
(1969) 08 CAL CK 0019

In the Calcutta High Court

Case No : Criminal Appeal No's. 655 and 656 of 1963

Corporation of Calcutta

APPELLANT

Vs

Rathi and Co. and Another

RESPONDENT

Date of Decision : 13-08-1969

Acts Referred:

Prevention of Food Adulteration Act, 1954 — Section 10, 10(1), 16, 7

Citation : AIR 1970 Cal 435 : (1970) CriLJ 1339 : 73 CWN 1012

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

Bench : Division Bench

Advocate : N.C. Banerjee, for the Appellant; Jaharlal Roy, for the Respondent

Judgement

Das, J.—Criminal Appeals Nos. 655 and 656 of 1963 arise out of two orders of acquittal by a learned Presidency Magistrate under the Food Adulteration Act. The respondents are common and decisions are based on common point.

2. In Criminal Appeal No. 656 of 1963, the prosecution case is that on December, 5, 1962 the Food Inspector of the Calcutta Corporation went to the godown of the accused P. C. Rathi at 8, Banstolla Lane and wanted to take samples of ghee from stock in the shop and the godown at the back of the shop. He found P. C. Rathi, respondent but he denied that the shop belonged to him and contended that the godown was an order-supplying concern, not connected with ghee business. Thereafter, respondent disappeared and could not be found. Police was posted and with the Magistrate's permission to break open the locks, the Food Inspector went to the shop at 5 p. m. on the next date and sealed the padlock. Next day i. e. 7-12-62, at about 2 p. m., he went with the Enforcement Police and in presence of witnesses, broke the padlock and opened the door of the godown at the rear of the shop. He found a name plate P. C. Rathi affixed on the door leaf of the godown. He seized big galvanised drums, copper vessel with tap, stoves and other implements for boiling including a pot containing yellow colour and made a seizure list. He also found several tins of lotus brand Dalda and took samples under the Rules, after affixing a copy of the notice. One of the samples

was sent to Public Analyst who found the ghee highly adulterated.

3. In case No. 11-D a similar raid was carried out on the same date in the same firm's godown on the ground-floor of 17, Banstolla Road. The godown was under lock and key and the respondent P. C. Rathi could not be found out. Policemen were posted at the request of the Food Inspector and he also stayed there for the night. Next day, permission from the Magistrate was taken to break open the lock. On 7-12-62, he broke open the lock in presence of 2 witnesses and policemen and seized 8 tins, 17 seers each, in wooden boxes wrapped with gunny and on the gunny was written "To P. C. Rathi Howrah" in ink. He took several samples under the Rules -- and sent one sample to Public Analyst who found it highly adulterated.

4. Thereafter sanction was obtained in both cases and complaints were filed.

5. Defence in either case is that the sample was not legally taken nor was it proved to be taken from the possession of the respondent and that it was not also proved to be adulterated.

6. The learned Magistrate found that the sample was highly adulterated but was not proved to be either legally taken or taken from possession of the respondent. He therefore, acquitted the respondents.

7. The Public Analyst found that the sample did not conform to the standard in respect of B. R. reading, Reichert value and Baudouin Test, due to the presence of excessive amount of foreign fat, containing sesame oil. On this report, the learned Magistrate was justified in holding that the samples were highly adulterated.

8. The learned Magistrate however found that the sample seized in the absence of the seller is not a sample within the meaning of Section 10(1) of the P. F. A. Act and therefore, the Public Analyst's report does not form the basis for a prosecution. The learned Magistrate has held that at every stage of taking sample, the presence of the seller or any person on his behalf is a pre-requisite for taking sample. As the seller or anybody on his behalf was not present at the time of taking sample, the quantity of ghee taken by the Food Inspector is no sample within the meaning of Section 2 of the Act. He also held that where the sample was taken, the premises were under police guard and as such, it was in possession of the police and not of the respondent.

9. Food Inspector was examined as the principal witness in either case and his evidence has given a clear picture how the respondent Sethi avoided his presence and how he slipped away and how in spite of serious attempt he could not be contacted. The premises were thereafter sealed and then opened with order from the Magistrate and samples were taken in presence of witnesses and police, after observing the formality laid down in the Act. Sample is defined in Section 2 and it means a sample of any article of food taken under the provisions of this Act or of any rules made thereunder. Evidence has disclosed that the

godown at 8, Banstolla lane and that at ground-floor of 17, Banstola Road were godowns of P. C. Sethi & Company, respondent No. 1. On the door leaf of the godown at No. 8, was affixed a name plate T. C. Sethi". The witness also stated that previously he collected sample from the shop of respondent No. 1 and he was convicted under Food Adulteration Act. This witness further says that when he entered the shop at No. 8, P. G. Rathie was found inside the shop. Rathie's defence at the time was that though the trade license was in his name, it was an order-supply concern. The existence of the trade license in his name supports the view that he is the owner of the shop and godown. P. W. 4 Assistant of the license department, Calcutta Corporation also proves that P. C. Rathie holds the profession license at premises No. 8, and that he paid trade license fee for 1962. P. W. 3 police officer stated that a crowd gathered and while he was trying to disperse the crowd, Sethi made himself scarce. In respect of No. 17, P. W. 1 stated that he came to know on the 5th that the shop belonged to P. C. Rathie and the godown belonged to Rathie and Co. P. W. 3 is son of the owner of premises No. 17 and they resided on the 3rd floor. He stated that the godown on the ground floor belonged to Tarachand and Company, of which the proprietor is P. C. Rathie. Ex. 10 is the petition of P. C. Rathie to Rent Controller where he describes himself as proprietor of Tarachand & Company which is a tenant in respect of the godown room on the ground floor of premises No. 17, Banstolla Gully. There is therefore, no doubt that the shops and godowns belonged to M/s. Rathie & Company, of which the proprietor is P. G. Rathie, respondent No. 1.

10. The learned Magistrate referred to Section 10 and held that the sample taken is not a sample contemplated u/s 10, as it was taken in the absence of the proprietor or seller and at a time when they were not in possession, as the shop and godown were in possession of police. The shop or godown was never in possession of the Police; the owner Sethi slipped away and therefore, the shop and the godown were sealed and kept under Police guard, till the lock was broken in presence of witnesses under order of the Magistrate. The possession in effect remains with the owner, though it is under police watch and guard and this does not mean transfer of possession either in law or in fact to the police. The seizure was therefore, from the shop or godown in possession of the owner and the learned Magistrate is wrong in holding otherwise.

11. The provision of Section 10 regarding taking sample is again misconstrued by the learned Magistrate. This is an enabling section but for which, the seller or the consignee might refuse to sell or allow the Food Inspector to take sample. The section begins with "Power of Food Inspector" and it empowers the Food Inspector to take samples from the seller, from the person who is in course of conveying, delivering or preparing to deliver such article to a purchaser or consignee, and also from the consignee after delivery of any such article to him. The section is not restrictive of the powers of the Food Inspector and it only enumerates certain circumstances in which samples may be taken from different persons. This enumeration is not exhaustive nor does it in any way operate as a restriction on the power of the Food Inspector to take a sample, which is the

object of this provision. Where therefore, sample is taken under the Rules from the stock in possession of the proprietor, it does not cease to be a sample merely on the ground that the proprietor or seller slips away on approach of the Food Inspector or that there is none to accept the price. These provisions are to ensure that the seller gets price of the sample and that samples are taken from the stock in his possession but by running away, the proprietor or seller does not take away the right to take samples for examination and prosecution. This provision is an enabling one, making the demand for sample legal. The provision for taking sample from seller is directory and not mandatory and it does not purport to restrict the power of the Food Inspector to take sample in such contingencies. The fact that price could not be paid, as none was there to receive does not change its character as a sale, for offer to pay price remains and credit sale is also a sale.

12. The provision for taking sample in presence of the seller was for the benefit of the seller, but was never intended to be utilised by a dishonest seller by running away and law will not allow him to take advantage of that dishonest move.

13. Facts in this case are glaring. The Food Inspector called at the shop or godown. The respondent No. 2 engaged him in conversation and then gave slip in one case locking up the shop. But in either case he was not found to be available. What happened therefore, has been dealt with by the learned Magistrate. In one case sample was taken in presence of the witnesses and in the other case, the shop was sealed and then broken open under the order of a Magistrate and thereafter sample was taken and in either case the sample of ghee was found to be highly adulterated. It is clear that the respondent No. 2 played dirty trick and therefore, he cannot be permitted to take advantage of the duty trick. The primary object of the provision for taking sample is to see that the sample is taken from the shop in such a manner that there may not be any doubt that the samples were taken from the shop where it was stored as food. What is important is whether the sample is within the meaning of Section 2 and whether it is taken from the shop so as to leave no doubt about the manner of taking and if that is so, failure to comply with such provisions as are rendered impossible of performance or as do not affect the quality of sample or give rise to a doubt as to whether sample was taken from the shop does, not vitiate the taking of sample. It has transpired in evidence that when the Food Inspector called at the shop at No. 8, the respondent No. 2 was there and after engaging the Food Inspector into conversation, he somehow gave a slip. If thereafter sample was taken in the manner stated, it is a continuation of the same process and the proprietor or seller shall be deemed to have been present.

14. In the result, we find that samples taken were samples under the law and samples were found to be highly adulterated ghee. The order of acquittal is not therefore proper and this order cannot be supported.

15. It appears from the evidence that the respondent No. 2 is the sole proprietor

of M/s. Rathi & Company and under the law both the firm and the sole proprietor cannot be convicted. We, therefore, do not convict the firm. So far as P. C. Rathi is concerned he has not only kept a huge stock of adulterated ghee, but the evidence shows that he was actually preparing large quantities of adulterated ghee, obviously for human consumption. He was not only doing this in a large scale, but when the Food Inspector came, he played a trick and slipped away. We, therefore, find no reason to take any lenient view of the offence committed by him. We have it in evidence that he was convicted prior to this also and the sentence should therefore, be deterrent and we therefore, convict the respondent No. 2 P. C. Rathi under Sections 7(i)/16(1)(a)(ii) of the Prevention of Food Adulteration Act and sentence him in respect of each case to rigorous imprisonment for one year and a fine of Rs. 2,000, in default to rigorous imprisonment for another six months. The sentences of imprisonment are to run concurrently.

K.K. Mitra, J.

16. I agree.