
(1970) 02 CAL CK 0009
In the Calcutta High Court
Case No : Criminal Appeal No. 368 of 1964

Beharilal Agarwalla and Another	Vs	APPELLANT
The Corporation of Calcutta		RESPONDENT

Date of Decision : 12-02-1970

Acts Referred:

Prevention of Food Adulteration Act, 1954 — Section 19(2), 19(3)

Citation : AIR 1970 Cal 450 : (1970) CriLJ 1344

Hon'ble Judges : K.K. Mitra, J;A.K. Das, J

Bench : Division Bench

Advocate : Dipty Kana Bose, Prasun Ch. Ghosh and Promode Ranjan Roy, for the Appellant; J.M. Banerjee and K. Ganguly, for the Respondent

Final Decision : Allowed

Judgement

Das, J.—This is an appeal against conviction u/s 7(i)/16(1)(a)(i) of the Prevention of Food Adulteration Act. The appellant Beharilal was sentenced to rigorous imprisonment for six months and to pay a fine of Rupees 1000 while the appellant Girdharilal was sentenced to rigorous imprisonment for one month and to pay a fine of Rs. 500.

2. The prosecution case is as follows : On November 29, 1963 the Food Inspector. Calcutta Corporation, visited the shop of Beharilal Omprakash at 149 Cotton Street, Calcutta. The appellant Giridharilal was then present. He took sample from one tin of lanka powder in presence of witnesses after observing the rules. He also took charge of the tin and then went to the godown of the firm at 37 Cotton Street across the street. There also he found 41 tins of lanka powder and took sample from one such tin. All formalities were complied with and one sample of each seizure was handed over to the appellants. He also seized all the 42 tins of lanka powder under two lists and thereafter sent the samples to the Public Analyst for analysis. The public analyst found the samples to be highly adulterated and thereafter with sanction from the Health Officer they were charged with offences under the Food Adulteration Act and convicted.

3. The defence was a plea of innocence. They pleaded that the samples were not taken according to law and that Beharilal was not a partner of the firm. They also pleaded warranty from the supplier at Bombay.

4. The learned Magistrate overruled the objections and held on the evidence of D. W. 6, a partner of the Bombay firm Madhabdas Raghavji and Co., that there was no warranty in respect of the tins from which samples were taken.

5. Mr. Dutta the learned Advocate for the appellants, pleaded the defence u/s 19 of the Prevention of Food Adulteration Act. Their contention is that they purchased mirchi in sealed tins from the firm Mangaldas Raghavji and Co., of Bombay and the tins were sent from time to time by railway with usual warranty. They contend that not only were the contents of mirchi powder (sic) but they stocked and sold the articles in the same condition they purchased from the Bombay firm. They had the necessary warranty of purity from the Bombay firm and as such they were not liable if the contents were adulterated. The relevant portion of Section 19(2) as follows:

"A vendor shall not be deemed to have committed an offence pertaining to the sale of any adulterated or misbranded article of food if he proves--

(a) that he purchased the articles of food--(ii) in any other case, from any manufacturer, distributor or dealer, with a written warranty in the prescribed form; and

(b) that the article of food while in his possession was properly stored and that he sold it in the same state as he purchased it." Sub-section (3) of Section 19 provides that--

"Any person by whom a warranty as is referred to in Section 14 is alleged to have been given shall be entitled to appear at the hearing and give evidence."

The appellants, therefore, shall not be deemed to have committed an offence pertaining to the mirchi powder, if they can prove that they purchased the articles from Mangaldas Raghavji and Co., a firm at Bombay, with a written warranty in prescribed form and that the articles while in his possession were properly stored and that he sold it in the same State as he purchased it.

6. The learned Magistrate rejected the plea on the finding that the plea was taken at a very late stage and is after-thought. He accepted the denial by a partner of the firm at Bombay that the rubber stamp warranty was manufactured and the tins containing the powder were changed while under attachment, though, he accepted the appellants' story of purchase from time to time of a large number of tins from the same firm. The learned Magistrate finally held that the lanka powder seized did not come from the Bombay firm. There is no dispute that the appellants purchased mirchi or lanka powder from the Bombay firm Mangaldas Raghavji and Co. It appears from the evidence of D. W. 7 Padan Kumar, a Clearing Agent, that on 27-11-62 he cleared 26 tins of mirchi powder for appellants by R. R. No. 897933 and on 23-11-62 he cleared 75 tins and he

identified the tin shown in Court as one of those tins. In cross-examination he stated that he was definite that this very tin was taken delivery by him. He is not connected with the appellants' firm and his evidence not only proves the purchase but he also identifies the container as one of those in which the consignment was cleared from the railway station.

7. The next witness is D. W. 2, the Durwan of the godown at 37, Cotton Street. He says that P. W. 7 Padan Kumar brought the tins of mirchi and he also identifies the tin shown in Court as one of those tins. He stated that he opened the padlock when the Corporation Inspector came and he proves "that the tins were kept in the same condition as kept by him as brought by Padan. Kumar". P. W. 6, partner of Mangaldas Raghavji and Co., admitted sale by them of the mirchi powder to appellants' firm and the correspondence and transport of the tins by railway, though he suggested that the tins were replaced and contents tampered. The learned Magistrate relied on him forgetting that he was interested to deny, for otherwise the liabilities would come on them. He however conceded that the tins produced were of the same size but he could not say what distinguished these tins from those in which they supplied. It is besides the prosecution case that the Food Inspector attached the tins after taking sample and the question of replacement of the tins should not therefore, arise at all. The evidence of D. Ws. 7 and 8 who identified the tins and who were not even cross-examined on this point should have persuaded the learned Magistrate to reject the interested evidence of the partner of the firm denying that the consignments were not in identical tins. Sub-section (3) of Section 19 gives right to the firm to appear at the hearing and give evidence. But no attempt was made to produce standard containers to show the difference with those produced by the appellants. Needless to say that the Bombay firm had a great stake and it is not, therefore, proper to give due importance to their denial and throw out the appellants' defence in limine. The appellants again adduced evidence to show that the tins had railway labels affixed on those tins.

8. The Bombay firm denied the rubber stamp warranty ; obviously they would, as the liabilities would otherwise come on them. They however adduced no evidence to show that the nature of warranty they used to give and a mere denial is not sufficient. The alleged warranty is written in Gujrati language. The firm witness D. W. 6, claimed it to be in incorrect Gujrati, but the witness who translated it did not say that. In any case, it is of little importance whether the writing is grammatically correct or not but the writing disclosed warranty within the meaning of Section 19. In the recent Supreme Court decision in Criminal Appeal No. 141 of 1967, K. Ranganatha Reddiar Vs. The State of Kerala, it was pointed out that the warranty is not a document drafted by a solicitor, it is a document using the language of the tradesman. Any tradesman when he is assured that the quality of the article is upto the mark will readily conclude that he is being assured that the article is not adulterated. If the words in the warranty can be reasonably interpreted to have the same effect as certifying "the nature, substance and quality" of an article of food, the warranty will fall within the

proviso. The language or the correctness of the language is there- "fore of no consequence. The learned Magistrate again was not right in treating D. W. 6 as a defence witness, though eked as a defence witness. According to the provisions of the Food Adulteration Act, he would face the prosecution instead of the appellants, if the appellants' contention is accepted and they were really at cross-roads. The initial onus is on the vendor, and if he proves that he purchases the article of food with a written warranty in the prescribed form, he shall not be deemed to have committed any offence. This onus, in our view, is discharged by proving the purchase and the warranty by the manufacturer, distributor or dealer. If the prosecution disputes the warranty, it is its duty to notify the dealer giving the warranty. The dealer is given the extraordinary right to appear and give evidence. If he chooses not to appear, the vendor must be deemed to have discharged the onus and he has committed no offence. The vendor cannot be a defence witness, for a defence witness cannot either have right of appearance or adduce evidence in support. In a prosecution where warranty is pleaded, the seller does not become a defence witness. We find that the seller was not only cited as defence witness but the defence had to pay a considerable amount as travelling expenses of the witness. After the notice is given to the seller, it is their option to appear, in view of Sub-section (3) of Section 19 and it is not the duty of the defence to produce him. The scheme of the Act makes them liable as suppliers and if they chose not to come, they take the responsibility of answering when the provisions of law are applied against him.

9. The learned Magistrate's approach treating the partner as a defence witness or relying upon his denial as such is misconceived. The learned Magistrate disbelieved the evidence that railway labels were attached to the tins, as such labels could be easily manufactured. But unless there is evidence that these were so manufactured or procured, the learned Magistrate should have given due weight to the labels attached to the tins in deciding the genuineness of these tins.

10. The learned Magistrate unfortunately did not give any importance to this plea of warranty on the ground of delay. It is however, in evidence that the challan was shown to P. W. 1 on the date of taking sample and the warranty is impressed on the challan. P. W. 1, the Food Inspector did not deny that the warranty in the rubber stamp was impressed on the challan shown to him and the only object of showing a challan was to raise the plea of warranty. The appellants have also adduced the evidence from D. W. 8 to show that the tins were kept in the same condition as brought by P. W. 7 Padan kumar; the Clearing Agent. The consignment, therefore, undoubtedly came from the Bombay firm and on the evidence, a large number of tins were brought from time to time. It is unthinkable and not perhaps in usual business course to alter contents of so many tins for purpose of adulteration and if, therefore the adulteration was there, in all probability the adulteration was at source. We have already referred to the challans which disclosed the warranty and the tins were kept in the same condition as received. The appellants, therefore, must be deemed under Sub-section (2) of Section 19 not to have committed any offence.

11. Mr. Dutt, the learned Advocate for the appellants, has raised other points viz.. about the legality of taking sample and whether the test applied in the case of mirchi powder. It is not necessary in view of our finding to go into this question but we may briefly refer to this. The prosecution case is that the samples were taken in presence of two witnesses, one of them was examined and in cross-examination he stated that he was called to the spot after the samples were taken. The other witness was present even on the date on which P. W. 1 was examined. The learned Magistrate did not examine him on the ground that his appearance was suspicious and he might not tell the truth. It is not for the learned Magistrate to make that impression in the absence of any allegation from the prosecution and such impression on the part of the learned Magistrate shows a bias in favour of the prosecution. After the defence cross-examined P. W. 2, the learned Magistrate put a question which was not for clarification but was in the nature of cross-examination to nullify the effect of cross-examination. The learned Magistrate should not do this at the risk of taking sides. In any case however, leaving aside the evidence of two witnesses, the evidence of the Food Inspector clearly shows that the samples were taken from the shop and then from the godown and looking at his evidence we are not prepared to say that the samples were not taken or that he deposed falsely.

12. Mr. Dutt has also challenged the Food Analyst's report. It appears that when this seizure was made there was no different standard laid down for mirchi powder which has since been done. There was however A. 05 in Appendix B where it was stated. "Spices, the standard, specified for various spices given in this clause shall apply to spices in whatever form whole or partly ground or in powder form". Even before the chilli and chilli powder were separated, this provision fixing standard for chilli would apply to chilli powder. Judged by that standard the present sample is adulterated.

13. We have however found that the appellants purchased the lanka powder from the Bombay firm under warranty and therefore no offence was committed.

14. In the result, the appeal is allowed, the conviction and the sentence passed on the appellants are set aside and they are acquitted. They be discharged from the bail bond.

K.K. Mitra, J.

15. I agree.