
(2015) 01 MAD CK 0016

In the Madras High Court

Case No : Cr.A. No. 237 of 2004 & Criminal Appeal No. 178 of 2003 & Criminal Appeal No. 237 of 2004

Madras Fertilizers Ltd.

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 07-01-2015

Acts Referred:

Citation : (2015) 2 MadWNCri 373

Hon'ble Judges : M. Sathyanarayanan, J.

Bench : Single Bench

Advocate : A. Velan for Ajmal Associates, Advocates, for the Appellant; P. Kandasamy, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

M. Sathyanarayanan, J.—This Criminal Appeal arises out the prosecution of the Appellants for the violation of Clauses 13 (1), 13(2) & 19(b) of the Fertiliser (Control) Order, 1985, which is punishable under Section 7(1)(a)(ii) of the Essential Commodities Act, 1955.

2. The Appellants are arrayed as A1 to A3. The First Respondent/Complainant is the Agricultural Officer (Plant Protection). Radhapuram and he has also been appointed as Fertiliser Inspector, vide Government Notification under Clause 27 of the Fertiliser (Control) Order, 1985 PW1-Fertiliser Inspector has tiled a Private Complaint alleging that during the inspection made on 16.9 1998, at 11.00 a.m., at Saravana Stores, Yallioor, Tirunelveli District, which belongs to A4, namely, T.V.A. Murugan, the stock of Vijay Complex 17:17:17 manufactured by A1, was verified and a sample was also drawn and after completing the formalities, the same was sent for Chemical Analysis PW2. after analysing the sample, has given his opinion, which is marked as Ex.P9, that the sample fails in Moisture, Total N and Ws K2 O. Thereafter, the prosecution in the form of a Private Complaint was launched against A1 to A5, for the commission of the offences under Clauses 13(1), 13(2) & 19(b) of the Fertiliser (Control) Order, 1985, which is punishable

under Section 7(1)(a)(ii) of the Essential Commodities Act, 1955

3. The First Respondent/Complainant, in order to sustain their case, examined himself as PW1, and PW2-Chemical Examiner and also marked Exs P1 to P20. MO1 - Reference sample was also marked.

4. All the Accused were questioned under Section 313(1)(b) of the Code of Criminal Procedure, 1973, with regard to the incriminating circumstances made out against them in the evidence tendered by the First Respondent/Complainant and they denied it as false.

5. On behalf of the Accused, DW1 was examined and Exs.D1 & D2 were marked.

6. The Trial Court on consideration of the oral and documentary evidence, has convicted A1 to A3 under the above said provisions and imposed the sentence as under:

Accused

Conviction

Sentence

A1

Clause 19(1)(s) & (b) of F.C.O., 1985, r/w Sections 7(1)(a)(ii) & 10 of the E.C. Act, 1955.

to pay a fine of Rs.25.000/-.

A 2 & A3

to undergo three months" Simple Imprisonment and to pay a fine of Rs.25.000 - each, in default to undergo three months Simple Imprisonment

and acquitted A4 & A5. Aggrieved over the conviction and sentence passed by the Trial Court, A1 to A3 have filed the present Criminal Appeal.

7. The learned Counsel for the Appellants has drawn the attention of this Court to the Fertiliser (Control) Order, 1985, more particularly, Clause 29 and Schedule II of the Order and made the following submissions:

7.1. As per Clause 29(1), a fertilizer sample drawn by the Inspector, shall be analysed in accordance with the instructions contained in Schedule II in the Central Fertilisers Quality Control and Training Institute, Faridabad or Regional Fertiliser Control Laboratories at Bombay, Madras or Kalyani (Calcutta) or in any other laboratory notified for tins purpose by the State Government with the prior approval of the Central Government. Clause 29(1-A) relates to Bio-Fertiliser samples and Clause 29(1-B) relates to Organic Fertilisers and non-edible de-oiled cake Fertiliser samples.

7.2. Schedule II-Part A. speaks about the procedure for drawal of samples of

Fertilisers and it is relevant to extract the following:

"1. General Requirements of sampling; 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 lie clean and dry when used,
- (c) The material being sampled, the following instruments and the bag of sample 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 P. 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 and type of fertiliser and the name of Inspector who has collected sample."

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2. Sampling from Bagged Material:

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(iii) Sampling from small godowns -

All the fertiliser bags of the same grade and type of each manufacturer though received on different dates shall be segregated and properly stacked. All bags of same grade and type of fertiliser manufactured by a particular manufacturing unit may be considered as one lot based on their physical conditions and the sample shall be drawn as per procedure laid down in Paras 2(i)(c) & 4.

... ..

... ..

3. Sampling Probe:

(i) An appropriate sampling instrument to be used by the Inspectors for collection of a representative sample is called sampling probe. The probe may comprise of a slotted single tube with solid cone tip made of stainless steel or brass. The length of the probe may be approximately 60 to 65 cms and the diameter of the tube may be approximately 1.5 cm and the slot width may be

1.2 to 1.3 cms. The probe may be used if the physical condition of the fertilisers and the packing material permits its use.

(ii) In case of High Density Polythylene Packings and also when the fertiliser material is not in free flowing condition, the use of sampling probe may not be possible, in such a case, selected bags for drawing samples may be opened and the fertilisers may be taken out of the bags and spread on a clean surface and samples drawn with the help of a suitable sampling device which may be made of stainless steel or brass cup.

4. Drawal of samples from bags

(i) Drawal of sample and preparation of composite samples Draw, with an appropriate sampling instrument, (sampling probe) small portions of the material from the selected bags as per procedure in Paras 2 (i)(b), 2(ii), 2(iii) & 2(iv)(a). The sampling probe shall be inserted in the bag from one corner to another diagonally and when filled with fertiliser, the probe is withdrawn and fertiliser is emptied in a container/or on polythene sheet or on a clean hard surface and made into one composite sample.

(ii) If, the bags do not permit the use of sampling probe to empty the contents of the bags on level, clean and hard surface and draw a composite sample by the process of quartering as described under Para 3(ii) or 5.

(iii) In case of chelated micronutrients and mixtures of micronutrients, the three identical containers of the batch, grade, type and manufacture, shall be selected which shall constitute the composite samples, provided it is not possible to draw a composite sample of the size given under Para 4-A(iii)."

7.3. Drawing the attention of this Court to the testimony of PW1, the learned Counsel for the Appellants would submit that in the cross-examination. PW1 would admit that he has not taken the instruments sample device for drawing the samples and he has drawn the fertilisers by using his hands. According to the learned Counsel for the Appellants A1 to A3, the said procedure adopted by PW1/ Complainant is in gross violation of Schedule II-Part-A-3(ii), as per which, the selected bags for drawing samples may be opened and the fertilisers may be taken out of the bags and spread on a clean surface and samples drawn with the help of a suitable sampling device which may be made of stainless steel or brass cup.

7.4. It is the submission of the learned Counsel for the Appellants that admittedly, in the oral evidence of PW1, nothing has been stated about the use of stainless steel or brass while drawing the sample and the said procedure is for the reason that the fertiliser is a component of chemicals and therefore, such a method is adopted to find out the true components of the samples and admittedly, such a mandatory procedure has not been followed by PW1 and on that sole ground, the Appellants; A1 to A3 are entitled to be acquitted.

7.5. In support of his submissions, the learned Counsel for the Appellants/A1 to

A3 placed reliance on the following decisions.

(ii) Kadarkarai & others v. State by Agricultural Officer, Fertilizer Inspector, Office of the Assistant Director of Agriculture, Sattur, Kamarajar District, 2000 (1) MWN (Cr.) 199, and

(ii) Sham Lal v. State of Haryana, 2004 CrL.L.J 1665.

7.6. Similar question arose for consideration in Kadarkarai and others v. State by Agricultural Officer, Fertilizer Inspector, Office of the Assistant Director of Agriculture, Sattur, Kamarajar District, 2000 (1) MWN (Cr.) 199 and in Paragraph 14, it was noted that PW1 did not use any instruments for taking the samples and it is a material defect. In Paragraph 18, it is held that non-observance of mandatory provisions in taking the samples by the Complainant and the suspicion with regard to taking samples from the nature of the bag and the corrections carried out in Exs.P2 & D1, all these tilings tin ow considerable doubt with regard to the genuineness of the Complainant's case and citing the said reasons, the conviction and sentence passed in the said case were set aside and the Appeals were allowed.

7.7. In Sham Lal v. State of Haryana, 2004 CrL.LJ 1665. similar view was taken.

7.8. The learned Counsel for the Appellants/A1 to A3, by placing heavy reliance on the said decisions, would submit that the facts of the present case are similar to that of the above said decisions and prays for setting aside the conviction and sentence passed against the Appellants/A1 to A3 and for allowing the Appeals.

8. Per contra, Mr. P. Kandasamy, learned Government Advocate (Criminal Side) for the First Respondent would vehemently contend that the suggestions with regard to non-following of Schedule II - Part A, have not been specifically put to the concerned Witnesses and therefore, it can lie construed that the Appellants/A1 to A3 have waived the same and hence, it cannot be said that they have been put to prejudice on non-following the re lev ant procedures.

9. It is further submission of the learned Government Advocate (Criminal Side) for the First Respondent that the Trial Court on a proper consideration and appreciation of oral and documentary evidence, has rightly convicted the Appellants/A1 to A3 and therefore, prayed for the dismissal of this Appeal.

10. This Court, on a careful consideration of the rival submissions and scrutiny and analysis of the materials placed before this Court, is of the considered opinion that this Criminal Appeal is to be allowed for the following reasons:

(a) The Fertiliser (Control) Order, 1985, was passed by the Central Government in exercise of the powers conferred under Section 3 of the Essential Commodities Act, 1955 (10 of 1955) and therefore, it is having a statutory force.

(b). As per Clause 29 (1) of the Fertiliser (Control) Order, 1985, a fertiliser sample, drawn by an Inspector, shall be analysed in accordance with the instructions contained in Schedule II in the concerned Laboratory.

(c) Schedule II speaks about the procedure for drawing of samples of fertilisers and as per Schedule II-Part A-1(b), the sampling instruments shall be clean and dry when used.

(d) Schedule II-Part A-3 speaks about as to how the sampling probe is to be done. 3(i) says that the sampling instruments may comprise of a slotted single tube with solid cone tip made of stainless steel or brass and it may lie used if the physical condition of the fertilisers and the packing material permits its use 3(ii) says that in case of High Density Polyethylene Packing's and also when the fertiliser material is not in free flowing condition, the use of sampling probe may not be possible, in such a case, selected bags for drawing samples may be opened and the fertilisers may be taken out of the bags and spread on a clean surface and samples drawn with the help of a suitable sampling device which may lie made of stainless steel or brass cup.

(emphasis supplied)

(e) Admittedly, the testimony of PW1 did not disclose the adherence to the said procedure.

11. It is well settled position of law that if the statute prescribed a thing to be done in a particular manner, it should be done in that way and not in any other manner.

12. The decisions relied on by the learned Counsel for the Appellants also laid down the proposition that if the mandatory procedure is not followed, then, it is fatal to the case of the prosecution. Hence, on this sole ground, the conviction and sentence passed by the Trial Court are liable to be set aside.

13. In the result, this Criminal Appeal is allowed and the conviction and sentence imposed in S.T.C. No. 40 of 2000, vide Judgment dated 20.1.2004, by the learned Special District and Sessions Judge for Essential Commodities Act and NDPS Act Cases, Madurai, are set aside and the Appellants A1 to A3 are acquitted of the charges framed against them and fine amount, if any, paid by the Appellants, shall be refunded to them. The bail bonds executed by them shall stand terminated.