

(1993) 01 GAU CK 0022

In the Gauhati High Court

Case No : Criminal Revision No. 313 of 1986

Naranga Lal Agarwalla @ Narangarai Agarwalla

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 25-01-1993

Acts Referred:

Prevention of Food Adulteration Act, 1954 — Section 10(7), 10(7), 13(2B), 13(2B)

Citation : (1993) 2 GLJ 143

Hon'ble Judges : U.L.Bhat, C.J.

Bench : Single Bench

Advocate : A.K.Goswami, N.M.Lahiri, A.Ahmed, G.N.Sahewalla, Advocates
appearing for Parties

Judgement

1. The Additional Chief Judicial Magistrate, Dibrugarh convicted the revision petitioner herein under section 7 and 16 of the Prevention of Food Adulteration Act, (for short the Act) for selling adulterated vanaspati "Sahil Brand" and sentenced him to undergo simple imprisonment for six months and to pay a fine of Rs. 1,000/ with default sentence. The Additional Sessions Judge, Dibrugarh dismissed his appeal. Hence this revision.

2. PW 1, Food Inspector, Dibrugarh visited the shop of the revision petitioner conducted under the name "Satyanarayan Manoj Kumar" on 26.3.84 and observing the legal requirements purchased 1500 grams of vanaspati "Sahil Brand" exhibited in the shop in a 10 Kg. container, paid the price and dealt with the sample in accordance with the Act and the PFA Rules. One of the parts of the sample was sent to the Public Analyst and the other two to the Local (Health) Authority. Public Analyst reported that the sample was adulterated and prosecution followed. The Food Inspector gave evidence as PW 1 and examined a witness to the sampling as PW 2. Revision petitioner examined two witnesses as DWs 1 and 2. He contended that he is a trader in textiles, yarn and stationery goods and not in vanaspati, that about a month prior to the visit of the Food Inspector (25.2.84) he performed the marriage of his son and purchased some

quantity of vanaspati for preparation of sweets in connection with the marriage feast and some quantity of vanaspati was left which was kept in the shop since his house and shop are in the same building and he was using it for his household and the vanaspati was not stored for sale and hence the Food Inspector could not have taken a sample thereof. Certain other contentions were also raised. Both the Courts below overruled all the contentions and upheld the prosecution case. The Courts below concurrently held that the stock of vanaspati was exhibited in the shop for sale.

3. There is no doubt that the vanaspati taken by the Food Inspector from the shop of the revision petitioner was found by the Public Analyst to be adulterated. Public Analyst in Ext. 13 report recorded his opinion that the sample did not conform to the standards prescribed by the Rules. A comparison of the result of analysis with the standard prescribed shows that the sample did not conform to the standards in regard to melting point, boudouin test and presence of synthetic Vitamin "A".

4 Learned counsel for the revision petitioner urged the following contentions :

(A) The shop belongs not to the revision petitioner but to his son.

(B) Revision petitioner is not a dealer in vanaspati and did not store the vanaspati for sale and hence Food Inspector was not competent to take a sample from him and the prosecution must fail.

(C) Section 10 (7) of the Act is mandatory and the mandatory provision has been violated by the Food Inspector by not calling any independent witness from the locality.

(D) There was violation of Rules 17 and 18 of the Prevention of Food Adulteration Rules, for short "the Rules", which are mandatory and hence acquittal must follow.

(E) There was violation of section 13 (2) of the Act. 5. Point (A) : The contention that the shop belongs not to the revision petitioner but to his son is raised for the first time in revision. Such a contention was not raised before the trial Court or the appellate authority. Revision petitioner is carrying on business in the trusted name "Satyanarayan Manoj Kumar". PWs 1 and 2 deposed so. It was suggested to them in cross-examination that revision petitioner was carrying on business in textiles, yarn and stationery goods, but not in foodstuff. It was not suggested to them that the trader is not the revision petitioner but his son Satyanarayan. When questioned by the trial Court he stated that he has textile, yarn and stationery shop and his shop and house are in the same building. DWs 1 and 2 examined on his behalf also deposed that he has textile, yarn and stationery shop. In these circumstances, it is not open to revision petitioner at this stage to contend that he is not the owner of the shop. He has produced, along with the memo of revision, a paper purporting to be photo copy of duplicate challan for alleged payment of licence fee. The document indicated payment of licence fee

on 14.3.83 under the Assam Trade Articles Licensing and Control Order, 1982 for retail sale of cloth and yarn on behalf of "Satyanarayan Monoj Kumar". It does not indicate payment of licence fee for conducting trade in stationery articles. The document is not accompanied by an affidavit or an application for reception of additional evidence. The original of the photo copy is not produced. The photo copy is therefore inadmissible. It requires proof also. The document is of no avail in view of the clinching evidence to show that the shop from which sample was taken belongs to the revision petitioner. This contention fails.

6. Point (B) : It is contended that sample of food article can be taken only from the dealer or from a person who has stored the food article for sale and if a sample is taken from a person who is not a dealer or did not store the article for sale, prosecution cannot stand. I will assume the proposition to be correct and examine the matter. PW 1, the Food Inspector and PW 2, the witness to the sampling and Peon of the office of the Chief Medical and Health Officer, deposed that the revision petitioner's shop is one where food articles are sold besides textiles, yarn and stationery articles. PW 2 lives only 1¹ KM away from the place.

7. It appears that one of the sons of the revision petitioner was married on 25.2.84 and a marriage feast was arranged in the house of the revision petitioner. Revision petitioner when questioned by the trial Court stated that his house and shop are in the same building. He had purchased articles like flour, sugar and vanaspati for the marriage feast and some quantities of these articles remained in excess and were kept by him for his household use and they were being used gradually and that he told PW 1 so. PW 1 denied having been so told by revision petitioner. PW 2 could not say if any such thing was mentioned by the revision petitioner. DW 1 resides 50 feet away from the shop of the revision petitioner. He and the revision petitioner have been residing in the locality for over 25 years. He deposed that the revision petitioner's house and shop are in the same building, that revision petitioner's sons marriage was performed and he attended the marriage feast, that sweets were prepared in the house for the feast and for that purpose flour, vanaspati and other articles were purchased from the town. Revision petitioner had given the witness 2 Ltrs. of oil. He deposed that he had not seen the revision petitioner selling grocery items or food stuff in the shop. It was suggested to him that on account of his acquaintance with the revision petitioner he was deposing falsely and he denied the suggestion. DW 2 is a childhood acquaintance of the revision petitioner. He deposed that revision petitioner is selling textiles, yarn and stationery articles and he had never seen him selling rice and dal. He also deposed about the marriage for which he accompanied the bridegroom's party. He attended the marriage feast also. Dishes for the feast were prepared in the house. He further deposed that when the Food Inspector came, revision petitioner called him to his shop. But he could not say if there was any talk between the Food Inspector and the revision petitioner. He stated that the food Inspector did not say anything to him. He denied that he was deposing falsely because he was on good terms with the revision petitioner.

8. The two Courts below considered the oral evidence and circumstances and accepted the evidence of the Food Inspector and rejected the stand taken by the revision petitioner and the evidence of DWs 1 and 2.

9. The evidence shows that the open tin with a capacity of 10 Kg and containing 5 or 6 Kg of vanaspati was kept in the shop. Revision petitioner or his witnesses did not explain how such a large quantity of vanaspati would remain after preparation of sweets for the marriage feast or as to why the open tin containing vanaspati was kept in the shop and not in the residential part of the building. Revision petitioner did not produce any licence before the trial Court. When a large quantity of food article like vanaspati is kept in an open tin in a shop, it can be prima facie presumed that it is kept or stored in the shop for sale and the shop keeper deals in such food articles. That DW 2, a childhood acquaintance of revision petitioner did not hear any statement being made by revision petitioner to the Food Inspector, is also significant. Having regard to the above circumstances, I find no reason to interfere with the concurrent finding of fact arrived at by the trial Court and the appellate Court that the revision petitioner was dealing in vanaspati and that he exhibited the same for sale in his shop. This contention also fails.

10. Point (C) : It is contended that section 10 (7) of the Act is mandatory and was not complied with by the Food Inspector. In Criminal Revision No. 212 of 1986 [1993 (1) GLJ 369] this Court (Division Bench) has held that section 10 (7) of the Act is directory and mere noncompliance is not fatal to the prosecution, that noncompliance may call for a close scrutiny of the evidence.

11. It is in evidence that there are shops and houses near the shop of the revision petitioner. The Food Inspector did not call any shop keeper or the resident of those houses. He deposed that there were customers present in the shop and he called them to witness the sampling, but they refused. PW 2 is a peon in the office of the Chief Medical and Health Officer, that is, Local (Health) Authority. He is not a peon of the Food Inspector. Therefore, he cannot be said to be a person dependant on the Food Inspector. There is no reason why he should not be regarded as independent witness. PW 1, the Food Inspector, deposed that when other persons in the shop refused to witness, PW 2, who was with him, agreed to be a witness. In crossexamination, PW 1 deposed that other persons were also present in the shop besides the revision petitioner. He was asked if they were the employees of the shop, but he could not say if they were employees of shop. No such question was put in the crossexamination of PW2. DW 2 who claims to be present at the time, did not state that any employees were present. DW 2 also did not depose that other customers were not present in the shop. He did not depose that the Food Inspector did not ask the customers to witness the sampling. Subsection (7) of section 10 does not require that the Food Inspector must call one or more persons from outside the shop. There is no reason who, if there were such persons in the shop, they should not be called. It was also not suggested in crossexamination of PWs 1 and 2 that at the relevant

time there were any persons outside, in the immediate neighbourhood of the revision petitioner's shop. In these circumstances, it is not possible to agree that Food Inspector failed to observe the requirements of subsection (7) of section 10 of the Act. Even assuming that there was such a failure on his part, that by itself, cannot lead to the rejection of his evidence or the failure of the prosecution. His evidence has to be considered alongwith the evidence of PW 2 on its own merit and it has to be decided whether the evidence is acceptable. The two Courts below have considered the evidence in a proper manner and found it safe to act upon the evidence. I find nothing unreasonable or perverse in the consideration of evidence by the Courts below. The point is answered against the revision petitioner.

12. Point (D) : According to the revision petitioner, Rules 17 and 18 of the Rules are mandatory and there was noncompliance with these Rules and hence prejudice has to be presumed and they should be acquitted. In Criminal Revision No. 212 of 1986, Rameshwar Rathi & another vs. State of Assam [1993 (1) GLJ 369] this Court has held that Rules 17 and 18 are directory and not mandatory, that substantial compliance is sufficient and if not substantially complied with, accused has to show prejudice and mere noncompliance cannot lead to acquittal.

13. PW 1 has deposed in chief examination that he put the three parts of the sample in dry clean containers and sealed them, prepared three labels with Serial No. 125/84 and put his own name and the vendor's name, date etc. and affixed them to the container with the signatures of himself and the accused, wrapped each container in wrapping paper separately and pasted it, affixed the paper slip around each paper and pasted the same and bound each packet with thread and sealed them with wax and ink and obtained the signature of the accused on outer cover also. He further deposed that he prepared Form VII memorandum in five copies and signed each of them and affixed seal impression on each of them. One part of the sample with memorandum was sent to the Public Analyst by registered parcel and a copy of the memorandum was sent with specimen impression of the seal separately by registered post to the Public Analyst and two parts with two copies of memoranda to Local (Health) Authority in sealed packet. He proved Ext. 3 to be a copy of the memorandum so sent to the Public Analyst and containing a specimen impression of the seal and Ext. 4, the forwarding letter, Ext.5 postal receipt and Ext. 6 postal acknowledgment of the Public Analyst. He proved Ext. 7 to be the letter sent to the Public Analyst separately with the memorandum containing specimen impression and Ext. 8 to be postal receipt and Ext. 9 to be postal acknowledgment of the Public Analyst. He also proved Ext. 10 to be the acknowledgment receipt of the separate packet received by Public Analyst under Rule 18. Ext. 11 is the letter sent by Food Inspector to Local (Health) Authority along with the two parts of the sample and two copies of memoranda. Ext. 12 is the acknowledgment thereto given by the Local (Health) Authority.

14. The Public Analyst's report, Ext. 13 states that the Public Analyst received

the sample of vanispati Sl. No. 125/84 (Code BP SI. No. 125) collected from the accused on 26.3.1984 at Jokai for analysis, properly sealed and fastened and found the seal intact and unbroken and the seal fixed on the container and the outer cover of the sample tallied with the specimen impression of the seal sent separately by the Food Inspector and the sample was in a fit condition for analysis. These recitals in Ext. 13 fully corroborate the evidence of the Food Inspector. In Criminal Revision Nos. 261 of 1985 and 262 of 1985, Ratanlal Agarwala vs. State of Assam [1993 (1) GLJ 286] this Court (Full Bench) held that the criminal Court, in its discretion can draw a presumption (under Illustration (e) to section 114 of Indian Evidence Act, 1872) that an official act shown to have been performed was performed regularly, that is in accordance with the requirements of law or that a letter forwarded by a Public Analyst has been duly and regularly forwarded as required by law. Drawing the presumption it must be held that there has been due compliance with Rule 17 (a) and 18 of the Rules.

15. According to the revision petitioner Rule 17 (b) that is, sending the sealed containers of the remaining two parts of the sample and two copies of the memoranda in Form VII in sealed packet to the Local (Health) Authority has not been complied with. The Food Inspector deposed that he had sent two parts of the sample with Form VII memoranda in sealed packet to the Local (Health) Authority and proved Ext. 11. Copy of the forwarding letter sent by him to Local (Health) Authority along with two parts of the sample and two copies of the memoranda in a sealed packet for the purpose of Rule 17 (b) of the Rules. Ext 12 is the acknowledgment of the Local (Health) Authority. This evidence is sought to be got over by the revision petitioner by relying on certain answers given by the Food Inspector in cross-examination. Food Inspector deposed that Local (Health) Authority sent two parts of the sample to the Court in sealed packet. Mat. Ext 1, and that the sealed packet was opened in Court that day. He identified the two parts of the sample as Mat. Exts. 2 and 3. He also identified the signature, seal and the SI. No. of the Local (Health) Authority and identified the wrappers containing the signatures of the revision petitioner. In cross-examination he stated that Mat. Ext 1 was not the part sent by him and it did not contain copy of the memoranda which he held sent along with Mat. Exts. 2 and 3. He also deposed that Local (Health) Authority in his presence accepted the sealed packet sent by him by opening it. On the basis of the answers it is argued the Food Inspector had not sent two parts of the sample in a sealed packet to Local (Health) Authority and in any event, the action of the Local (Health) Authority in opening the sealed packet vitiates the entire prosecution and the absence of two copies of memoranda in sealed packet. Mat. Ext. 1 is fatal to the prosecution.

16. Section 11 (1) (c) (ii) requires the Food Inspector to send the remaining two parts of the sample to the Local (Health) Authority for the purposes of subsection (2) of that section and subsections (2A) and (2E) of section 13. This is to enable the Local (Health) Authority to send one of the parts of the sample to the Public Analyst on a requisition by the Food Inspector or the Public Analyst if the part of sample sent by Food Inspector to the Public Analyst is lost or damaged. This

provision is also necessary in view of subsections (2A) and (2E) of section 13 where under on an application by the accused the Court shall obtain part or parts of the sample from the Local (Health) Authority and forward the same to the Director, Central Food Laboratory after ascertaining that the mark and seal or fastening are intact and the signature or thumb impression is not tampered with. According to subsection (2E) of section 13 if the Local (Health) Authority is of the opinion that the report of the Public Analyst is erroneous, the Authority shall forward one of the two parts of the sample to any other Public Analyst for analysis. The provisions of subsections ^2) to (2D) of section 13 shall apply to the report of that Public Analyst. There is no Rule which prohibits the Local (Health) Authority from opening the sealed packet sent to the Authority by the Food Inspector under Rule 17 (b) of the Rules. Assuming that Local (Health) Authority opened the sealed packet received by it under Rule 17 (b), that action cannot be said to be in contravention of any Rule. Since the Public Analyst reported that the part of the sample received by him was adulterated, the only use to which the remaining parts of the sample could be put to is transmission to the Director, Central Food Laboratory by the Court on an application by the accused. There is no provision in the Act or the Rules requiring the Court to compare the seal with the specimen impression of the seal. The Court is required under section 13 (2B) only to ascertain that the mark and seal or fastening are intact and the signature or thumb impression is not tampered with. The Director, Central Food Laboratory is also not required to compare any seal with the specimen impression of the seal. It is therefore clear that the specimen impression of the seal loses all importance once report is received from the Public Analyst indicating that the part of the sample is adulterated. I therefore hold that there has been no violation either of Rule 17 (b) of the Rules. The point is answered accordingly.

17. Point (E) : It is argued by learned counsel for the revision petitioner that copy of the report with the necessary intimation under section 13 (2) of the Act was not served on the revision petitioner. The Food Inspector in chief examination deposed that the Local (Health) Authority forwarded a copy of the Public Analyst's report with intimation to the revision petitioner. He proved Ext. 17, copy of the letter and Ext. 18, the postal receipt. In cross examination he stated that he obtained Exts. 17 and 18 from the office of the Local (Health) Authority, that the acknowledgment of the revision petitioner was not produced and that he could not trace it out from the office of the Local (Health) Authority. It was suggested to him that no such letter was sent to revision petitioner, but he denied it.

18. In Criminal Revision Nos. 261 of 1985 and 262 of 1985 [1993(1) GLJ 286] referred to above, this Court (Full Bench) has held that the duty of the Local (Heath) Authority is only to duly "forward" the document to the accused and it is not under a duty to "serve" or "deliver" it to him. If it is duly forwarded, it has done all that is statutorily required. The Full Bench also pointed out that the document is to be forwarded by registered post and not necessarily

acknowledgment due. The Full Bench further held that presumption under section 27 of the General Clauses Act and Illustration (e) to section 114 of the Indian Evidence Act, 1872 could in appropriate cases be legitimately drawn. The facts of the present case justify the presumption being drawn.

19. The entry dated 27.12.84 in the order sheet of the trial Court contains a direction to the office to serve a copy on the accused and the order sheet contains an endorsement of the accused that he had received the copy. The trial Court judgment shows that the copy furnished was of the Public Analyst's report. In this connection, it will be useful to refer to the decision in *Balan vs. Food Inspector, Always Municipality*, 1984 KLT 280 (also reported in 1984 (I) FAC 358). In that case Local (Health) Authority forwarded a copy of the report and intimation to the accused in the address shown in the document prepared at the time of taking the sample and it was returned by the postal authority to the Local (Health) Authority with endorsement "not known, no such addressee". The summons served on the accused was also sent to the same address. The accused had no case that the address shown on the cover by the Local (Health) Authority was not the correct address and on the date of appearance of the accused in Court a copy of the report and intimation in the cover was handed over to him. The Court held that there was no noncompliance with section 13(2) of the Act and Rule 9A of the Rules. The Court also commented on the fact that even though copy was received later the accused did not move an application before the trial Court under section 13 (2) of the Act and therefore the contention of prejudice has to fail. The facts in the present case are more or less similar. Local (Health) Authority did forward copy of the report with the necessary intimation to the accused in the address in which summons was later served. Revision petitioner had no case at any stage that the address was not correct. In any event he received it from the Court. Yet he did not move an application to the Court to send for the remaining part or parts of the sample from the Local (Health) Authority and to send one of the parts to the Director, Central Food Laboratory. I therefore hold that there is no noncompliance with section 13 (2) of the Act or Rule 9A of the Rules and accused has not been prejudiced on account of any default of Local (Health) Authority. The point is answered accordingly.

20. No other contention has been urged before me. I find no ground to interfere with the conviction or sentence. The revision petition is dismissed.