
(2012) 08 DEL CK 0469
In the Delhi High Court
Case No : Criminal Rev. P. 569 of 2003

Vikram Bakshi

APPELLANT

Vs

State and Another

RESPONDENT

Date of Decision : 22-08-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 239, 251, 252, 255, 258

Citation : (2012) 08 DEL CK 0469

Hon'ble Judges : Pratibha Rani, J

Bench : Single Bench

Advocate : Ravi Gupta, With Mr. Ankit Jain, for the Appellant; Rajdipa Behura, APP for State/Res. No. 1 and Ms. Sana Ansari, Advocate for Ms. Zubeda Begum, Advocate for Res. No. 2, for the Respondent

Final Decision : Dismissed

Judgement

Hon"ble Ms. Justice Pratibha Rani

1. This petition u/s 397/401 read with Section 482 Cr.P.C has been filed praying for setting aside the order dated 29th May, 2003 and 12th June, 2003, passed by learned MM, whereby the prayer of the petitioner for dropping of the proceedings was declined and notice u/s 251 Cr.P.C was served. In brief, the case of the petitioner is that he is the Managing Director of M/s. Connaught Plaza Restaurant Pvt. Ltd., 47, Basant Lok, Vasant Vihar, New Delhi.

2. During inspection of the Restaurant on 23rd July, 1997, the Inspector noticed, milk shake being sold in glass and the quantity was not mentioned either on the glass or on the notice board. Petitioner was served with notice u/s 9 (2) and 38 of the Weights and Measures (Enforcement) Act, 1985 (hereinafter referred to as "the Act"). Petitioner contested the notice but without success resulting in initiation of proceedings against him before the Court.

3. Petitioner filed an application u/s 258 Cr.P.C., for dropping of the proceedings, which was dismissed vide order dated 29th May, 2003. On 12th June, 2003, the

Court served the notice u/s 251 Cr.P.C. on the petitioner to which he pleaded not guilty. He now impugns the orders before this Court on the ground that milk shake was sold in a glass through dispenser and provisions of Section 9(2) and 38 of the Act are not applicable in such type of sale, he is exempted from the provisions of the Act.

4. Notice of the petition was sent to the respondents.

5. Brief written synopsis have been filed by the parties. I have heard Mr.Ravi Gupta, learned senior counsel for the petitioner.

6. On behalf of the petitioner it has been submitted that there is wrong invocation of provisions of Section 9(2) of the Act as the said provision only prohibits the use of weights and measures other than standard weights and measures, which is not the case of the prosecution. It is further submitted that Section 2(I) defines "pre-packed commodity", meaning thereby that the commodity is packed in a package of whatever nature so that the quantity contained therein having a predetermined value could not be altered without the package or its lid/cap opened or modified. The expression "Package" means a package containing a pre-packed commodity. In the present case, the milk shake sold in a glass is not covered under the definition as it is not a pre-packed commodity.

7. Learned senior counsel for the petitioner referred to Section 2(p), which defines "Retail Package", which means a package containing any commodity which is produced, distributed, displayed, delivered or stored for sale through retail sale agencies. Chapter II contains the various provisions applicable to packages intended for retail sale.

8. Learned senior counsel for the petitioner referred to Rule 34(1)(d), which provides that any package containing fast food item packed by a restaurant/hotel and like are exempted from the provisions of these Rules.

9. Mr.Ravi Gupta, learned senior counsel submits that in this case milk shake sold in a glass is just like food and other articles which are sold and served in a restaurant. Hence the sale of milk shake without specifying the quantity is exempted and the learned trial court has wrongly ordered for issuance of notice u/s 251 Cr.P.C., after dismissal of application for dropping of the proceedings.

10. On behalf of the respondent, brief written synopsis were filed. Paras 1, 2 and 3 of the written synopsis referred to the maintainability of the revision petition before this Court without seeking remedy before the Court of Session. In this regard, suffice it to mention that on 2nd November, 2011 this Court after referring to the case law, referred to by the learned counsel for the petitioner, observed that the case pertains to the year 2003 and for 8 long years, respondent No. 2 never raised such issue or even bothered to file reply to the instant petition. The availability of an alternative remedy is, even otherwise, a self imposed restriction and not a bar to the exercise of jurisdiction by a writ

court. So this contention no longer survives.

11. It is submitted on behalf of the respondent that glass of milk shake is neither a "pre-packed commodity" nor the petitioner was prosecuted for violation of Packaged Commodity Rules, 1977. It is submitted that the standard weights and measures were introduced for the purpose of standardizing the weights and measures so that the people cannot sell the goods by their own whims and fancies. Learned counsel also referred to Clause 14 and 12 of the Act, where "l" and "ml" are the standard unit of volume. Learned counsel submits that in the instant case, it is clear that the petitioner was selling milk shake in a glass and the quantity filled in the glass is measured in terms of volume, namely, l/ml. The seller is under a contract to serve a particular quantity in standard weight or measure. Milk shake served through measure of glass only and without quantified in terms of "l/ml" cannot be termed as standard weight and measure, that the milk shake could be sold through standard measure i.e. "ml" in the present case. The milk shake being sold in measure of glass is non standard variable entity which is vague and against the interest of consumer. Hence there is a contravention of Section 9(2) of the Act.

12. I have considered the submissions made by learned senior counsel for the petitioner as well as the submissions made on behalf of the respondent. A perusal of copy of the order dated 22nd April, 2003 reveals that while making submission on the application for dropping of proceedings and on service of notice u/s 251 Cr.P.C., it was contended before the learned Trial Court that accused was not selling the milk shake in the packed form and the Act governs only 2 kinds of commodities, namely, "which are in the packaged form" and "which are not in a packaged form". Once the petitioner is able to bring on record that he was not selling the milk shake in packaged form, he could not be prosecuted under this Act.

13. While dealing with this contention, the learned trial court observed that the accused was not prosecuted by the complainant for selling the commodities in violation of Weights and Measures (Packaged Commodity) Rule, 1977. Thereafter, at the request of the accused, the matter was adjourned for further arguments on 29th May, 2003. Further arguments were advanced on the application, seeking dropping of proceedings but at that time, the accused changed the stand, which was noticed by the learned trial court as under:-

Although on the last date of hearing, learned defence counsel had started with the submissions that his clients are selling milk shake in their McDonald Restaurant at Vasant Lok, Vasant Vihar in "Unpackaged form". However, today he has submitted second limb of his arguments with the submissions that actually they are selling milk shake in "packaged form".

14. The contention of the complainant before the trial court was as under:

It is contended on behalf of the complainant that since the glass of the accused is neither a pre-packed commodity nor they are being prosecuted for violation of

Packaged Commodity Rules, they cannot be allowed to avail the benefit of exemption, provided u/s 34 of Packaged Commodity Rules. It is further observed that accused have failed to show on record that they have any registration u/s 35 of Packaged Commodity Rule (P.C. Rules), so as to substantiate as they are in the business of packaging fast food items.

15. The learned Trial Court took note of the contention of the complainant that glass of milk shake is neither a pre-packed commodity nor they are being prosecuted for the violation of Packaged Commodity Rules. The accused cannot be allowed to avail the benefit of exemption provided u/s 34 of Packaged Commodity Rules. There was nothing on record to show that the accused had any registration u/s 35 of the Packaged Commodity Rules. The learned trial court was of the view that even if the contention of the accused that the commodity is a packaged commodity is accepted then they are covered under Sr. No. 18 of 3rd Schedule, under Rule 5 of Packaged Commodity Rules.

16. Finding that sale of milk shake in a glass without specifying the quantity on the glass or on the notice board, the court ordered for service of notice on the accused for violation of Section 9 (2) and 38 of the Act.

17. The petitioner is facing trial in a summons trial case and after dismissal of the application for dropping of the proceedings, notice u/s 251 Cr.P.C. has been served upon him. Section 258 Cr.P.C. is the only provision under which in a summon trial case the Magistrate can drop the proceedings and if such order is passed after the evidence of the principal witnesses, order will have the effect of acquittal and in any other case after passing of the order of dropping the proceedings, either to release the accused or have the effect of discharge. Section 258 Cr.P.C. does not specify the circumstances under which it can be used. Power to be exercised by the learned Magistrate being discretionary in nature has to be exercised after taking into consideration all the relevant circumstances. Only in exceptional circumstances that the accusations made against the accused do not constitute any offence, that powers vested in learned M.M., u/s 258 Cr.P.C., can be exercised.

18. In the instant case the manner in which different stands were taken by the accused before the learned M.M as to whether the milk shake sold in the glass was to be termed as packaged item or unpackaged item and whether sale of milk shake in glass without mentioning quantity either on the container or on the notice board amounted to violation of Section 9 (2) and 38 of the Act can only be decided during trial. The exemption claimed u/s 34 of the Act in respect of the milk shake sold in a glass cannot be decided by this Court while disposing of this revision petition. In the garb of this revision petition the accused is seeking adjudication as to whether the complaint is maintainable in view of the defence that the provisions of Weight and Measurement Act are not applicable in the given case which is beyond the scope of this revision petition.

19. In Munna Devi Vs. State of Rajasthan and anr, , it was held that the

revisional power under the Code of Criminal Procedure cannot be exercised in a routine and casual manner. While exercising such powers, the High Court has no authority to appreciate the evidence in the manner as the trial and the appellate courts are required to do. Revisional powers could be exercised only when it is shown that there is a legal bar against the continuance of the criminal proceedings or the framing of charge or the facts as stated in the First Information Report even if they are taken at the face value and accepted in their entirety do not constitute the offence for which the accused has been charged.

20. The second contention of the petitioner that on the basis of allegations, no notice u/s 251 Cr.P.C. could be served on the accused, is again liable to be rejected for the reason that Section 251 Cr.P.C. does not empower the Magistrate to discharge the accused facing trial in a summons trial case.

21. In *Subramaniam Sethuraman Vs. State of Maharashtra and Another*, , the Hon"ble Supreme Court while dealing with identical situation observed as under:-

16 The next challenge of the learned counsel for the appellant made to the finding of the High Court that once a plea is recorded in a summons case it is not open to the accused person to seek a discharge cannot also be accepted. The case involving a summons case is covered by Chapter XX of the Code which does not contemplate a stage of discharge like Section 239 which provides for a discharge in a warrant case. Therefore, in our opinion the High Court was correct in coming to the conclusion once the plea of the accused is recorded u/s 252 of the Code the procedure contemplated under Chapter XX has to be followed which is to take the trial to its logical conclusion.

22. A Coordinate Bench of this Court in *Asian Fans & Appliances Co. Pvt. Ltd. & Ors. Vs. Usaka Industrial Components Pvt. Ltd.* - CrI. M.C.No. 1543/2007 decided on 23.03.2009 had the occasion to deal with the provisions of Section 251 Cr.P.C. and in paragraph-9, it was observed as under:-

9. On a bare reading of Section 251 it is manifest that at this stage the Magistrate is not required to make application of his mind and all that is required u/s 251 of the Code is that the substance of the accusation is to be stated and the accused is to be asked whether he pleads guilty or has any defence to make and it is not necessary to frame a formal charge. Chapter XX which provides for the procedure for trial of summons cases, contains 251 to 259. Section 251 provides that when an accused is brought before the Magistrate, the particulars of the offence of which he is accused of, shall be stated to him. After that, his plea of guilt is recorded and in case of examination of evidence u/s 255 of the Code, contained in this Chapter, the Magistrate shall acquit him if in his opinion the accused is not guilty of the offence. u/s 251 of the Code only substance of the accusation has to be stated. Technically, it might be taken akin to the framing of the charge, but when the question of discharge is to be considered relatively with this provision, it cannot be equated with the framing of the charge.

23. Taking into consideration the fact that the plea taken by the petitioner can be

proved only during trial, this Court in exercise of revisional jurisdiction cannot undertake the exercise to examine the material on record and assume the role of the Trial Court. By dismissing the application u/s 258 Cr.P.C. and serving notice u/s 251 Cr.P.C. on the petitioner explaining the accusations against him, the learned Trial Court has not committed any illegality or infirmity which has resulted in any miscarriage of justice that needs to be corrected by this Court. Finding no merit in the revision petition, the same is hereby dismissed. Since the matter is very old pertaining to the year 2003 and the trial remained stayed for all these years due to pendency of this revision petition, it is expected that the learned Trial Court shall conclude the trial expeditiously.