has no force and it must be rejected.

16. The Petitioner did not deny the taking of the sample from him, but he only stated that on the previous day he purchased a tin of mustard oil, out of which sample was taken and he was selling out of that tin. It has been held in various decisions that where the person did not deny the taking of sample from him, the question whether any independent witness was or was not taken by the Food Inspector as required by Section 10(7) was not at all material. (A.I.R. Manual 4th Edition Vol. 29 page 691).

It has been held by many High Courts and also the Supreme Court that even if the Food Inspector does not call the witnesses of the locality to witness the seal, that by itself will not vitiate the trial and it was more so when testimony of the Food Inspector had been relied upon by both the Courts and the accused did not deny of the sample taken from him. (A.I.R. Manual 4th Edition Vol. 29 page 692).

In this case the accused had admitted the taking of the sample and the testimony of the Food Inspector has been believed by the trial Court, as well as the appellate Court and hence, in view of principles of law stated above, the contention of the learned advocate for the Petitioner that there is non-compliance of Section 10(7) of the P.F.A. Act cannot be sustained.

17. It may be observed that the accused (Petitioner) admitted the taking of mustard oil from his and has stated that he purchased one tin of mustard oil on previous day from Babul Ram of Karanjia and he was selling out of the said tin. Thus, virtually the accused has admitted the prosecution allegations and he has taken no defence. Probably the accused thought by stating that he purchased a tin of mustard oil from Karanjia, it would be covered by warrantee and hence, there would be no criminal liability. There is, however, no question of the defence of warrantee being taken by the accused the accused has not also proved the purchase of mustard oil from Babul Ram of Karanjia by any convincing material.

Hence, it must be said that it is a defenceless case.

18. The other allegation is that the accused (Petitioner) did not have the food licence for the year 1983. The trial Court and the appellate Court have given concurrent finding that the accused (Petitioner) did not have the food licence for the year 1983 and hence, he has committed an offence u/s 16(1)(a)(ii) of the P.F.A. Act. I think there is absolutely no reason to interfere with the said finding.

19. In the circumstances discussed above, it must be held that the conviction and sentence passed against the accused (Petitioner) is quite justified.

In the result, there is no merit in this revision and the same is dismissed and the conviction and sentence passed against the Petitioner are upheld.

Revision dismissed.