

(1992) 08 MAD CK 0046

In the Madras High Court

Case No : Criminal A. No. 983 of 1986

State by Inspector, Civil Supply C.I.D., Thanjavur, rp. by
Public Prosecutor, Madras

APPELLANT

Vs

Natarajan and Others

RESPONDENT

Date of Decision : 13-08-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 3 Rule 3
Criminal Procedure Code, 1973 (CrPC) — Section 293, 293(4), 313
Essential Commodities Act, 1955 — Section 7(1)(a)(ii)

Citation : (1992) LW(Cri) 589

Hon'ble Judges : Swamidurai, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Swamidurai, J.—Accused 1 to 14 in S.T.C.No.9 of 1984, on the file of the Special Court for Essential Commodities Act Cases, Thanjavur are the appellants herein. The charge against them as amended is that the accused 1 to 14 were associates and doing business in adulterated cement and selling the same as "Quality cement" knowing them to be adulterated. On 20.7.1983 morning, the first accused Natarajan sold five bags of cement for Rs. 350/- to P.W 1 Philavendran which are adulterated. The accused have also stored large quantity of adulterated cement in 40 bags and two heaps of (10 to 9) adulterated cement for sale and 440 bags of black silicate mineral for adulterating the cement. The Cement is not of the prescribed standard. They have sold and stored for sale adulterated cement. Hence the accused noted in the margin have contravened clause 3 of Cement (quality control) Order, 1962 punishable u/s 7(1)(a)(ii) of Essential Commodities Act, 1955 and hence the charge.

2. The prosecution examined P.Ws. 1 to 6. The accused examined Kesavan and Subban as D.Ws. 1 and 2 respectively. Exhibits P-1 to P-5 were filed and M.Os 1 to 3 were marked. The trial Court after considering the oral and documentary evidence found accused 1 to 4, and 6 to 14 not guilty and acquitted them. The

fifth accused died before the pronouncement of the judgment by the trial Court. The State has filed this appeal against the judgment of the trial Court.

3. The learned Public Prosecutor took me through the evidence of the prosecution witnesses and contended that the lower court has committed material irregularity in not accepting the evidence of the prosecution witnesses. P.W.1 is Philavendran and he was doing business in mosaic stones under the name and style of "Tamil nadu Mosaic Tiles Company". He purchased five bags of cement from the first accused at the rate of Rs. 70/- per bag. P.W. 1 took the cement bags to his company and found that the cements were adulterated and so he had taken back the five bags of cement to the house of first accused at about 10:00 a.m. on 20.7.1983. P.W.1 appeared to have asked the first accused to take back the cement and repay the sale price. P.W.1 also noticed in the premises of the first accused that adulterated cement bags were also stored. According to P.W.1, the first accused threatened him, that if P.W.1 would ask for the return of the sale price, he would murder him. P.W.1 kept the five bags of cement in the premises of first accused and returned. Then he gave a report to the Police, Civil Supplies Investigation Wing (Crimes). Exhibit P.1 is the report. P.W.2 Thangaraj also supported the evidence of P.W.1 and he stated that he accompanied P.W.1 to the Police station, when the latter gave a report to the Inspector of Police. The Inspector of Police, took P.Ws 1 and 2 to the house of the first accused at about 4:00 p.m. on that day and they noticed that Accused 1 to 14 had been mixing and making adulterated cement. The Inspector of Police waited to catch hold of these accused, Accused 1 and 2 escaped from the house, but the Inspector of Police apprehended the other accused and seized the cement and took samples from the 9 bags of cement kept in the room and also samples from the 220 bags separately. The Inspector of Police seized the other materials kept for packing the cement under mahazar Exhibit P-2, which was attested by Natarajan and M.Os 1 to 3 were seized under that mahazar. P.W.3 Natarajan is an employee working in the Tamilnadu Mosaic Tiles Company run by P.W.1 He has accompanied P.W.1 for the purchase of five bags of cement from first accused and he corroborates the evidence of P.Ws.1 and 2. P.W.4 Manian is the Assistant working in the Tamil Nadu Electricity Board at Mannargudi in May. 1984. He owned a house at Arokia Nagar, Thanjavur. It appears that some of the accused were residing in his house and he was examined by the prosecution to show that the accused were residing in his house. First accused was also stated to be an occupant of the house of P.W.4, wherein first accused was doing business in adulterated cement. But this witness turned hostile while he was examined in court and his evidence in Chief is that he did not know whether any of the accused; in court was a resident in his house. P.W.5 Damodaran is the translator in the Lower Court. He deposed the fact that he had received the material objects suspected to be adulterated cement and he sent the same to the analyst for examination and report. He received report from the analyst under Exhibit P-5. P.W.6 was the Inspector of Police (Crimes) in the Civil Supplies Investigation Wing, Thanjavur between 3.3.1983 and 17.6.1985. He received a

report from P.W.1 at 2.00 p.m. on 20.7.1983 and P.W.1 was accompanied by P.Ws.2 and 3. He went to the police station along with P.Ws.1 to 3 and registered a case in Crime No. 387 of 1983 against accused 1 to 14. Then he went to the house of first accused and on seeing the police, accused 1 and 2 escaped from the house and he found accused 3 to 14 mixing some back powder with cement. P.W.6 arrested accused 3 to 14 in the presence of P.Ws.2 and 3 and other witnesses and he took samples from the 40 bags of adulterated cement and also from the 240 bags of Kadappa stone powder kept there for adulteration and other materials used for package under Ex.P-2 mahazar. He sent a requisition to the Judicial Magistrate on 12.8.1986 requesting him to send the samples for chemical analysis. He was engaged in the month of September 1983 in preventive detention cases and so he could not send the samples received from the police under Ex.P.3 on 10.11.1983 for chemical analysis. He completed the investigation on 11.2.1984 and after completing investigation on 13.2.1984 he filed charge sheet against the accused on that date. Due to the order of anticipatory bail granted by this court, accused 1 and 2 could not be arrested. Accused 1 to 14 were questioned u/s 313 Criminal Procedure Code separately, and they denied the occurrence and pleaded not guilty. Thereafter the accused examined Kesavan and Subban as D.Ws.1 and 2 respectively. D.Ws. 1 and 2 supported the case of defence. The lower court accepted the case of defence in preference to the evidence of the prosecution witnesses and acquitted all the accused, except the 5th accused, who had expired during the trial. As against the acquittal, the State in the appeal.

4. The learned Public Prosecutor submits that there is cogent evidence of the prosecution witnesses and the lower court has failed to appreciate the evidence and refused to accept the material evidence, resulting in miscarriage of justice.

5. The learned counsel for the respondents submits that even according to the prosecution, the sample cement said to have been adulterated, and seized on 20.7.1983 by the Police under Exhibit P-2 had been sent to the lower court only on 10.11.1983 i.e. nearly after four months for chemical analysis. The reason given by P.W.6 is that he was engaged in preventive detention cases in the month of September and October, 1983 and hence he could not send the sample to the court for chemical examination. However, his evidence is that he filed the charge sheet on 13.2.1984 in the lower Court. The delay on the part of P.W.6 in sending the samples for chemical analysis has not been properly explained and the reason given by P.W.6 cannot be accepted. Even if P.W.6 was on duty, he could have directed the subordinates to send the samples to the court for chemical examination. Therefore, the delay in sending the sample to the Court is not justified. The learned counsel for the respondents pointed out that Exhibit P-5 certificate received from the Public Analyst showing that the sample was adulterated does not specify the statutory requirements as found under Order 3 of the Cement (Quality Control) Order, 1962.

6. The learned counsel for the respondents Mr. M. Karpagavinayagam, submitted

that sufficient tests as enumerated in Section 2 have not been conducted in this case. The definition of cement as found in order 2 of the Cement (Quality Control) Order 1962 is as under:

Cement means any variety of cement manufactured in India, and includes blast furnace slag cement, Portland Pozzolana cement, rapid hardening portland cement, white Portland cement, hydrophobic portland cement, ordinary Portland cement, low heat portland cement, high strength ordinary portland cement, cement used for the manufacture of railway sleepers, masonry cement, oil well cement, super sulphated cement or any other variety of cement which the Central Government may by notification in the Gazette specify for the purpose of this Order.

and Order 3 of the said Orders as follows:

No person shall himself or by any person on his behalf manufacture or store for sale, sell or distribute any cement which is not of the prescribed standard.

7. Admittedly, the analyst has done the lest in respect of two varieties of cement as seen from Exhibit P-4. In the remarks column in Exhibit P-4, It is stated as follows:

The sample Nos. 1 and 2 i.e. (item 5 and item 6) were analysed for their chemical composition. The samples do not conform to the specification I.S. 269-W76 for ordinary portland cement. They were examined for Portland Pozzolana.

8. Cement as per I.S.489-76 does not conform to the above specification for Pozzolana. It is clear that items 5 and 6 are adulterated cement. The sample of black powder and other samples were analysed and the chemicals are given in the annexure. The name of the black powder could not be given. From the mixture for sale, it is not possible to find out that adulteration was there in items 5 and 6. They can be stated that they are highly adulterated cement. Exhibit P-4 is dated 4.11.1984 and it was signed by somebody for the Joint Director (Chemicals). The learned Counsel for the respondents submitted that the expert has not done the other tests required. In support of his contention, he also relied upon the decision reported in Rajagopal and seven Others v. Inspector of Police C.S.C.I.D. Mambalam, Madras 1990 L.W. (CrL.) 166, wherein Janarthanam J. observed as follows:

In this appeal against their conviction for the violation of clause 3 of the Cement (quality control) Order. 1962 punishable under S.7(1)(a)(ii) of the Essential Commodities Act, 1955. It was contended on behalf of the appellants that reliance cannot at all be placed on Ex.P-5. the Test Certificate, in view of the fact that the analyst P.W.6 admitted that he did not perform all the ten tests prescribed under Clause 2(b) of the Cement (Quality Control) Order, for finding out as to whether the samples subjected to examination were standard or sub-standard as prescribed under the Order.

Then the analyst has categorically admitted that in the course of analysis, he did

not perform all the tests prescribed under "2-B of the Cement (Quality Control) Order. On the face of such evidence, I am of the view that unless all the ten tests are performed by the analyst, it cannot be stated that the samples subjected to chemical analysis only to a certain of the tests are of sub-standard.

1987 L.W.(crl) 424 Relied on. In view of what has been stated in the above case, I am of the view that it would not be safe to convict the appellant/accused 2 to 9 on the basis of the perfunctory report of the Analyst. As such, the conviction and sentence of the appellants are not sustainable in law.

In another decision in *Mariappan v. State by Inspector of Police Civil Supplies C.I.D. Trichy* 1990 L.W. (Crl.) 190 , Arunachalam, J. has taken a similar view regarding the absence of evidence of prosecution witnesses to indicate the variety of cement which was tested and in para 10 of the Judgment, it was held

"The last ground strikes at the very" foundation of the prosecution. Ex.P-4 has not been proved in accordance with law. Ex P4, the report of analysis has been marked through P.W.6, the Head Clerk of the trial Court. Section 293 of the Criminal Procedure Code permits reports of certain Government Scientific Experts, to which that Section applies to be used as evidence in any enquiry, trial or other proceeding under this Code, without examination of the expert, unless the court thought it fit to summon and examine him as to the subject matter of the report. Exhibit P-4 has been signed by some person for the Joint Director, (Chemicals). The report shows that analysis had been conducted in the Department of industries and Commerce, Chemical Testing and analytical Laboratory Industrial Estate, Guindy Madras. Exhibit P4 is stated to be the test certificate, containing test results. The signatory to Ex.P-4 who himself appears to be not Joint Director, does not fall within the category of the Scientific Exports enumerated under S.293(4), CrI.P.C. It is also not claimed by the prosecution that the chemical Testing and Analytical Laboratory is State Forensic Science Laboratory. Exhibit P-4 has to be proved in accordance with law by examining the author, who would be subjected to cross-examination by the accused Ex.P.4 has to be excluded in law. As rightly pointed out by the learned counsel for the appellant if Ex.P-4 is excluded, there is nothing on record to show that the cement bags contained adulterated cement.

9. The facts of the above decisions do apply to the facts of the present case. In the absence of evidence on the side of the prosecution, that the analyst had done all the tests for finding out the variety of cement and admittedly when he has done tests only with regard to two varieties of cements, the report Exhibit P-4 of the analyst is not helpful. In the circumstances, the prosecution has failed to establish that the cement samples taken from the first accused were adulterated. Therefore, the findings of the trial court that the accused are not guilty is upheld and the Criminal Appeal is dismissed.