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(2009) 04 BOM CK 0035

In the Bombay High Court

Case No : Criminal Appeal No. 330 of 1997 & Criminal Appeal No. 331 of 1997

The State of Maharashtra APPELLANT

Vs

Vijaykumar Babulal Sharma RESPONDENT

Date of Decision : 04-04-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 216(5)
Prevention of Food Adulteration Act, 1954 — Section 13(2), 14, 14A, 16(1), 16(2)
Prevention of Food Adulteration Rules, 1955 — Rule 12, 15, 17, 18, 4

Citation : (2009) 111 BOMLR 2083 : (2009) CriLJ 3811

Hon'ble Judges : V.R. Kingaonkar, J

Bench : Single Bench

Advocate : S.S. Autade, app, for the Appellant; Netrali Jain, holding for B.A. Darak and Varsha Lotke, for the Respondent

Final Decision : Allowed

Judgement

V.R. Kingaonkar, J.—Challenge in this appeal is to judgment rendered by learned Judicial Magistrate (F.C.), Gangakhed, in a Criminal Case No.1/1996), whereby the Respondent came to be acquitted for the offence punishable Under Sections 2(ia)(a) read with 7(i), 2(ia)(m) read with 7(i), 2(ia)(m) read with 7(i), 14(a) and Rule 44(e) read with 16(1)(a)(2), 16(ia)(i), 16(1)(a)(i) 16(la)(2) and 16(1)(a) of the Prevention of Food Adulteration Act, 1954.

2. The Respondent is proprietor of a grocery shop styled as "M/s Omprakash Vijaykumar Sharma Kirana Stores". The grocery shop is situated on main road at Shelgaon under Gangakhed Tahsil of Parbhani District. P.W.1 - Suresh Tiwari, at the material time, was working as Food Inspector for Parbhani District. He was duly appointed to work as Food Inspector vide Government Notification dated 6th September, 1972.

3. Briefly stated, the prosecution case is that on August 8, 1995, P.W. 1 - Suresh Tiwari, visited grocery shop of the Respondent No.1 at about 12-30 hours. He was accompanied by panch Ramprasad Sarda. The Respondent was then

attending the business of the grocery shop. P.W. - Suresh Tiwari disclosed his identity as Food Inspector and inquired about ownership of the grocery shop. The Respondent informed him that he was owner of the grocery shop. P.W. - Suresh Tiwari then inspected the shop premises. He noticed a canister containing about 10 Kgs. of Safflower oil and another canister containing about 8 Kgs. of Sunflower oil. He purchased 450 grams each of Safflower oil and Sunflower oil against payment of Rs.18-90 Ps. and Rs.16.65 Ps. respectively being the price of the oils. He obtained a composite receipt (Exh.24) from the Respondent. He served notice in form No.VI as per Rule 12 of the P.F.A. Rules and obtained signature of the Respondent on office copy thereof. He issued another notice u/s 14-A of the of P.F.A. Act. The notices were duly served on the Respondent. The Respondent gave his acknowledgments. The Respondent did not, however, furnish the purchase bills as demanded under the notice issued u/s 14-A.

4. The Food Inspector (P.W. - Suresh Tiwari) divided the Safflower oil in three parts of 150 grams each. He filled those three packets in clean, dry and empty bottles. The sample bottles were closed by means of plastic corks. The mouths of the sample bottles were sealed by means of lakh seals. The sample bottles were affixed with labels as per Rule 15 of the P.F.A. Rules. The labels were signed by the Respondent, panch and the Food Inspector. Thereafter each of the bottle was wrapped separately in a thick brown paper. The corners of the brown papers were pasted by means of gum, inversely, to prepare sample packets. A paper slip bearing signature of the Local Health Authority and Code No.ABD/14/P Sr.No.002522 was affixed on each of the sample packet. The wrappers were also signed by the Respondent and the panch and the Food Inspector. The Food Inspector firmly tied each of the sample packet horizontally and vertically by means of a twill (thread). The knot and other three sides of the packets were sealed by means of a lakh seal. Similar method was adopted while collecting the sample of sunflower oil. Thereafter Memorandum Panchanama (Exh.27) was drawn then and there. The Food Inspector thereafter returned to his office. On the next day, he prepared five (5) copies of form No.VII and a forwarding letter addressed to the Public Analyst, Aurangabad. He sent one of the sealed sample packet alongwith a forwarding letter and original form No.VII to office of the Public Analyst, Aurangabad in a sealed packet. He separately sent the specimen seal impression and a duplicate copy of form VII alognwith a covering letter to the office of the Public Analyst by R.P.A.D. On the same day, he sent the remaining two packets of the sample packets, two copies of form No.VII and intimation notice in another sealed packet to the Local Health Authority. He received copy of the report of the Public Analyst from the Local Health Authority on September 25, 1995. It was reported that the acid value found in the sample of safflower oil exceeded the prescribed limit and moreover castor oil was found present in the sample. He lateron sought consent of the Local Health Authority to prosecute the Respondent. Upon receiving the consent letter issued by the Competent Authority, namely, Joint Commissioner (Food and Drugs Administration), he instituted the complaint case against the Respondent for

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commission of the offences as indicated earlier.

5. The Respondent denied truth into the charge (Exh.51). His defence was of simple denial. He did not ascribe any reason for his prosecution. He only stated that the Criminal case was false.

6. It is pertinent to mention here that the Respondent exercised right available u/s 13(2) of the P.F.A. Act. On his application, one of the sample packet was called from the Local Health Authority by the learned Judicial Magistrate (F.C.). That sample packet was sent to the Central Food Laboratory, Calcutta by the learned Judicial Magistrate (F.C.) after following due procedure. The Director, C.F.L. gave report (Exh.60) to the effect that the acid value exceeded the prescribed limits and, therefore, the sample of the safflower oil was found adulterated. In the report of the C.F.L., however there is nothing about presence of caster oil in the sample of the safflower oil. Thus, the earlier report of the Public Analyst was partly confirmed by the report of the Director,C.F.L., Calcutta.

7. At the trial, P.W.1 Suresh Tiwari (Food Inspector), P.W. - 2 Vaijinath Babne, Assistant Commissioner (Food and Drugs), Parbhani being the Local Health Authority and P.W. 3 - Ramprasad Sarda being the panch were examined on behalf of the prosecution. Out of them, P.W. - 3 Ramprasad Sarda did not support case of the prosecution. He states that on 8.8.1995 he was called by the Food Inspector to act as panch in the grocery shop of the Respondent. He further states that the Memorandum Panchanama (Exh.27) bears his signature. He vaguely states that the said panchanama was drawn in respect of the seizure of oil in the sealed packets.

8. The learned Judicial Magistrate acquitted the Respondent from the charges mainly for the reason that after receiving report of the C.F.L. no fresh consent was obtained by the Food Inspector to prosecute the Respondent. The learned Judicial Magistrate relied upon view taken in "S.M.Anwar & Co. and another Vs. State of West Bengal and another" 1993 CLJ 3754. The learned Judicial Magistrate further held that the sample bottles were filled to the extent of half of the capacity and, therefore, the delay in conducting the analysis could be the reason as to why the acid value was found more than the prescribed limits. On the basis of such findings, the Respondent came to be acquitted.

9. Heard learned A.P.P. and learned advocate for the Respondent. I have perused the record and proceedings with the help of the learned A.P.P. and learned advocate of the Respondent.

10. Crucial points for determination are :

(i) Whether it is proved that the Respondent sold the safflower oil to P.W. - Suresh Tiwari, the Food Inspector, in the noon of August 8, 1995, which was of the quality inferior to what was represented.?

(ii) Whether it is proved that the Respondent sold the safflower oil to P.W. - Suresh Tiwari, Food Inspector which was below the prescribed standard and was

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therefore, adulterated.?

(iii) Whether it is proved that the Respondent did not disclose name and address of the person from whom he had purchased safflower oil though was served with notice u/s 14-A of the P.F.A. Act, and, therefore, is liable for punishment u/s 16(1)(a)(2) of the said Act.?

11. Before I embark upon the scrutiny of the prosecution evidence, it is worthwhile to note that the Respondent did not dispute his ownership of the grocery shop in question. The Respondent did not furnish any information to P.W. Suresh Tiwari as regards the name of the person from whom the safflower oil was purchased by him. The standard prescribed for safflower oil is shown vide item NO.A.17.09 in appendix B of Rule 5 of P.F.A. Rules, 1955. The safflower oil (Mardi oil) shall meet the following standards :

A. 17.09- [SAFFLOWER SEED OIL] (barrey ka tel) tel) means the oil expressed from the seeds of Carthamus tinctorius. It shall be clear, free from rancidity, suspended or other foreign matter, separated water, added colouring or flavouring substances, or mineral oil. It shall conform to the following standards :

(a) [Butyro-refractometer - 62.4 to 64.7 reading at 40 C

OR

Refractive Index at 40 C - 1.4674-1.4689

(b) Saponification value - 186 to 196.

(c) Iodine value - 135 to [48]

(d) Unsaponifiable matter - Not more than 1.0 per cent.

(e) [Acid value - Not more than 6.0]

(f) Bellier test [***] - Not more than (Turbidity temperature- 16 C] Acetic acid method)

12. The version of P.W. Suresh purports to show that he is duly appointed as Food Inspector and was having authority to work as such in the area of Parbhani District during the relevant period. There is no dispute about his experience and authority. His version purports to show that he visited the grocery shop of the Respondent at about 12-30 hours on August 08, 1995 alongwith the panch witness. He narrated as to how he purchased 450 grams of the safflower oil from the Respondent for consideration of Rs.18.90 Ps. His version is corroborated by the payment receipt (Exh.24). The receipt is signed by the Respondent. His version reveals further that he issued the notice in form No.VI and obtained acknowledgment of the Respondent on the office copy thereof (Exh.25). His version reveals that he served notice u/s 14A of the P.F.A. Act on the Respondent and obtained his acknowledgment on the office copy thereof (Exh.26). His categorical statement is to the effect that inspite of service of such notice, the Respondent did not submit information about the purchase bills in respect of the

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safflower oil.

13. P.W. Suresh, Food Inspector narrated as to how he prepared the three sample packets by dividing the three (3) parts of the safflower oil which were filled in three samples bottles. He categorically states that the sample bottles were clean, dry and empty. He narrated further procedure of preparing the sample packets in the manner required under the law. His such statement was not challenged during course of the cross-examination. He narrated as to how one of the sample packet was forwarded by him to the Public Analyst alongwith a forwarding letter and original form No.VII. His version reveals further that he separately forwarded a copy of form No.VII and the specimen seal impression to the Public Analyst, Aurangabad. He states that the remaining two sealed sample packets and the two copies of form Nos.VII alongwith intimation notice were sent to the Local Health Authority in a sealed packet. He received copy of the report of the Public Analyst on 25.9.1995 (Exh.39) alongwith letter of the Local Health Authority (Exh.38). The report indicated that the acid value found in the sample of safflower oil was 7.69. The maximum prescribed limit of the percentage of acid value is 6% and, therefore, it was found not in conformity with the prescribed standards. The report also showed presence of castor oil in the safflower oil. He therefore, moved the Local Health Authority to issue consent letter. After receipt of the consent letter, he prosecuted the Respondent through the private complaint case. He admits that the oil sample was collected in a steel utensil which was with him. and thereafter it was divided. He admits that he did not see measuring flask/pot used by the Respondent for weighing the oil. He denied the suggestion that the same measuring flask was used by the Respondent for weighing the sunflower as well as safflower oil and it was of the shop of the Respondent. According to P.W. Suresh Tiwari, he did not use any measuring flask while dividing the oil in three equal parts. He states that he prepared the three equal parts because the sample bottles were of the identical size. His version reveals that each of the sample bottle was filled upto about half of the portion. According to him, approximately 150 grams of the oil was filled in each of the sample bottle. He denied suggestion that the shop and the residential house of the Respondent are in the same premises.

14. The version of P.W. Vaijinath Babne purports to show that he was working as Assistant Commissioner (Food and Drugs Administration) and Local Health Authority for Parbhani District during the relevant period. He corroborates the fact that on August 9, 1995, the Food Inspector handed over two sealed sample packets in sealed condition, alongwith the seal impressions, to him. His version reveals that on September 21, 1995, he received report of the Public Analyst in quadruplicate. He sent one of the copy of the report to the Food Inspector alongwith a forwarding letter (Exh.38). His version further reveals that the Food Inspector forwarded relevant papers to the Joint Commissioner (Food and Drugs), Aurangabad through him. He further deposed that he issued notice to the Respondent alongwith the copy of the report of Public Analyst, as required u/s 13(2) of the P.F.A. Act with intimation that he could challenge the same within

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ten (10) days from date of the receipt thereof. The intimation letter and acknowledgment (Exh.56 and Exh.57) are corroborated by him.

15. Significantly, the Respondent filed the application in the Court of learned Judicial Magistrate (F.C.), on 15.1.1996. His application (Exh.5) shows that he desired analysis of the safflower oil sample through the C.F.L. The copy of Memorandum (Exh.59) dated August 28,1996 reveals that the C.F.L. report was sent to the learned Judicial Magistrate vide letter dated August 28, 1996. The report (Exh.60) shows that the sample packet was received by the office of the Director Central Food Laboratory, Calcutta on July 30, 1996 alongwith memorandum No.463/96 dated 19.7.1996 issued by the learned Judicial Magistrate. The report itself shows that the sample was found in fit condition and was useful for the purpose of analysis. The C.F.L. report shows that the acid value was 7.7%. The opinion of the Director of the C.F.L. shows that the sample of the safflower oil was adulterated.

16. As stated before, the learned Judicial Magistrate heavily relied upon dictum in case of "S.M.Anwar & Co. and another Vs. State of West Bengal and another (supra)". It is for want of subsequent fresh consent letter u/s 20 of the P.F.A. Act after the C.F.L. report was received by the Court, that the Respondent came to be acquitted besides the reason of probability that the acid value could increase due to half open space available in the sample bottles. The main ground of acquittal is, however, not available to the Respondent. The dictum in "S.M.Anwar & Co. and another Vs. State of West Bengal and another" (supra) is no more good law in view of Food Inspector, Ernakulam and Another Vs. P.S. Sreenivasa Shenoy, . The Apex Court held that when report of a Public Analyst was superseded by a certificate of Director of Central Food Laboratory, it is not necessary to obtain afresh consent to institute prosecution and recommence the proceedings under the P.F.A. Act. It is observed that if the prosecution has been validly instituted neither any new data nor any added reasons contained in the certificate issued by the Director of Central Food Laboratory would be sufficient to annul the sanction already obtained with which the prosecution was already instituted. The trial has to proceed on the certificate on record which superseded the Report of the Public Analyst. The Apex Court observed :

Variation regarding the reasons or the data by which two different analysts had reached the conclusion that the sample is adulterated is not sufficient to hold that the basic facts on which the prosecution is founded, have been altered. Hence Section 216(5) of the Code would not improve the position of the accused for the purpose of obtaining fresh consent on the facts of this case.

17. Considering the legal position settled by the Apex Court, it will have to be said that the Respondent could not be acquitted of the charge on account of failure of the Food Inspector to obtain afresh consent u/s 20 of the P.F.A. Act after receipt of the report from Director of the C.F.L. The reasons ascribed by the learned Judicial Magistrate are not valid and proper.

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18. The next plank of the defence was that the acid value could be increased due to keeping of half of the sample bottle unfilled. The learned Judicial Magistrate further noticed that exact date of the analysis was not mentioned in the report of the Public Analyst. He noticed that the data given in the report of the Public Analyst differs from the data mentioned in the certificate of the C.F.L. (Exh.60). It need not be emphasised that the certificate of the C.F.L. would supersede the report of the Public Analyst. So far as variation in the acid value is concerned, the Public Analyst reported that the acid value in the sample oil was 7.69 whereas the Director, C.F.L. reported that it was 7.7. It is manifest that the variation is of marginal nature. The report of the Public Analyst (Exh.39) reveals that the sample of safflower oil was analysed before 18.9.1995. Thus, within a period of 45 days from collection of the sample oil, the analysis was completed. There was no unreasonable delay in carrying out the analysis. The learned Judicial Magistrate seems to have placed reliance on "Nagar Swasthaya Adhikari, Nagar Mahapalika Vs. Mohammad Wasim" 1992 CLJ 3681. The facts of the given case are not on the same footings. There was delay of 46 days in analysing the sample with empty space in the sample phial. The learned Single Judge of Allahabad High Court discarded the report of the Public Analyst due to circumstances obtained in that case. I respectfully disagree. Unless it is shown that the empty space in the sample bottle could cause increase in the acidity value due to any scientific reason, such kind of inference can not be drawn merely on basis of guess-work. It was never the suggestion of the Respondent during cross-examination of the Food Inspector that the acidity value in the sample oil had increased due to empty space in the sample bottles.

19. True, there was no facility of cold storage in the office of the Food Inspector or the Asstt.Commissioner. Still, however, it cannot be overlooked that the Food Inspector forwarded the sealed sample packets of the Public Analyst vide letter dated 9.8.1995 (Exh.29) on the very next day. There is absolutely no substratum to infer that due to some vacant space left in the sample bottles, the acidity value could be increased. The Court cannot draw imaginary inference about probable increase in the acid value only because some part of the sample bottle was vacant inasmuch as half of the sample bottle was filled with safflower oil. It is important to note that the Director, C.F.L. gave categorical opinion that the oil sample was found fit for the purpose of analysis. In fact, if the sample bottles were not properly stored then there was probability of rancidity of the oil. The conclusion drawn by the learned Judicial Magistrate that there was probability of the excess percentage of the acid value due to open space available in the sample bottles is based upon mere conjectures. One cannot be oblivious of the fact that the Respondent did not call for the Director of the C.F.L. for the purpose of cross-examination. The Respondent invited the certificate of the C.F.L. and unless there is substantial reason to dislodge the certificate, the learned Magistrate should not have discarded the same.

20. The next plank of the contention raised before the trial Court was that the reports of the Public Analyst (Exh.39) and the C.F.L. (Exh.60) did not show that

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the safflower oil was unfit for the human consumption and, therefore, it could not be termed as adulterated one. The observations of the learned Judicial Magistrate in this behalf are clearly contrary to the settled legal position. The Apex Court in Tulsiram Vs. State of Madhya Pradesh, , held :

It is therefore seen that the sale of an article of food the sale of which is prohibited by any rule made under the Act also renders the person selling the article of food liable to punishment u/s 16(1)(a)(i). Rule 44(3) prohibits the sale of a mixture of two or more edible oils as an edible oil. A mixture of Soyabean oil and cotton seed oil cannot therefore be sold as Soyabean oil irrespective of whether the mixture has affected the Soyabean oil injuriously or not.

21. Mrs.Netrali Jain, learned advocate holding for Mr.Darak, advocate would submit that the report of the Public Analyst could not be considered inasmuch as the qualifications of the Chief Chemist were not mentioned therein. It is also submitted that the report does not show as to on what date the sample was analysed and other details were missing from the said report. Reliance is placed on "The State of Maharashtra Vs. Radheshyam Gopikishan Mantri" MH LR 1982 Bom 178. A Single Bench of this Court, in the particular fact situation of the given case, declined to accept report of the Public Analyst for variety of reasons. The report of the Public Analyst did not show what tests were applied or what tests were followed in arriving at the conclusion. In the present case, however, such details are indicated in the report of the Public Analyst (Exh.39) and moreover, that report is superseded by the certificate of the Central Food Laboratory, Calcutta (Exh.60). The certificate of the C.F.L. would show the details of the tests applied and the findings resulted from the tests. It goes without saying that the prosecution sufficiently established the fact that the sample of the safflower oil was adulterated owing to excess acid value over and above the permissible prescribed limits. It is also duly proved that the Respondent did not comply with the directions to furnish the necessary information though was served with notice u/s 14-A of the P.F.A. Act. There was no irregularity pointed out in the procedure adopted while sending the samples to the Public Analyst and the Central Food Laboratory. The Apex Court in "Benny Thomas Vs. Food Inspector, Kochi and another" 2008 ALL MR (Cri.) 2553 (S.C.), held that when the proper procedure was followed while sending the samples to the Public Analyst and the Central Food Laboratory, the High Court rightly held that there was no violation of Rule 17 and 18 of the P.F.A. Rules. The Apex Court also noticed that the sentence imposed was minimum as provided under the P.F.A. Act and, therefore, the appeal of the accused was dismissed.

22. For the reasons aforestated, I have no hesitation in holding that the prosecution successfully proved that the Respondent sold the safflower oil to P.W. Suresh Tiwari, the Food Inspector which was not in accordance with the prescribed standard and thereby contravened the provisions of Sections 2(ia)(m) read with 7(i) punishable u/s 16(1)(a)(i) of the Prevention of Food Adulteration Act. It is also proved that he did not disclose the name and address of the person

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from whom he had purchased the adulterated safflower oil, when the same was demanded by P.W. Suresh Tiwari, the Food Inspector, and thereby committed contravention of Section 14(a) punishable u/s 16(1)(a)(2) of the P.F.A. Act. The Respondent ought to have been therefore, convicted and sentenced for the commission of said offences.

23. In the result, the appeal is allowed. The impugned judgment of acquittal is partly set aside. The Respondent is convicted for offences for contravention of provisions of Sections 2(ia) read with 7(i) punishable u/s 16(1)(a)(i) and for Section 14-A punishable u/s 16(1)(a)(2) of the Prevention of Food Adulteration Act, 1954 and is cumulatively sentenced to suffer rigorous imprisonment for six (6) months and to pay a fine of Rs.10,000/- (Rupees ten thousand), in default to suffer rigorous imprisonment for a period of three (3) months more. The remaining part of the order of acquittal order is however, maintained. The Respondent to immediately surrender to bail before the learned Magistrate.

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