(1999) 08 MAD CK 0123

In the Madras High Court

Case No : C.A. No''s. 104 115 and 116 of 1993

Kadarkarai, Appl. C.A. 104/93 M.L. Ramanathan C.A. 115/93 and K. Hamsath Irbahim, C.A. 116/93 — APPELLANT

Vs

State by Agricultural Officer, Fertilizer Inspector, Office of the Assistant Director of Agriculture, Sattur, Kamarajar Dist. — RESPONDENT

Date of Decision : 06-08-1999

Acts Referred:

Citation : (2000) 1 LW(Cri) 20

Hon'ble Judges : A. Subbulakshmi, J

Bench : Single Bench

Advocate : S. Shanmugavelayutham for K.K. Ananthapadmanabhan, in C.A. 104/93 and Mr. C.A. Sundaram,s in C.A. 115 and 116/93, for the Appellant; V.R. Balasubramaniam, G.A. (Crl.), for the Respondent

Judgement

A. Subbulakshmi, J.—Complainant is the Fertilizer Inspector appointed under Clause 27 of the Fertilizer (Control) order 1985 and is authorised to file complaint for the offences committed under the said Order under sec. 12AA(i)(a) of the Essential Commodities Act. A5, employed as Manager and Chief Manufacturer is incharge and responsible for the manufacturing of fertilizer in all the mixing units of E.I.D. Parry (I) Ltd., Madras. A3 is the proprietor of firm and also responsible for the sale of standard fertilizer standard mixture No. 2 which was manufactured by A5. A4 is the accountant employed by the third accused. He was present at the time of sampling and also responsible person in the firm for the conduct of business of A3. A2 is the chemist and incharge and also responsible for distribution of fertilizer standard mixture No. 2. On 17.5.80, the complainant inspected the premises of A3 firm situate in 50 Railway Feeder Road, Sattur. On verification of the stock, it was found out that there was stock of 0.720 mt. of standard mixture No.2. The stock was in stitched bags containing outer writing as "E.I.D. Parry Standard Mixture No. 2". PW1 decided to take the sample from the lot and intimated the fact to A4 accountant of A3 who was present there and managing its affairs. The lot was containing 18 bags, each bag containing 40 kgs of fertilizers. Out of 18 bags, PW1 selected two bags as per Fertilizer Control order (hereinafter to be referred as ''the Order). Those bags were emptied in a clean surface and drawn a composite sample by quartering method. Then composite sample was divided into three portions of 400 gms. each in weight. Then each portion of sample was immediately transferred to a polythene bag and again it was put in a cloth bag which was sealed with fertilizer inspector seal. A4 has not affixed his seal since no metal seal was available with him. A4 was asked to take one part of sample among the three prepared and he has taken one part of the sample and also put his signature in ''J'' form. One part of sample was handed over to the next higher authority viz. Assistant Director of Agriculture, Sattur and the other part of the sample was sent to Agricultural Chemist, Paramakudi along with ''K'' form adopting all the procedures contemplated in the order. The code number was ascertained as SRT 5/90-91. The agricultural Chemist analysed the sample and reported that the sample of mixture 2 contained only 0.14% of water soluble p 205 (phosphoric acid) as against 1.20% and the sample was declared as ''not according to specification''. On receipt of analytical report from the Agricultural Chemist, Paramakudi, the complainant inspected the premises of the third accused on 28.6.90 to freeze the remaining stock of standard mixture No.2 from which the sample was drawn and it was noticed that the entire quantity of non standard mixture No. 2 was sold out and hence no freeze was done. As per the records, A2 has supplied 2000 kgs of standard mixture No. 2 as per invoice No. 3744 dated 16.2.90. A2, A3 and A5 were called upon to explain for the deficiency noted in the analytical report. A6 gave his reply on behalf of A2 and A4. A5 replied in his explanation that the deficiency in water soluble p 205 is due to storage overtime. The second accused company requested to grant time for sending the detailed report but, no explanation was received from it even after that date. The third accused retailer has stated that such occurrence will not occur in future and this being the first time, he may be excused. The Joint Director of Agriculture Virudhunagar did not accept all the explanations of A3, A4 and A5 and has granted permission to take legal action against the manufacturers and others concerned in this case. A2 has manufactured the sub-standard fertilizer in Unit situate in Madurai and distributed the same to A3 and A3 has stocked and exhibited the same for sale, the fertilizer which was not of specific standard. A4 knowing fully well that the mixture is sub standard was assisting for the sale. A5 is responsible for the manufacture of standard mixture in all units of E.I.D. Parry (I) Ltd. So, the complainant states that A2 to A5 have contravened the provisions of Clause 19(i)(b) of the Order and they are punishable under sec. 7(1)(a)(ii) of the Essential Commodities Act, 1955. A5 is added as per the order of court as requested by the department and as informed by the E.I.D. Parry (I) Ltd., Madras. A6 is substituted in the place of A1.

2. The case of the complainant summarized on the evidence of PWs is as follows:

PW1 is the Agricultural Officer (Quality control) and he inspected the shop of A3 on 17.5.90 where he found 18 bags of standard 2 fertilizer and A4 was present in that shop at that time. That shop procured 2 tonnes of fertilizer. At the time of inspection by PW1, he found only 18 bags, each containing 40 kgs as per the stock register Ex.P1. As per the provisions of the Order, PW1 took selected two bags out of 18 bags and he spread the fertilizer on the floor where there was no moisture and he spread it into a cylinderical shape and divided it into four portions, discarded two opposite portions and again made a cylinderical shape and divided it into four portions deleted the opposite two portions and the remaining portion was again divided. Likewise, he did it for six times and at the sixth time, he took little portions of fertilizer and divided it into three portions and from that, he took sample of 400 grams each in three portions and put them in polythene bags tied them tightly with thread and then put them separately in cloth bags, tied, thus he prepared three sample bags and affixed the seal in each of the bags and he has also affixed the Fertilizer Office seal in each of the bags. PW1 asked A4 also to affix his shop''s seal as A4 was not having his office seal that seal cannot be affixed. PW1 has written SRT 5/90-91 in each of the bags. By keeping the three bags on the table, PW1 asked A4 to take any one of the sample bags and A4 took one sample bag. PW1 prepared J form Ex.P2 and obtained the signature of A4 in Ex.P2 for having handed over possession of one sample bag. PW1 brought the remaining sample bags. He sent one sample bag to the Assistant Director of Agriculture Department, Sattur and another sample along with K form Ex.P3 to the Chemical analyst, Paramakudi PW2 on 17.5.90 and received chemical analysis report Ex.P4. PW5 Analyst found that the sample contained only 0.14% of water soluble p 205 as against 1.20%. PWs 4 and 5 have signed in Ex.P4. On receipt of Ex.P4, PW3. the Assistant Director, Quality Control issued show cause notice to the accused calling for their explanation and copy of that notice Exs.P.8 to P10 and received reply from the accused under Exs.P11 to P13. A6 was added on the evidence of PW6.

3. Learned Special Judge, E.C. Court tries the case and found A1 to A3 not guilty and acquitted them and found A4 to A6 guilty under Clause 19(1)(b) of the Fertilizer Control Order 1985 read with sec. 7(i)(a)(ii) of the E.C. Act, 1955 and convicted and sentenced them to R.I. for three months each and to pay a fine of Rs. 500/- in default to undergo R.I. for one month each.

4. As against that conviction and sentence A4 preferred C.A. 104/93. A5 preferred C.A. 115/93 and A6 preferred C.A. 116/93.

5. In these appeals, the appellants contend that no mahazar was prepared at the time of taking the sample or no special report has been sent to the court about the seizure effected and the report sent to the Assistant Director was also not filed and the signature of A4 was not obtained in Ex.P2 form in the place meant for the owner and since the fertilizer was found in stitched bags, A4 cannot be liable since he has not manufactured the fertilizer and there is no mens rea on the part of the appellants to commit an offence alleged against them. They further contend that the fifth accused was not in charge and responsible for the business and he was only an Executive and not responsible for the manufacture

of fertilizer and he was authorised by a Board Resolution dated 19.2.90 to only represent the company which was after the samples were drawn and he cannot be held liable for the manufacture of fertilizer prior to his appointment and there are also discrepancies in the J form. They further contend that due to chemical reaction which is beyond the control of the manufacturer, it is not possible to maintain the water soluble p 205 and there would be chemical reaction due to long storage and the deficiency of water soluble was due to natural reaction and not due to the fertilizer being substandard and there cannot be prosecution of individual officers. When the alleged offence has been committed by the company, such company should be proceeded against before its officers are prosecuted against. There is no evidence that A6 was in charge and responsible for the business. While Form J produced by the prosecution shows that the samples were taken from stitched bag, the carbon copy of the same marked as Ex.D1 would show that ''open bag'' being corrected to ''stitched bag''. Such discrepancy would go to the very root of the matter and the appellants would be entitled to the benefit of doubt and there was improper sampling done by the Inspector and failure to strictly follow the procedure laid down under the Order would vitiate the analysis and findings. The provisions of G.O.Ms. 1288 dated 17.7.85 have to be applied and the said G.O. provides that after a period of 60 days even the minimum cannot be granted by the manufacturer.

6. Point for consideration is whether the conviction and sentence passed on the appellant is sustainable.

7. Appellants A4 to A6 were convicted under the provisions of sec. 19(1)(b) of the Fertilizer Control Order and sec. 7(i)(a)(ii) of the E.C. Act 1955 and they were sentenced to undergo R.I. for three months each and to pay a fine of Rs. 500/-in default to undergo R.I. for one month each.

8. Counsel for appellants submitted that G.O.Ms.No.1288 dated 17.7.85 has not been properly applied by the complainant and if that GO. was applied, these appellants would not have been held responsible since that G.O. states that in the absence of adequate quantity of Ammonium Sulphate for mixing purposes only urea and super have to be used mostly and under such condition reversion of water soluble p 205 into critic soluble phosphoric acid becomes inevitable and it would be difficult to maintain even 10 to 15% water soluble p 205 and based on the discussion held in the scientific workers conference and in conformity with the provisions under sec. 10(a)(i) of the Fertilizer Control Order 1957, it was decided that the water soluble portion may be considered as 20% of the present guaranteed level and so, the water soluble portion cannot be expected after storage of 60 days and even the minimum cannot be guaranteed and so, basing on the chemical analysis report the fertilizer cannot be said to be sub-standard.

9. On a perusal of the above said G.O. it is revealed that in G.O. Ms.No.2102 Agriculture dated 9.8.72 and G.O. Ms. No. 154 Agriculture dated 6.2.76, the Government has prescribed various standards for fertilizer mixtures for adoption of various crops and it was laid down that the entire phosphoric acid content

(p205 content) in standard grades 1,2,4,5,7,13 and 18 and 18 shall be in water soluble form and in all other grades the water soluble and non-water soluble p 205 will be in 50:50 ratio. On report received, number of standard mixtures were found to be non-standard for the reasons these samples do not comply with the standards of water soluble p205 content. The matter was placed and discussed in a wider forum of scientific workers conference, and on the view expressed by the participants in the conference and the discussions held by the scientific workers and in conformity with sec. 10(1)(i) of the Fertilizer Order, 1957, it was decided that the water soluble portion may be considered as 20% of the present guaranteed level and that water soluble portion should be indicated within brackets and based on that discussion, the Director of Agriculture proposed to issue notification which was accepted and approved by the Government for publication in Tamil Nadu Gazette. The notification sets out the standards specified in the schedule for the purpose of Clause 10A of the Fertilizer Control Order, 1957 and for mixture No. 2, the water soluble portion is specified as 1.2. The Fertilizer Control Order, 1985 is dated 25.9.85 of the Ministry of Agriculture and Rural Development, Government of India, New Delhi. G.O.Ms.No.1288 was passed on 17.7.85. So, it was stated that the G.O. having been passed prior to the Fertilizer Control Order 1985, the G.O. is not applicable to this case.

10. Counsel for the appellants drew my attention to C1.39 of the Fertilizer Control Order 1985 which reads as follows:

39. Repeal and saving

(1) The Fertilizer (Control) Order, 1957 is hereby repealed except as respects things done or omitted to be done under the said Order before the commencement of this Order.

(2) Notwithstanding such repeal, an order made by any authority, which is in force immediately before the commencement of this Order and which is consistent with this Order, shall continue in force and all appointments made, prices fixed, certificates granted and directions issued under repealed Order and in force immediately before such commencement shall likewise continue "in force and be deemed to be made, fixed, granted or issued in pursuance of this Order till revoked.

C1.39 specifically states that the Order which is in force immediately before the commencement of this Order 1985 and which is inconsistent with this Order shall continue in force and be deemed to have been made in pursuance of this Order. So, the provisions of 1957 Order is applicable. The G.O. also recites that in conformity with the 1957 order, it was decided with regard to water soluble portion as 20% of the present guaranteed level. So, it cannot be stated that G.O.Ms.No. 1288 dated 17.7.85 is not applicable for the instant case as decided by the learned Special Judge. G.O.Ms.No. 1288 dated 17.7.85 does not give complete exemption with regard to water soluble portion and it has prescribed the water soluble portion as 1.2.% for standard mixture No.2. The chemical analysts PWs 4 and 5 who analysed the samples sent by PW1 have stated that the sample is not according to specification and the water soluble must be 1.2 as per the specification and the water soluble was only 0.14 and so, it is of sub-standard quality. Ex.P4 certificate issued by them shows that as per specification it must be 1.20 and the composition as per the analysis was 0.14 and the variation was 1.06 and PWs 4 and 5 have given their opinion that the sample was not according to specification and it has failed in water soluble p 205. The evidence of PWs 4 and 5 and ex.P4 proves that the sample has failed in water soluble p205. Relying upon the evidence of PWs 4 and 5 and ex.P4, the learned Public Prosecutor submitted that the stock of shop A4 which was manufactured by A5 and A6 is of sub-standard and the conviction passed on A4 to A6 is sustainable since they have violated the provisions of the Fertilizer Control order.

11. Counsel for the appellants submitted that even in the conference of Scientific Workers it was decided that it is very difficult to maintain even 10 to 15 p205 and the reversion is due to chemical reaction which is beyond their capacity and control and after storage of 60 days, even this minimum cannot be guaranteed and so, the variation in the water soluble portion cannot be taken note of seriously and because of long storage, the water soluble portion cannot be maintained and some variation found during analysis cannot be strictly said to be not in accordance with the specifications so as to violate the provisions of the Fertilizer Control Order.

12. A perusal of the G.O. goes to establish that in the conference held it was decided that water soluble portion may be considered as 20% of the present guaranteed level and that water soluble portion should be indicated within brackets. The G.O. does not give complete exemption with regard to water soluble portion. Specific recital is that water soluble portion may be considered as 20% of the then guaranteed level and the notification sets out that on analysis, the water soluble portion should be 1.20 which establishes that as decided in the conference, the water soluble portion should be 1.20 on analysis and accordingly, the notification was issued and published in the Tamil Nadu Gazette after acceptance and approval by the Government. So. the G.O. does not indicate that some variation would not mean contravention of the provisions of the Fertilizer Control Order. The standard specified for water soluble is 1.20 for mixture No. 2 and that must be confirmed during analysis and if any variation in the composition and if the sample is not according to the specification it is in utter violation of the provisions of the Control Order. PW1 states that he sent the sample for chemical analysis and the chemical analyst found that the sample was not according to specification and issued certificate ex.P4. The learned Public Prosecutor also pointed out that the analysis was done in the Laboratory approved by the Government and there is no deviation in that aspect. Ex.P4 indicates that the sample is not according to specification. P.Ws.4 and 5 have spoken to the effect that the sample received by them were analysed in the lab and they found out that the samples failed in water soluble p 205 and accordingly they have issued ex.P4.

13. Counsel for the appellant submitted that the complainant has not followed the procedure in taking the sample and he has not prepared any magazar or any report for taking the sample and in the absence of any special report or any magazar with regard to taking sample, it cannot be stated that PW1 took the sample by following the procedure as contemplated under the Fertilizer Control Order. Schedule II of the Fertilizer Control Order prescribes the procedure for drawal of samples of fertilizers. Clause 2 Sec. C of Schedule II prescribes the number of bags to be chosen from a lot for taking sample. It states that if the bags are less than 10. the number of bags to be selected for sample is one bag and if it is in between 10 to 100, the number of bags to be taken for sample is 2 bags. In the instant case, PW1 has selected two bags for taking samples. He found the stock of 18 bags in A4 shop. So, he has correctly followed the procedure in selecting the bags for sample. Clause 1 of Schedule II relates to general requirements of sampling. It reads as follows:-

"In drawing samples, the following measures and precautions should be observed:-

a) Samples shall not be taken at a place exposed to rain/sun;

b) The sampling instruments shall be clean and dry when used;

c) The material being sampled, the sampling instrument and the bags of samples should be free from any adventitious contaminations;

d) To draw a representative sample, the contents of each bag selected for sampling should be mixed as thoroughly as possible by suitable means;

e) The sample should be kept in suitable, clean dry and air tight glass or screwed hard polythene bottle of about 400 gm capacity or in a thick gauged polythene bag. This should be put in a cloth bag which may be sealed with the Inspector''s seal after putting inside the detailed description as specified in Form ''J''. Identifiable details may also be put on the cloth bag like sample No./Code No. or any other details which enables its identification;

f) Each sample bag should be sealed air tight after filling and marked with details of sample, type and brand of fertilizer, name of dealer/manufacturer and the name of Inspector who has collected sample"

14. PW1 has spoken in his evidence that he spread the fertilizer on the floor where there was no moisture content and then divided it into four portions and he did it for six times and then he took the sample of 400 grams each in three polythene bags and then he put them in cloth bags. Even though in the chief examination, he has stated that he took the sample by following the procedure, gave one packet sample to A4, gave one copy of J form and got his signature in J form also for having handed over one sample bag, his cross-examination has shaken his evidence of chief examination and from his cross examination, it is evident that he has deviated from following the procedure. Clause 1 (b) and (c) of part A of Schedule II states that the sampling instruments should be clean and

dry when used and the material being sampled, the sampling instruments and the bags of samples should be free from any adventitious contaminations. PW1 admits that so far as this case is concerned, he did not use any instrument for taking the sample. So, it is well evident from his evidence that no instrument was used by him while taking the sample. This is not in conformity with the procedure contemplated in Schedule II of the Fertilizer Control Order. PW1 also admitted that he did not prepare any mahazar or special report with regard to his taking sample and on what basis he took the sample. He has spoken in his evidence, only with regard to taking of samples. In the absence of any report or magazar, it cannot be concluded that he followed the procedure and only as per the procedure laid down under the Fertilizer Control Order, he took the sample. In the absence of report with regard to taking sample, what are all stated in oral evidence are of no avail. It cannot be expected that PW1 who took the sample would remember each and every thing that had happened at the time of taking sample which took place two years prior to his examination in court. So, in the absence of any special report or mahazar with regard to the procedure followed by him for taking sample, any amount of oral evidence let in by him cannot be believed and it cannot be stated that he followed the mandatory provisions in taking sample of fertilizer. The fact that PW1 did not use any instrument for taking sample is also a material defect.

15. Learned public prosecutor submitted that A4 has signed in J form for having acknowledged receipt of a sample bag from PW1 and in the receipt it is stated that the sample was drawn in accordance with the procedure and as such A4 has not disputed the procedure adopted by PW1 and PW1 has followed the procedure laid down under the Fertilizer Control Order while taking the sample.

16. Of course, in the J form receipt of the dealer it is stated that the sample of fertilizer has been drawn in accordance with the procedure laid down in the Fertilizer Control Order 1985 from the stock in his possession and he has received one test sample out of the three test samples prepared. From the wording found in the receipt in J form, it cannot be concluded that the sample was drawn in accordance with law. A4 was not expected to know the mandatory provisions with regard to taking of sample and the form which was prepared by PW1 and signed by A4 and that will not conclusively establish that PW1 followed the procedure The burden is upon the complainant to prove that he followed the mandatory provisions while taking sample and he took the sample strictly following the procedure. The evidence of PW1 itself proves that he did not follow the procedure by not using any instrument and also by not preparing mahazar or special report with regard to taking sample. These things establish that PW1 did not follow the procedure while taking the samples and so, PW1 has violated the mandatory provisions of the Order while taking samples.

17. Counsel for the appellants submits that while the J form produced by the prosecution shows the samples were taken from stitched bags, the carbon copy of the same given to the accused shows that it was taken from open bag and

thereafter it was corrected to stitched bag and such discrepancy would go to the very root of the matter and the appellants would be entitled to benefit of doubt.

18. On a perusal of J forms Exs.P2 and D1 I find that there is correction in column No.8 whether the samples drawn from open bags (or) stitched bags. There is a correction in the word ''stitched'' in both R2 and D1. On a perusal, it is seen that at the first instance, it was written as open bags, and then it was corrected to stitched bags. The letters ''op'' is clearly seen. This correction also goes to the root of the matter and it creates doubt whether the sample was drawn from open bags or stitched bags. Further in column 7 in P2 "granules good" is mentioned whereas in Ex.D1 ''granules'' alone is mentioned. In column 3(a) of Ex.P2.

''Standard Mix2'' is mentioned whereas in Ex.D1. ''Standard Mix 2 1(d) 3'' is mentioned. The mentioning of ''1(d)3'' is struck in ex.P2. There is also omission of the word ''N.P.K.'' in column 3 (d) in Ex.D1. So, there are some variation in the columns in the copy of J form given to A4. These corrections create suspicion with regard to taking sample as to whether it is from open bags or stitched bags. So, in addition to non-observance of the procedure in taking sample, there is also doubt with regard to taking sample from open bag or stitched bag, and this rouses doubt with regard to taking sample from the nature of the bag. The non-observance of mandatory provisions in taking sample by the complainant and the suspicion with regard to taking sample from the nature of the bag and the corrections carried out in exs.P2 and P1, all these things throw considerable doubt with regard to the genuineness of the complainant''s case and the complainant''s case has to fail and the accused are entitled to benefit of doubt.

19. Hence, I find that the conviction and sentence passed by the Special Judge, E.C. Court is not sustainable and it is liable to be set aside.

In the result, the criminal appeals are allowed. The conviction and sentence passed on A4 to A6 is set aside and the accused are acquitted of the charges. The fine amount if paid, is ordered to be refunded.

