

(1965) 08 CAL CK 0020
In the Calcutta High Court
Case No : Criminal Appeal No. 119 of 1963

Gopalpur Tea Co. Ltd.

APPELLANT

Vs

Corporation of Calcutta

RESPONDENT

Date of Decision : 23-08-1965

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 103
Prevention of Food Adulteration Act, 1954 — Section 10(4), 10(7), 11(1), 11(4), 13(2)
Prevention of Food Adulteration Rules, 1955 — Rule 7(2)

Citation : AIR 1966 Cal 51 : (1966) CriLJ 135 : 70 CWN 1005 : (1966) 2 ILR (Cal) 220

Hon'ble Judges : P.B. Mukharji, J

Bench : Single Bench

Advocate : J.N. Ghosh and Nut Behari Mukherji, for the Appellant; N.C. Banerjee, for the Respondent

Judgement

P.B. Mukharji, J.—This is a criminal appeal from the order of conviction passed by a Municipal Magistrate, Calcutta convicting the appellant as the Secretary of a company called Gopalpur Tea Co. Ltd. The learned Magistrate found Gopalpur Tea Co. Ltd. and S. Sarvadyaksha, representative of the said company guilty u/s 7(1) read with Section 16(1)(a)(i) of the Prevention of Food Adulteration Act, 1954 and convicted the company and sentenced the company to pay a fine of Rs. 2000 which was the maximum under that Act before its amendment in 1964.

2. The facts of this case may be stated briefly at the outset. The prosecution case is that on the 15th March 1960 Dr. H.S. Mandal, a Food Inspector of the Corporation of Calcutta went to the godown of M/s. Jalpaiguri Air Travels at 4B, Mechuabazar Street, Calcutta and there he drew samples from two bags of tea sent by Gopalpur Tea Co. Ltd. and sent one of the samples of each to the Public Analyst for analysis. One of the samples was found to be adulterated in so far as it contained crude fibre upto 16.58 per cent which was in excess of the permissible limit of 15 per cent under Rule A14 (f) read with Rule 5 of the Prevention of Food Adulteration Rules 1955 defining the standards of quality of

various articles of food specified in appendix B to those rules. Rule A14(5) deals with tea which is the subject matter of controversy in this appeal. The prosecution called P. W. 1 Dr. H.S. Mondal, the Food Inspector. He has proved the samples of the bags lying at the godown of the Air Carrying Corporation and has made it clear that he observed all the legal formalities. The learned Magistrate noted that there was no challenge or suggestion on behalf of the accused that the legal formalities were not observed. He also stated that it is only with great difficulty that he could procure only one such witness namely Sankar Misra and the Tea Board Inspector, P.K. Sen who is P. W. 2. These were the two witnesses to the sampletaking. It is proved that Sankar Misra could not be produced by the prosecution and the summons was returned with the observation that he was not available. Sankar Misra's signature however, appears on Exts. 2 and 3, The learned Magistrate was satisfied that Sankar Misra could not be produced in spite of best efforts of the prosecution and he also held that the defence contention that Sankar Misra was a fictitious person could not be accepted. The evidence of the Food Inspector further is that he took three samples from each bag and sent one sample from each bag to the Public Analyst. The Public Analyst's report is marked Ext. 6 in this case giving the details of his analysis and showing that crude fibre was 16.58 per cent in the sample analysed. Ext. 6 also expresses the opinion that the sample of tea did not conform to the specification in respect of crude fibre and was therefore adulterated within the meaning of the Act and the rules made thereunder. This was the basis of the prosecution. Actually the Assistant Analyst who himself analysed the sample was called as a court witness. His name was Sachindra Nath Dutta. In March 1960, it being noted that the Public Analyst's report is dated 28th March 1960, this Sachindra Nath Dutta was an Assistant Analyst and not then appointed under the Prevention of Food Adulteration Act, but he was to assist the Public Analyst and in fact the analysis was done by him under the supervision of the Public Analyst. Indeed, his evidence is that he arrived at the result of the report himself. He got the sample from the hands of the Public Analyst. In fact the sample was received from an Assistant Public Analyst by the name of K. Sahu. According to the rule, namely Rule 22, the sample was approximately 4 oz.

3. The Food Inspector clearly establishes that he saw the mark of Gopalpur Tea Co. Ltd, imprinted on the bags and the letters marked Exts. 7 and 8 written for and on behalf of Gopalpur Tea Co. Ltd. by its agent identified the bags from which samples were taken. The bags from which samples were taken were consigned by Gopalpur Tea Co. Ltd.

4. Originally, in addition to the Secretary S. Sarbadhaksha of the Gopalpur Tea Co. Ltd., there were two other accused namely, B.C. Dey and B.N. Sen. B.C. Dey and B.K. Sen were acquitted by the learned Magistrate. In both the Exts. 7 and 8, B.C. Dey described himself as the agent of the Gopalpur Tea Co, Ltd. In printed captions and in his examination u/s 342 of the Code of Criminal Procedure, this B.C. Dey described himself also as an Entry Tax Agent of Gopalpur Tea Co. Ltd. and he received handling commission. But B.C. Dey's

point was that he was an agent at the Calcutta end and not at the manufacturing or handling end of the Gopalpur Tea Co. Ltd. which was Jalpaiguri. His case was that he did not take delivery of the articles, but the samples were taken when these articles were still in deposit with the Jalpaiguri Air Travels who was the Carrying Agent. The learned Magistrate, therefore, came to the conclusion that this B. C. Dey could not be held responsible on the ground that no effective link was established to render him liable for this offensive article.

5. So far as accused B.N. Sen was concerned, he was admittedly an employee of the Jalpaiguri Air Travels and was as such responsible for the article while it was in transit and for the purpose of transit, even that too in a remote way. On that ground the learned Magistrate came to the conclusion that he could not be touched under the law for his such vicarious dealing with the goods in question. Therefore, he acquitted accused B.N. Sen.

6. The learned Magistrate however found that the case against Gopalpur Tea Co. Ltd. had been proved and established. The bags had the name of the firm well imprinted on the outside. Exts. 7 and 8 also fully corroborate this aspect of the prosecution case. The learned Magistrate, therefore, came to the finding that Gopalpur Tea Co. Ltd. sent this consignment to Calcutta and it was this company which was responsible for the article and the company could not be absolved of the complexity in the offence.

7. The Secretary S. Sarbadhaksha in his examination u/s 342 of the Code of Criminal Procedure admitted that he was the Secretary of the Gopalpur Tea Co. Ltd. His case further was that his office was at Jalpaiguri whereas the tea garden was at Dooars and therefore, he pleaded that he had no hand in the matter of the existence of the adulterated matter in the sample. The learned Magistrate came to the conclusion rightly in my view, that the garden and the office might be at different place, but that did not make any difference in the responsibility, because he was the Secretary of the Company and was the Chief Executive of the Company. But then the learned Magistrate rightly makes it clear that he was being tried only as a representative of the company and not personally.

8. Mr. Ghosh for the appellant has urged a number of points in this appeal. I shall briefly summarise his points of contention. In the first place, his submission is that non-examination of Sankar Misra vitiates the search and also has caused prejudice to the appellant. In the second place, his submission is that the learned Magistrate was wrong to infer the presence of Sankar Misra from the list of seizure where his name appears when nobody proves Sankar Misra's signature.

9. Before proceeding with the other points of Mr. Ghosh for the appellant, it will be better to dispose of these two points briefly. In support of these two points Mr. Ghosh has relied on a decision of the Kerala High Court in State Vs. Mohammed Ibrahim, . That case is an authority for holding that where in a prosecution for an offence u/s 16(1) and (7) read with Section 2(1) of the Prevention of Food Adulteration Act, it was shown that the Food Inspector had not complied with the

provision of Section 10(7), inasmuch as he did not call two persons to be present at the time he took samples of the articles, even though the shop of the accused was situated in the bazar and that the samples were not taken in clean bottle as required by Rule 14, the non-compliance with Section 10 amounted to a flagrant violation of the provisions of the Act. Even if this was treated as an irregularity, this had resulted in the prejudice to the accused.

10. In this case I do not think that there is any prejudice at all to the appellant. Section 10(7) of the Act uses the following words:

"Where the Food Inspector takes any action under Clause (a) of Sub-section (1), Sub-section (2), Sub-section (4) or Sub-section (6), he shall, as far as possible, call not less than two persons to be present at the time when such action is taken and take their signatures".

11. Now the significant words in that Section are "as far as possible." Therefore, it follows that calling not less than two persons enjoined in that sub-section is only "as far as possible" and no more. If it is not possible then it cannot vitiate the search or the seizure. I do not find in the Kerala decision any reference to the significant words "as far as possible" u/s 10(7) of the Act. What is more in this case is this that there is no violation by the Food Inspector of Section 10(7) of the Act by not calling two persons. He did call Sankar Misra and Sankar Misra did subscribe his signature. What happened was that he could not be available or produced at the time of the trial. Therefore, there was no breach in law of Section 10(7) of the Act. Sankar Misra was one witness and the Tea Board Inspector P.K. Sen P. W. 2, was the other witness. All that is necessary is "as far as possible" to call not less than two persons to be "present" at the time.

12. Then there was a refinement of this argument by Mr. Ghosh for the appellant that in respect of search, the provisions of Section 103 of the Code of Criminal Procedure should as far as possible be followed. The inspiration for this argument appears from the second proviso of Section 10(5) of the Prevention of Food Adulteration Act. No doubt that is so. Section 103 of the Code of Criminal Procedure enjoins that two or more respectable inhabitants of the locality in which the place to be searched is situate should be called by the officer to witness the search. But then here as is now well settled that even failure to call such witnesses will not vitiate the search. It has been laid down in many cases that the gist of this provision is that honest effort should be made to secure presence of respectable persons of the locality. But if no such witness was available the search would not be vitiated for that reason only and each case must be decided on its own facts and circumstances.

13. For these reasons on the facts stated above I overrule the above two submissions made by Mr. Ghosh for the appellant.

14. The next attack of Mr. Ghosh is that the conviction is bad because the Food Inspector committed breach of Section 11(1)(a) of the Prevention of Food Adulteration Act. That statutory provision lays down "When a food inspector

takes a sample of food for analysis, he shall give notice in writing then and there, of his intention to have it so analysed to the person from whom he has taken the sample." Prima facie there is no substance in this contention because of Exhibit 1 in this case. Now Exhibit 1 is a notice signed by the Food Inspector and addressed to M/s. House of Commerce who were the consignees of this tea. It states in clear terms as follows:

"I have this day taken from the premises of 4B, Mechuabazar Street godown of Jalpaiguri Air Travel situated at Calcutta two samples of the food specified below to have the same analysed by the Public Analyst for determining fitness as per stated.

Details of Food.

Tea (003501(1))

Tea (003502 (2))

On inspection the tea appears to be of two qualities hence one sample taken from each quality." This exhibit is dated the 15th March, 1960.

15. Now from the language of Section 11(1)(a) of the Act as quoted above it will be clear that the notice in writing has to be given to the person from whom the sample is taken. Now prima facie the sample is being taken from the consignee. Therefore this Exhibit 1 is addressed to the consignee, So it satisfies the prim a facie test. It also satisfies the test of the condition of the notice, namely, that it must express the Food Inspector's intention to have the sample analysed by the Public Analyst.

16. Mr. Ghosh, therefore, placed his argument in a round about way on this point. He attacks (sic) the consignee of this notice by relying on the inscriptions at the top of the notice to the following effect:

"As told by Mr. B.C. Sen of Jalpaiguri Air Travel Prop. Sjt. B.C. Ghose, 5, Garstin Place, Calcutta."

Mr. Ghose's contention is in the first place that B.C. Sen was not an agent of the consignee, the House of Commerce. Therefore it is a bad notice so far as the consignee is concerned. It is argued that Mr. Sen was only an employee of the carrying Company. His second submission is that Mr. B.C. Ghose was not the proprietor of the House of Commerce. Mr. B.C. Ghose was the Managing Director of Gopalpur Tea Co. Ltd, the consignor. It is also on this ground that Mr. Ghosh for the appellant contends that the notice is bad.

17. Now all these objections seem to me to be without substance. This notice in writing was left with Mr. B.C. Sen, Carrying Company's agent. The Carrying Company's agent was also acting as agent of the Company for it was the duty to send the tea to the consignee, the House of Commerce. I do not find that any objection was ever taken on the ground that this notice marked Exhibit 1 did not reach the House of Commerce. It is a new invention at this stage in this appeal.

When it was accepted in evidence not a word was uttered challenging this notice or its receipt by the House of Commerce. Indeed even B.C. Dey who was the agent of Gopalpur Tea Company Ltd. in his examination u/s 342 of the Code of Criminal Procedure did not say that this notice was not received by the consignee. It may be noticed in this connection that B.C. Dey was the agent of Gopalpur Tea Co. Ltd. its entry Tax Agent who received handling commission, and it was this Gopalpur Tea Co. Ltd. which was sending these goods to the House of Commerce. Taking his statements u/s 342 Cr. P. C. as well as the statement of Bhupendra Nath Sen who was an employee of the Carrying Company, it will appear that there is no room for doubt that this notice was duly received by the House of Commerce, the consignee. Indeed it is noteworthy that the language of Section 11(1)(a) of the Act is that notice has to be given "to the person from whom he has taken the sample". Now the Food Inspector was asking the sample from B.C. Sen of Jalpaiguri Air Travel, therefore, it was enough that this notice was handed over to him. This Section does not say that notice has to be given to the consignee even though he or anyone on his behalf was not present.

18. Mr. Ghosh for the appellant lastly on this point, fell back upon another decision of the Kerala High Court in City Corporation of Trivandrum Vs. V.P.N. Arunachalam Reddiar and Another, and specially on the observations made at page 358 of the report saying:

"In such circumstances the notice required by Section 11 should have been given to both the accused. The only notice produced in this case is Ext. P2 and it is addressed to the first accused. But it was not served on him. This notice is seen to have been served on the second accused. Such service cannot be accepted as service of notice on the first accused. The acceptance by the second accused of a notice addressed to the first accused, cannot also be said to be service of the required notice on the second accused. The failure to issue notice as required by Section 11 is also a vital defect which has vitiated the prosecution in this case."

19. That case has no application to the facts of the present appeal before me. There is no question here of acceptance by the second accused of a notice addressed to the first accused. The language of Section 11(1)(a) as quoted above makes it clear beyond any argument that notice is only to be given to the person from whom the sample is taken. That test is satisfied here on the facts of this case as I have stated above. In the first place the sample was taken from B.C. Dey, the agent of the Carrying Company and that was enough, therefore, to leave the notice to him. That it was addressed to the consignee, the House of Commerce, makes it also inviolable because it is the duty of the Carrying Agent to inform the consignee that the goods had arrived.

20. I, therefore, overrule this third submission of Mr. Ghosh.

21. The next point taken by Mr. Ghosh for the appellant is that there has been a breach of Section 11(4) of the Prevention of Food Adulteration Act, 1954, which

provides that "An article of food seized under Sub-section (4) of Section 10 shall be produced before a Magistrate as soon as possible." It is argued that the tea seized has not been produced before the Magistrate.

22. This argument is based on a misconception of what the law provides and a disregard of the facts in this case. The language of Section 11(4) of the Act makes express reference to article of food seized u/s 10(4) of the Act. A reference to Section 10(4) of the Act will at once make it clear that the provision there mentioned is that "If any article intended for food appears to any Food Inspector to be adulterated or misbranded, he may seize and carry away or keep in the safe custody of the vendor such article in order that it may be dealt with as hereinafter provided" This only applies in the case where the Food Inspector seizes and carries away the goods or where he keeps it in the safe custody of the vendor.

23. Now in this case the facts must be clearly borne in mind. The samples were taken of the adulterated tea, but as will be clear from the petition of the Food Inspector for forfeiture and destruction of the goods u/s 11(5) of the Act, printed in the Paper Book, the custody of the tea was with B.G. Sen of Jalpaiguri Air Travels. That petition stated as follows: "The custodian of the tea Sree Bhupendra Chandra Sen of Jalpaiguri Air Travels was present at the time of inspection, sampling and sealing of the tea in the above godown. The sealed tea was left under the custody of the owner of the godown under the provisions of the Act No. 37 of 1954 (and rules made thereunder) with their consent and of others concerned." The production of goods before the Magistrate u/s 11(4) of the Act relates to the seizure and destruction case. Here in the facts the seizure and destruction case was also filed which was case No. 189D/61 and which was tried along with this main case on the substantive offence. Technically, therefore, even in law this production in this appeal was not necessary, because there was already a case for forfeiture and destruction of these goods. Indeed in this case the Magistrate had already directed on that case that the articles seized were to be confiscated and destroyed at owner's cost. That order will appear from the penultimate paragraph in the order made on the 29th January, 1963, at the end of the order-sheet. Now there was no complaint or revision against that order of seizure and destruction. One should have thought that if the appellant's case was that the goods were not produced then their seizure and confiscation were bound to be challenged on the ground of such non-production before the Magistrate. The facts of the seizure and destruction case are not before me and therefore this point of the appellant cannot succeed, specially when it is found that this point was never taken before the Magistrate. I can well imagine why this point was not taken before the Magistrate having regard to the fact of seizure and destruction case. It is needless to point out here that the Food Inspector was not even asked and no challenge was thrown to him suggesting that the goods had not been produced before the Magistrate. In this substantive offence, as I understand the procedure, the sample and the Public Analyst's report are the very foundation of this proceeding and that is the reason why

special provisions are made in Section 13 of the Act about the report of the Public Analyst and how it is proved specifically under Sub-section (5) thereof as evidence of the facts stated therein.

24. In fact it may be noted here that it was Mr. B.C. Sen of Jalpaiguri Air Travels who told the Food Inspector that the House of Commerce, the consignee, had Mr. B.C. Ghose as proprietor with the address 5, Garstin Place, Calcutta. This will be clear from Exhibit 5 which is addressed to M/s. House of Commerce with the following endorsement at the top "Prop, S. B.C. Ghosh of 5 or so Garstin Place Calcutta as told by Bhupeudra Chandra Sen of Jalpaiguri Air Travels at 4B, Machuabazar Street, Calcutta". This is Form IV under Rule 10 of the Prevention of Food Adulteration Rules. It clearly states the following:

"Whereas the forty four bags of tea (single gunny bag) as per sample No. 003501(1) and 003502(2) as fixed on leaf and stage intended for food which is in your possession appears to me to be adulterated/misbranded each bag about 75 lbs. as told by S. B.C. Sen of Jalpaiguri Air Travel.

Now therefore under Sub-section (4) of Section 10 of the Prevention of Food Adulteration Act, 1954 (37 of 1954), I hereby direct you to keep in your safe custody the said sealed stock subject to such orders as may be issued subsequently in relation thereto and M/s. Jalpaiguri Air Travel of 4B Mechuabazar St. and M/s. House of Commerce of 5 or so Garstin Place, Calcutta".

This was sent by the Food Inspector. It was also endorsed on the back as "Noted, understood and received one copy in presence of witness Sen and Misra" signed by B.C. Sen, for Jalpaiguri Air Travels". Therefore, the stock was left with the custodian of the tea, be it House of Commerce, the consignee, or Gopalpur Tea Co. Ltd., the consignor or the Carrying Company, Jalpaiguri Air Travels. This, therefore, was in any event not a case where the whole stock was removed by the Food Inspector, it was a case where the stock was left with either the vendor, Gopalpur Tea Co. Ltd. or the consignee, House of Commerce or B.C. Sen of Jalpaiguri Air Travels who was apparently working as Agent both for the vendor and the vendee.

25. For these reasons I am unable to accept the above contention made on behalf of the appellant.

26. The next criticism of the Magistrate's order is that his order of conviction is bad on the ground that the Public Analyst himself was not examined and called at the trial. This point also has no substance. I shall state the reasons why this point cannot succeed. Section 13 of the Act provides for the report of the Public Analyst. By Sub-section (1) of that Section the Public Analyst has the statutory obligation to deliver in the form prescribed, a report to the Food Inspector of the result of the analysis of any article of food submitted to him for such analysis. Then by Sub-section (2) of that Section it is provided that after the institution of a prosecution under this Act the accused vendor or the complainant may, on payment of the prescribed fee, make an application to the Court for sending the

part of the sample mentioned in Sub-clause (i) or (iii) of Clause (c) of Sub-section (1) of Section 11 to the Director of the Central Food Laboratory for a certificate. What is material for the purpose of this appeal is that by Sub-section (5) of Section 13 of the Act it is laid down as follows: "Any document purporting to be a report signed by a public analyst, unless it has been superseded under Sub-section (3) or any document purporting to be a certificate signed by the Director of the Central Food Laboratory, may be used as evidence of the facts stated therein in any proceeding under this Act.

27. Therefore, the report of the Public Analyst is evidence of the facts slated therein in any proceeding under this Act. That report is Exhibit 6. The Public Analyst who signed this report was M. Saha. It notes that the Public Analyst received from the Food Inspector the above numbered sample of tea with the seal intact and unbroken. It then proceeds to say that he had analysed the aforementioned sample and then the report notes the result of that analysis.

28. The order-sheet under date 15-12-62 notes: "The defence prays for examining the Public Analyst. Summon the Asstt. Analyst who actually examined the sample". It was therefore on the prayer of the defence that the person who actually examined and analysed the sample was called. In fact this Analyst S.N. Dutta to whose evidence reference has already been made in the judgment was called as a court witness. In his deposition he has clearly stated without challenge that he was the person who assisted the Public Analyst, that the actual analysis was done by him under the supervision of the Public Analyst and that he arrived at the result of the report himself. The Public Analyst only signed the report as a matter of form. In doing that the Public Analyst did nothing wrong. Rule 7(2) of the Prevention of Food Adulteration Rules expressly provides as follows: "The Public Analyst shall cause to be analysed such samples of articles of food as may be sent to him by a Food Inspector or by any other person under the Act". Therefore, the Rule recognises the fact that the Public Analyst need not examine it himself but he can have it examined and analysed by any other person under the Act. That this S.N. Dutta was a qualified person cannot be challenged. At the time he was giving evidence he was the Public Analyst under the order of the Corporation of Calcutta in March 1960 (sic) he was an Assistant Analyst and even though he was not appointed under the Food Adulteration Act yet he was to assist the Public Analyst. The provision in Rule 7(2) of the Act to cause the samples analysed by any other person under the Act is obviously made for practical reasons because one Public Analyst for any particular area would have hardly enough time to analyse all the articles that would be sent to him for analysis. He needs to have assistance and that is why provision is made that the Public Analyst shall cause to be analysed such samples and that may be done by any other person under the Act. That is also clear from Form III which uses the words "I have caused to be analysed," This Form III is made under Rule 7(3) of the Rules.

29. In that view of the matter the appellant's contention that the Public Analyst

was not called cannot succeed, nor has it caused any prejudice to the appellant. In fact it has been for the benefit of the appellant that the Analyst who actually analysed the sample was called to give evidence and there was no challenge on this point and it was on the defence prayer that this person who actually analysed was called to give evidence. I, therefore, overrule this point.

30. It has also been contended for the appellant that the sample taken was not really a representative sample. In the first place it is criticised that out of 25 bags only one bag was selected. That is said to be not a fair method of taking a sample. Secondly, it is criticised that the evidence on this point seems to suggest at one place that the sample was taken from the top of the bag and at another place by incision in the middle of the bag. In the third place it is said that where crude fibre exceeding the requisite proportion is the charge, the contents of the bag must first be thoroughly mixed up before a sample is taken.

31. No doubt a sample should be a sample. That means it must be a fair sample of the whole. That is what is meant by a representative sample. But where 25 bags of tea are sent, each bag separately marked and tagged then a bag selected at random when it contains crude fibre beyond permissible limit, it is adulteration within the meaning of Section 2(i)(1) of the Prevention of Food Adulteration Act, Each bag, I think in such context of facts can be taken separately. If 25 or 100 bags are sent, each separately packed, marked and tagged, then I do not think the doctrine of representative sample requires that the contents of all the 25 or 100 bags must first be mixed up together and thereafter the representative sample should be taken. So long as the bag is selected at random and such selection is not mala fide no objection, in my view, can be taken on the ground that only one bag out of 25 was used for taking a sample. The main reason for saying so is that each bag is separate by itself, it contains separately its own quantity of tea and; can be sold separately or used separately without any reference to the tea in other bags and therefore, on the point of adulteration one bag can be taken for a sample of tea to be checked and if that bag contains adulterated tea the offence under the Act cannot be challenged on the ground of sampling.

32. The other criticism that the sample in this case was said to have been taken either from the top or from the middle of that particular bag without first mixing up thoroughly the contents of that bag is also in my view not essential for a representative sample. No doubt if in taking the sample the Food Inspector had only selected crude fibre to make 4 oz. packet which is the minimum for sample then certainly his sampling would have been bad. If he had not selected the tea but selected only the fibre that would clearly not be sampling. But that is not the allegation here. It is not even suggested that the Food Inspector only selected the crude fibre. Indeed the Analysts report shows that the sample was fair in the sense that it showed crude fibre to be only 16.58 per cent in excess of the prescribed limit of crude fibre. It was not a case where the sample shows 100 per cent crude fibre. This fact itself proves the inherent fairness of the sample

taken in the facts of this case. Therefore, the learned Magistrate was quite right in his conclusion on the question of sampling. He emphasised rightly that according to P. W. 2 the samples were taken by P. W. 1 by opening the bags on removing the thread at its top and the samples were not taken from the bottom and even at the top such percentage of adulteration was found and that the Analyst had said that the crude stalks would be perfectly uniform in the bag. On that finding I am not prepared to accept the contention of the appellant that the samples were not representative in the facts of this case.

33. Mr. Ghose for the appellant wanted to make a point about the seals on the samples. The main hint behind his argument was somehow or other the seals had been broken or tampered with. Now no suggestion ever was made on behalf of the defence about the breaking of the seals or about tampering with the seals. That case was never made. In fact the Food Inspector in his petition for forfeiture and destruction of the tea u/s 11(5) of the Act made it clear that the sampling was duly made and that the seal was also duly given. In answer to that petition no criticism was made at any stage of the trial either in writing or in evidence to suggest that the seals were not properly given or that they had been broken. The report of the Public Analyst, marked Exhibit 6 to which reference has already been made also expressly mentioned that the seals were intact and unbroken. Indeed even Exhibit 7 signed by B.C. Dey for Gopalpur Tea Co. Ltd. as its agent and dated the 16th March 1960 expressly stated that the seals had been given by the Officer of the Corporation of Calcutta and that letter was addressed to the Chief Health Officer of the Corporation of Calcutta. I, therefore overrule this attempt to make a belated case about the seals on the sample. I hold that the seals were not broken or tampered with.

34. Lastly Mr. Ghose for the appellant submits that there is no evidence that this tea was for sale and therefore, there could be no conviction u/s 7 of the Act. The Magistrate also notes this point. The suggestion was and some questions were asked in the evidence that there was a Waste Tea Ware Housing, and that there was no evidence to show that this particular consignment was meant for such Waste Tea Disposal and the suggestion was that this particular consignment might have been meant for such Waste Tea Disposal end. This really is an argument of despair both on facts and in law. So far as the facts are concerned, it is clearly found from the letter dated 16th March 1960, marked Exhibit 7 that B.C. Dey writing as Agent for Gopalpur Tea Co. Ltd. himself stating "I take this opportunity to put forward a true copy of certificate of fitness from the Public Analyst, Public Health Laboratory, Jalpaiguri, for your satisfaction." Now this alleged certificate of fitness from Public Analyst of Jalpaiguri Public Health Laboratory was never produced on behalf of the defence. But then that could only be a certificate of fitness for sale. What is worse, in that very letter Exhibit 7 the penultimate paragraph reads as follows: "As the tea is lying in a place unsuitable for tea store, I shall feel obliged to your kindly releasing same for removal and sale immediately." Therefore, by this letter Gopalpur Tea Co.'s Agent was actually asking for release of the tea "immediately" for sale. In fact 19

bags of tea were released on that representation. That is the clear endorsement on that letter marked Exhibit 7, How then can it be said now for the appellant that the tea was not for sale? Again in the letter dated the 22nd March, 1960, Exhibit 8, written by the same B.C. Dey as Agent of Gopalpur Tea Co. Ltd. expressly says: "I shall now request you to kindly consider the matter and releasing the tea for sale at your earliest convenience." It is, therefore, plain that this tea was for sale and not for Waste Tea Disposal. On the facts, therefore, the argument of the appellant cannot succeed.

35. Nor can this argument succeed in law. Section 7 of the Food Adulteration Act not only prohibits manufacture for sale but also store. The language of Section 7 of that Act is "No person shall himself or by any person on his behalf manufacture for sale, or store, sell or distribute (i) any adulterated food; (ii) any misbranded food etc.," Therefore, what is prohibited is manufacture for sale, store, sell or distribute. Therefore, even storing would be bad.

36. For these reasons this appeal against the conviction must fail. But Mr. Ghose for the appellant has pleaded for reduction of sentence. The learned Magistrate expressed the view: "I find no reason why a lenient sentence should be given in Food Adulteration case." In that view he sentenced Gopalpur Tea Co. Ltd. to a fine of Rs. 2,000 (Rupees Two thousand) which was the maximum. Adulteration of food is a serious offence. The only question, however, here is the nature of the adulteration. The adulteration here is u/s 2(i)(1) of the Food Adulteration Act. That provision defines adulteration for the purpose of this case. It says "Adulterated--an article of food shall be deemed to be adulterated--if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities which are in excess of the prescribed limits of variability." The adulteration, in this case was the presence of the crude fibre to the extent of 16.58 per cent and the prescribed limit was only 15 per cent. It is then in excess by only 1.58 per cent which is adulteration within the meaning of Section 2(i)(1) of the Prevention of Food Adulteration Act. Now presence of crude fibre up to a certain point is made permissible on the ground that it is natural to find such crude fibres in tea. It is not a case where the adulteration is dangerous, fatal or injurious to health. Indeed these limits of percentage of crude fibres and other constituents some times vary. Before the new Prevention of Food Adulteration Act, 1954, came into operation there were local State laws and the relevant provision, so far as Calcutta is concerned, was contained in Section 462(ix) of the Calcutta Municipal Act, 1951, under which the permissible limit of this very crude fibre in tea was twenty per cent. This provision, however, of the Calcutta Municipal Act now stands repealed u/s 25 of the Prevention of Food Adulteration Act, 1954. It is only intended to show that the limit is variable. As pointed out by Harries C. J. in Mani Bhai Patel Vs. The State, that this crude fibre was not really a foreign matter but was part of the tea stem or stalks and even good quality of tea would naturally contain some percentage of stalks and that is why even 15 per cent was allowed as a limit under the Prevention of Food Adulteration Act of 1954. Foreign matter would be alien to tea. But this stem or stalk which would

be crude fibre within the meaning of the Act would not in that sense be a foreign matter injurious to health. In this view of the matter I consider it to be a circumstance and reason not to impose the maximum fine as done by the learned Magistrate. I would, therefore, reduce the sentence to a fine of Rs. 1000 (Rupees one thousand), which I consider will meet the ends of Justice.

37. For these reasons I uphold the conviction of Gopalpur Tea Co. Ltd. represented by its Secretary S. Sarvadyaksha u/s 7(1)/16(a)(1) of the Prevention of Food Adulteration Act and dismiss the appeal with the modification of reducing the sentence of Gopalpur Tea Co. Ltd. to a fine of Rs. 1000 (Rupees one thousand).

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