
(1973) 12 DEL CK 0005

In the Delhi High Court

Case No : Criminal Appeal No. 138 of 1969

Municipal Corporation of Delhi

APPELLANT

Vs

Thou Ram

RESPONDENT

Date of Decision : 14-12-1973

Acts Referred:

Citation : (1974) ILR Delhi 648

Hon'ble Judges : R.N. Aggarwal, J; Jagjit Singh, J

Bench : Division Bench

Advocate : B. Dayal and Ghanshyam Das, for the Appellant;

Judgement

R.N. Aggarwal, J.

(1) This is an appeal by the Municipal Corporation of Delhi by leave u/s 417(3) of the Code of Criminal Procedure against an order of the Additional Sessions Judge, Delhi, whereby the appeal of Thou Ram, respondent herein, against his conviction and sentence u/s 7 read with section 16 of the Prevention of Food Adulteration Act was allowed.

(2) The respondent is a Halwai and has his shop in Krishna Nagar, Delhi. On August 9, 1968, V. B. Sharma, Food Inspector visited the shop of the respondent at about 11 A.M. The Food Inspector found the respondent selling "barfi" prepared of "khoa", sugar and "basin". The Food Inspector purchased 1500 grams of "barfi" prepared of "khoa", sugar and "basin" on payment of Rs. 7.50 as its price for the purposes of analysis. The Food Inspector divided the sample in three equal parts and put it in three jars. One part of the sample was sent to the Public Analyst, one part was given to the accused and the third part was retained by the Food Inspector. The Public Analyst on an examination of the sample found that the "barfi" was not prepared of "khoa" as declared because the extracted fat was not milk but vanaspati, and accordingly the sample was declared by the Public Analyst as "misbranded". The sample was analysed by the Public Analyst on August 20, 1968 and he had submitted his report on August

27, 1968.

(3) On receipt of the report of the Public Analyst, the Municipal Prosecutor filed a complaint u/s 7 read with section 16 of the Prevention of Food Adulteration Act, against the respondent. The Magistrate found the respondent guilty of the offence charged with and sentenced him to rigorous imprisonment for six months and a fine of Rs. 1000.00. and in default of payment of fine to undergo rigorous imprisonment for four months. Against his conviction and sentence the respondent went in appeal to the Sessions Judge. The Additional Sessions Judge allowed the appeal on two grounds: (i) that from the statement of the Public Analyst it appeared that some quantity of milk fat or "ghee" had been used in the sample of "barfi" and, Therefore, the sample could not be said to be "misbranded". (ii) that there was violation of rule 7(3) of the Rules framed under the Prevention of Food Adulteration Act, as there was inordinate delay in the submission of the report by the Public Analyst. Point NO. 1.

(4) The Additional Sessions Judge had recorded the statement of Shri Prem Parkash Bhatnagar, Public Analyst, as a court witness, on August 19, 1969. The witness stated as follows :

"KHOA contains milk fat. In order to find out whether there is any milk fat in the khoa we carry out the same test as laid down for ghee. Ghee contains volatile fatty acids and one of the tests to find out the same is reichert value test, which is determined by a special method.

(5) Thereichert value of ghee should not be less than 28 but in the instant case the reichert value was only 5.06. So it means that the fat which was extracted from the barfi was not milk fat as the reichert value was much less than the requisite minimum. Volatile fatty acids are present in almost negligible quantity in fats/oils other than milk fat. Therefore, my report Ext. Pe would indicate that the milk fat content in the burfee in question was almost negligible and adulterated khoa might have been mixed in the burfee. It is equally possible that a little quantity of milk fat might have been used."

(6) The witness to a question put by the counsel for the accused stated that it was correct that in no edible oil or fat other than butter fat, the reichert value is more, then, 1 per cent. The witness in cross-examination by the Public Prosecutor stated that the reichert value of the fat could be 5.06 if some adulterated ghee was used in preparation of "barfi".

(7) On the basis of the statement of the Public Analyst, the Additional Sessions Judge found that there was some quantity of milk fat or "ghee" in the sample of "barfi" and, Therefore, the sample could not be described as "misbranded". The Public Analyst in his report dated 27th August, 1968, had stated that the sample was not prepared of "khoa" as the extracted fat is not milk fat but vanaspati. The Public Analyst had reached this conclusion as the reichert value in the sample was found only 5.06 whereas according to the standard laid down for "ghee", the reichert value should have been not less than 28. The Public Analyst in a

statement in the court stated that it is possible that a little quantity of milk fat might have been used in the sample. From the statement of the Public Analyst at best it can be said that a small quantity of milk fat may have been used in preparation of the "barfi" of which sample was taken by the Food Inspector.

(8) On the facts found, the question arises whether the sample of "barfi" was "misbranded". The definition of the expression "misbranded" consists of a number of clauses. The relevant clause of the definition reads as:

""MISBRANDED"- an article of food shall be deemed to be misbranded- (a) if it is an imitation of, or is a substitute for, or resembles in a manner likely to deceive, another article of food under the name of which it is sold, and is not plainly and conspicuously labelled so as to indicate its true nature;"

(9) From a reading of the above clause it is clear that an article of food shall be presumed to be misbranded if it resembles in a manner likely to deceive another article of food under the name of which it is sold and is not plainly and conspicuously labelled so as to indicate its true character. No general rule can be laid down as to what is and what is not a colourable variation. All that can be said is to ascertain in every case whether there is such a resemblance as to deceive a purchaser using ordinary caution.

(10) Turning to the facts of the case in hand, the respondent was found selling "barfi" which was held out to have been prepared from "basin", sugar and "khoa". Item No. A. 11.02.17 of Rule 5 of the Rules framed under the provisions of Food Adulteration Act lays down the standard of "khoa" and it provides:

"KHOA means the product obtained from cow or buffalo milk or a combination thereof by rapid drying. The moisture in khoa shall not exceed 28.0 per cent. and the milk fat content shall not be less than 26.0 per cent of the dry matter."

(11) The Public Analyst on an examination of the sample had found that the sample of "barfi" was not prepared of "khoa" as declared because the extracted fat was not a milk fat but vanaspati. The statement of the Public Analyst recorded in the court of the Additional Sessions Judge only shows that a negligible quantity of milk fat may have been used in the "barfi" of which the sample was taken by the Food Inspector. For all practical purposes the "barfi" sold did not contain any "khoa". The "barfi" was being sold by the respondent holding out that it was prepared from "khoa", "besin" and sugar. The declaration by the respondent that the "barfi" was prepared from "besin", sugar and "khoa" was clearly false. On these facts there can be little doubt that the addition of small quantity of milk fat, if at all, was only a colourable variation to deceive a purchaser. Disagreeing with the finding of the Additional Sessions Judge, we hold that the sample was misbranded. Point NO. 2.

(12) The second reason given by the Additional Sessions Judge for allowing the appeal was that there had been contravention of the provisions of the Food Adulteration Rules 1955. Rule 7 relates to duties of the Public Analyst. Sub-rule

(3) was to the effect that after Analysis has been completed, the Public Analyst shall "forthwith" supply to the person concerned a report in form No. 3 of the result of such analysis. This sub-rule was amended by a Notification No. 1533 dated 8th July, 1968, and the amended sub-rule (3) reads as:

" AFTER the analysis has been completed, he shall send to the person concerned two copies of the report of the result of such analysis in form 3 within a period of sixty days of the receipt of the sample."

(13) In the instant case the sample was received by the Public Analyst on August 9, 1968. The sample was analysed on August 20, 1968, and the report is dated August 27, 1968. There is nothing on the record to show that there was any violation of sub-rule (3) as amended.

(14) The Additional Sessions Judge after noticing the amendment in sub-rule (3) had proceeded to hold that there was violation of sub rule (3) following the decision in *Brij Mohan v Municipal Corporation of Delhi* (Criminal Revision No. 427 of 1968, decided on 20th June, 1969) (1), and *Municipal Corporation of Delhi v Tulsi Dass* (Criminal Appeal No. 96-D of 1964, decided on 6th August, 1969) (2). Both the cases relied upon by the Additional Sessions Judge related to the period before sub-rule (3) was amended. The said authorities are of no help in interpreting the sub-rule (3), after it was amended. However, we may add that the view expressed in the case of *Brij Mohan* (supra) was not approved by this Court in *Municipal Corporation of Delhi v Darshan Lal Sharma* (Cr. A. 126 of 1967, decided on September 8, 1969 (3), by Mr. Justice Hardayal Hardy, (as his Lordship then was) and Mr. Justice Jagjit Singh). While construing the unamended rule 7(3) it was stated as under:-

" WITH very great respect we are, however, unable to agree with the view taken in the case of *Brij Mohan* that any Violation or breach of a statutory rule must result in acquittal of the accused. What is important in such a case is to see whether the contravention has resulted in prejudice being caused to the accused. If there was no prejudice then in spite of technical contravention conviction may not be had if it may otherwise be justified on the facts and merits of the case. In the grounds of appeal in the Court of Sessions there was no objection on the part of the respondent that there had been any contravention of rule 7(3) much less that the contravention had resulted in any prejudice to him. Before the learned Additional Sessions Judge as well no argument was raised in that connection. A public Analyst has to deal with numerous samples of articles of food which are sent to him for analysis. There is bound to be some time lag between performance of the analysis and the signing of a report. Merely because there was a delay of one week it cannot be inferred that the delay must have been caused due to any extraneous influences. In the absence of any indication to the contrary the normal presumption would be that the few days delay in signing the report occurred in routine or due to volume of work to be handled and not because of any extraneous influences or considerations. We are, Therefore, unable to agree with the learned counsel for the respondent that contravention of

rule 7(3) in so far as the report of the Public Analyst was signed and supplied after a week of the analysis of the sample resulted in any prejudice to the respondent and merely on that ground the order of acquittal should not be interfered with."

(15) This point need not detain us any more, for after the amendment the Public Analyst can submit his result of analysis within sixty days of the receipt of the sample. We disagree with the view of the Additional Session Judge on the 2nd point also and hold that there was no violation of sub-rule (3).

(16) In the view we have taken the judgment of acquittal will be have to be set aside and substituted with an order of conviction. We allow the appeal, set aside the order of acquittal and convict the respondent u/s 7 read with section 16 of the Prevention of Food Adulteration Act and sentence him to a fine of Rs. 1000.00. In default of payment of fine he would undergo rigorous imprisonment for three months. The respondent is allowed one month's time to deposit the fine in the Court of Mr. J. D. Jain, Additional Sessions Judge, Delhi. If the respondent fails to pay the amount within the time allowed he will be taken into custody to undergo the sentence of imprisonment awarded to him.