
(2005) 04 GAU CK 0051
In the Gauhati High Court
Case No : Criminal R.P. No. 249 of 1997

Shyam Sundar Maheswari	Vs	APPELLANT
State of Assam and Another		RESPONDENT

Date of Decision : 05-04-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 401, 433
Prevention of Food Adulteration Act, 1954 — Section 14, 16, 19, 19(2), 20
Prevention of Food Adulteration Rules, 1955 — Rule 12A, 7(3)
Sales of Goods Act, 1930 — Section 12

Citation : (2005) CriLJ 4562 : (2005) 2 GLT 395

Hon'ble Judges : H.N. Sharma, J

Bench : Single Bench

Advocate : A.K. Goswami and A.D. Talukdar, for the Appellant; D. Goswami, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

H.N. Sarma, J.—This criminal revision arises out of the judgment and order dated 18-11-1996 passed by the learned Additional Session Judge, Jorhat in criminal appeal No. : 23/1996 upholding the judgment and order dated 19-4-1996 passed by the learned Chief Judicial Magistrate, Jorhat in C.R. Case No. 190 of 1994 thereby convicting the accused petitioner under Sections 7/16 of the Prevention of Food Adulteration Act, . 1954 and sentencing him to undergo R.I. for a period of 6 (six) months and to pay a fine of Rs. 1000/- in default, to undergo further R.I. for one month.

2. I have heard Mr. A. K. Goswami, learned senior counsel for the petitioner, and also heard Mr. D. Goswami, learned Public Prosecutor appearing on behalf of the State of Assam.

3. Briefly stated, the prosecution case leading to the conviction of the petitioner inter alia is that on 6-4-1994, the Food Inspector, Jorhat accompanied by his Peon visited the shop of the accused petitioner and observing all the formalities,

purchased 750 gms. of Arohar Dal by paying necessary prices against receipt. The sample was divided into three equal parts and after packing and sealing properly in presence of the witnesses, one part of the same together with a copy of the memorandum was sent by registered post to the Public Analyst, Government of Assam for necessary examination. The Food Inspector also sent separately a copy of the memorandum in accordance with the provision of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as "the Act" and the Rules") and deposited other two samples to the Public Analyst together. In due course of time, the report of the Public Analyst was received which discloses that the sample of article is artificially coloured by tartrazine which is found to be adulterated and is not permitted to be used in Arohar Dal and hence, found to be adulterated. Thereafter the public analyst delivered his report to the local health authority and after obtaining necessary sanction from the authority the complaint for prosecution was filed in the Court alleging violation of the provision of the Prevention of Food Adulteration Act, 1954 and Rules thereunder. The accused-petitioner was summoned by the trial Court and an offence u/s 7/16 dt the Act was explained to the accused-petitioner to which he pleaded not guilty. During the course of trial, M/s. Gopal Bhandar was also impleaded as co-accused u/s 20 of the Act vide order, dated 7-3-2005. The impleaded accused M/s. Gopal Bhandar on his appearance and having been explained the particulars of offence, also denied the same and pleaded not guilty. 4. During the course of trial prosecution examined two witnesses and exhibited some documents in support of their case whereas the defence adduced no evidence and the plea of the defence, is of total denial and they sought protection under Sub-section (2) of the Section 19 of the Act. After completion of the trial, the learned Chief Judicial Magistrate, Jorhat acquitted that the added accused M/s. Gopal Bhandar whereas the other accused i.e. the present petitioner was convicted and sentenced to R.I. for 6 (six) months and to pay a fine of Rs. 1000/- in default, further R.I. for one month, vide judgment and order passed in GR Case No. 190 of 2004 dated 19-4-1996.

Against the aforesaid conviction and sentence, the petitioner filed an appeal being Criminal Appeal No. 23/1996 before the learned Sessions Judge, Jorhat and the same was dismissed vide judgment and order dated 18-11-1996 upholding the conviction and sentence passed by the learned trial Court. Being aggrieved by the aforesaid judgment and order, the present revision petition has been filed u/s 401, Cr. P.C.

5. Assailing the impugned judgment and order, Mr. Goswami has submitted that the learned Court below illegally rejected the defence plea raised u/s 19(2)(b) of the Act and illegally rejected the Exhibit "Ka", the cash memo dated 2-6-1994 issued by M/s. Gopal Bhandar in the name of M/s. Shyam Store. It has also been submitted that there has been violation of the provisions of Rule 7(3) of the Rules as the report of the public analyst was delivered beyond 45 days from the date of receipt. According to the learned Counsel, the petitioner. purchased Arohar Dal, in question, from M/s. Gopal Bhandar by obtaining a cash memo

(Exhibit Ka) and having sold the said articles as it is, he is protected u/s 19 of the Act. Learned counsel relied on a decision of this Court rendered in Nirmal Poddar Vs. State of Assam, in support of his contention.

6. Mr. D. Goswami, learned Public Prosecutor appearing for the State on the other hand, submitted that the petitioner has failed to discharge the burden as conjoined under the law, to prove that Arahar Dal, in question, was purchased from M/s. Gopal Bhandar and was sold as it is and the learned Court below duly considered this factual aspect of the matter and has rightly rejected the same. According to Mr. Goswami, the concurrent finding of the facts arrived at by both the Courts below should not be disturbed exercising revisional jurisdiction u/s 401, Cr. P.C.

7. I have carefully considered the rival submissions made by the parties. In order to appreciate the contention of the learned Counsel for the petitioner, let us look at the provisions of Section 19 of the Prevention of Food Adulteration Act, which is quoted below :--

"Section 19. Defences which may or may not be allowed in prosecutions under this Act--

(1) It shall be no defence in a prosecution for an offence pertaining to the sale of any adulterated or misbranded article of food to allege merely that the vendor was ignorant of the nature, substance or quality of the food sold by him or that the purchaser having purchased any article for analysis was not prejudiced by the sale.

(2) A vendor shall not be deemed to have committed an offence pertaining to the sale of any adulterated or misbranded article of food if he proves--

(a) that he purchased the article of food--(i) in a case where a licence is prescribed for the sale thereof, from a duly licensed manufacturer, distributor or dealer.

(ii) In any other case, from any manufacturer, distributor or dealer, with a written warranty in the prescribed form, and

(b) that the article of food while in his possession was properly stored and that he sold it in the same state as he purchased it."

8. Section 14 of the Act, (i) casts a duty and obligation upon a manufacturer, distributor, or dealer of any article of food to give a warranty in writing in the prescribed form at the time of selling of such article to any vendor. Section 14 is quoted hereinbe-low :

"14. Manufacturers, distributors and dealers to give warranty-- No (manufacturer or distributor of, or dealer in) any article of food shall sell such article to any vendor unless he also gives a warranty in writing in the prescribed form about the nature and quality of such article to the vendor;

(Provided that a bill, cash memorandum or invoice In respect of the sale of any article of food given by a manufacturer or distributor of, or dealer in, such article to the vendor thereof shall be deemed to be a warranty given by such manufacturer, distributor or dealer under this section.)

Explanation-- In this Section, in Sub-section (2) of Section 19 and in Section 20-A, the expression "distributor" shall include a commission agent."

9. In the light of the aforesaid provisions of law we are now to examine whether the defence has been able to discharge his burden taken as a defence in this case, and whether the rejection of defence plea by the Court below is correct or not. The plea of the defence, as indicated above, is that they purchased the Arahar Dal from M/s. Gopal Bhandar and obtained necessary cash memos and sold the goods as it is and accordingly, the said cash memo being warranty within the meaning of Section 14 of the Act, the petitioner is not liable.

The term "warranty" has not been defined under the Act. Description of term can be found in the Sale of Goods Act.

Section 12 of the Sale of Goods Act de- fines condition and warranty; as follows :

"12. (1) A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or an warranty.

(2) A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated.

(3) A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

(4) Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract."

10. Again Rule 12A of the Rule found under the Prevention of Food Adulteration Act prescribes the form of warranty. Rule 12A of the Rules provides as follows :--

(i) every manufacturer, distributor or dealer selling an article of food to a vendor shall give either separately or in the bill, cash memo or a label a warranty in the Form VI-A.

In Form VI-A prescribed under Rule 12A contains a certificate to be given by the manufacturer, distributor or dealer. Form VI-A is quoted herein below :--

FORM VI-A (See Rule 12-A) Form of Warranty Invoice No..... Place.....
Form..... Date..... To..... Date Nature of Batch No. or Code No.
Quantity Price of sale quality of article/Branch Name, if any 1 2 3 4 5 I/we
hereby certify that food/foods mentioned in this invoice is/are warranted to be of
the nature and quality which it/these purport/purports to be" Name and Address
of Manufacturer/Packer In case of packed article Licence No.....

(Wherever applicable)"

This certificate is to be issued by the manufacturer, distributor or dealer.

11. In order to appreciate the contentions raised by the petitioner, I have gone through the content of Exhibit "Ka", the cash memo relied by the petitioner as warranty and also the other materials and evidence on record including the statement in defence made by the two accused persons u/s 313, Cr. P.C. The Exhibit "Ka" does not contain any endorsement/certificate required to be given as per Form VI-A quoted above. The witness on behalf of the added accused M/s. Gopal Bhandar in his examination u/s 313, Cr. P.C. has specifically stated that the Arahar Dal, in question, has not been sold from their firm. He further stated that their cash memos are different whereas the accused-petitioner never in his statement stated that he purchased the Dal in question, from M/s. Gopal Bhandar. It is pertinent to note here that even at the time of taking sample by the Food Inspector, the petitioner has not stated that the Dal, in question was purchased from M/s. Gopal Bhandar. The case of Nirmal Poddar Vs. State of Assam, relied upon by the petitioner is entirely based on different footing. In that case it appears that the learned Court below did not accept the defence u/s 19(2) as the dealer was not a licensed one. Further in that case, the cash memo issued by the dealer was admitted and to that effect, defence witnesses were examined, whereas in the instant case, the alleged dealer has denied the sale of adulterated Arahar Dal to the petitioner and no defence witness was examined to discharge the burden. Further the said cash memo, in question, the Exhibit "Ka" does not contain the necessary warranty clause as required under Rule 12A as prescribed in Form VI .A. A similar question came up for consideration before the Apex Court in M/s. Murlidhar Shyam Lal and another Vs. State of Assam, At paragraph 8 of the judgment, the Apex Court held as follows :

"Para 8. It would only indicate that the packed tin containing the same weighing 16 Kg. (nett) with a printed label on it "New Rice and Oil Mill, Raha, pure mustard oil (Biswanath Brand) nett wt. 16 Kg." stored for sale in the said premises. From this, it is contended that the appellant had to warranty and that, therefore, by operation of S. 19(2) read with R. 12-A, the appellant is absolved of his liability to be prosecuted for sale of the adulterated article of food. We are afraid that we cannot accept the contention. In view of the above warranty as envisaged under Form VI-A, there must be specific mention therein by the dealer or distributor or manufacturer, that the article of food sold was in the same nature and quality of the article of food, as the case may be. Then only he would get acquitted, though the article of food was found adulterated. It would be then open to the prosecution to proceed against the manufacturers, dealer or distributor."

(Underscore by me)

12. In view of the above proposition of law laid down by the Apex Court, there must be specific mention in the warranty as envisaged by Form VI-A, by the

dealer or distributor or manufacture that the article of food sold was in the same nature and quality of the article of food as the case may be. And in that event only in spite of the article of food is found to be adulterated the accused would be acquitted and it would be then open to the prosecution to proceed against the manufacturer, distributor or dealer.

13. In view of the above findings the first contention raised by the learned Counsel for the petitioner fails and cannot be accepted. Regarding the other contention i.e. violation of Sub-rule (3) of Rule 7 of the Rules for not furnishing the report within 45 days, it is seen from the record that vide Exhibit 13, the public analyst received the sample on 13-6-1994. Vide Exhibit 12, letter, the public analyst sent the report to the local health authority in respect of the sample of food, in question, and the report was sent to the public analyst on 16-7-1994. The learned appellate Court also taking note of this fact has held that when the letter was posted within the period, it fulfills the condition of Rule 7(3).

Rule 7 contains 3 sub-rules and each are independent in nature. Reading to the Rule 7(3), discloses that the same is a procedural provision, meant to speed up the process of investigation and even if there is non-compliance of the said rule that will not vitiate the proceeding. Although "sale" is narrated in the said rule, it deals with the stage prior to launching of the prosecution is only based "on the report of the public analyst that the concerned authority has to take a decision whether to institute a prosecution or not. There having no prescribed time limit within the prosecution has to be instituted, merely, the insertion of the word "shall" will not make it mandatory and it is merely a directory one. In arriving at the aforesaid view, I am fortified with the view expressed by the Apex Court in T.V. Usman Vs. Food Inspector, Tellicherry Municipality, Tellicherry, Thus the second contention raised by the learned Counsel for the petitioner has also no force and consequently the same is rejected.

14. Mr. Goswami has also made an alternative prayer to direct the State Government to deal with the case of the petitioned u/s 433, Cr. P.C. This Court considers that no such direction from the Court is necessary for exercising power by the appropriate Government u/s 433 of Cr. P.C., as it is an independent statutory power exercisable by the State Govt., if the facts of a case so warrants.

15. The learned trial Court duly considered the evidence and materials available on record and convicted and sentenced the petitioner in the manner aforesaid. The learned appellate Court also carefully considered the case and dealt with the points raised by the petitioner in the appeal and upon such consideration dismissed the appeal. No perversity and illegality could be shown by the petitioner in the findings of the learned Courts below.

16. Having regard to the aforesaid discussions and provisions of law alluded above, I find that there is no merit in this revision petition necessitating interference by this Court in its revisional jurisdiction and accordingly the same is dismissed and the conviction and sentences passed by the learned Chief Judicial

Magistrate and as affirmed by the learned Sessions Judge, Jorhat is upheld. The bail bond of the petitioner is cancelled and he is directed to surrender forthwith to serve out the sentence.

17. No order as to cost.