

(2015) 08 KL CK 0002
In the High Court Of Kerala
Case No : Criminal R.P. No. 1965 of 2003

V.R. Vijayan Nair

APPELLANT

Vs

Food Inspector, Changanacherry and Others

RESPONDENT

Date of Decision : 13-08-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 397, 401
Prevention of Food Adulteration Act, 1954 — Section 16, 16(1)(a), 16(1)(a)(i), 16(1)(a)(ii), 16(1)(a)(ii)

Citation : (2015) 4 KHC 936 : (2015) 4 KLJ 234 : (2016) 1 RCR(Criminal) 509

Hon'ble Judges : Raja Vijayaraghavan V., J.

Bench : Single Bench

Advocate : K. Gopalakrishna Kurup and S. Manu, for the Appellant; M.G. Lisha, P.P., for the Respondent

Final Decision : Allowed

Judgement

Raja Vijayaraghavan V., J.—Sustainability under law of the concurrent findings arrived at by the Courts below is under challenge in this Revision Petition filed u/s. 397 r/w s. 401 of the Code of Criminal Procedure. The petitioner along with three others were prosecuted by the Food Inspector, Changanasserry Circle in C.C. No. 143 of 1999 on the files of the Chief Judicial Magistrate Court, Kottayam, for having committed offence punishable u/s. 2(ia)(a) , 7(i) and (iii) and s. 16(1)(a)(i) of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as "Act 34 of 1954" for brevity).

2. The facts, concisely stated, are as follows:

On 2.5.1995, the Food Inspector, Changanasserry Circle inspected the grocery shop run by the petitioner in door No. A.P. V/254 of Ayarkunnam Panchayath. The food inspector purchased 750 gms of "toor dhal", which was exhibited for sale. Further, probe revealed that the petitioner was not having a valid license for the period 1995-1996. The food article was sampled and sealed in accordance with law. One such sample was sent to the public analyst, Ernakulam. On

analysis, it was revealed that the sample contained added coal tar coloring matter by name "Tartrazine" and hence, adulterated. As it was revealed that the petitioner had purchased the "toor dhal" as per bill dated 12.4.1995 from the 2nd accused, he was also proceeded against. Based on the application filed by the 2nd accused, accused No. 3 and 4, who are the wholesale distributors who sold the articles to the 2nd respondent were also impleaded.

3. Thereafter, trial was proceeded with and to prove the case of the prosecution, PW. 1 to 3 were examined through whom Exts. P. 1 to P. 22 were marked. After duly recording the 313 statement and obtaining the explanations from the accused, the defence were permitted to adduce evidence. DW. 1 and 2 were examined and Exts. D. 1 to D. 4 were marked.

4. The learned Magistrate as per judgment dated 23.3.2001 held that the petitioner herein was well protected under warranty and was entitled to the protection under S. 19(2) of the Act. Nonetheless, it was held that the petitioner was not holding a license and was liable for offending Rule 50 of the Prevention of Food Adulteration Rules, 1957. The petitioner was convicted u/s. 16(1)(a)(ii) of the Act 34 of 1957 and was sentenced accordingly. The 2nd accused was convicted u/s. 16(1)(a)(i) of Act 34 of 1957 and was sentenced for the same. The accused 3 and 4 were acquitted as the 2nd accused failed to prove that he was protected by a warranty.

5. The above conviction and sentence was challenged by the petitioner as well as the 2nd accused by preferring separate appeals. Petitioner preferred CrI.A. 180 of 2001 and the 2nd accused preferred CrI.A. 166 of 2001 before the Sessions Court, Kottayam.

6. As per common judgment dated 30.4.2003, the learned Sessions Judge allowed the appeal filed by the 2nd accused but confirmed the conviction and sentence imposed on the petitioner. It is challenging the above concurrent finding that the petitioner is before this Court in revision.

7. I have heard Sri K. Gopalakrishna Kurup, the learned Senior counsel appearing for the petitioner as well as the learned Public Prosecutor.

8. The contention raised by the learned Senior counsel based on several precedents, in its essence, is that the petitioner after having been charged under S. 16(1)(a)(i) for selling adulterated food could not be convicted u/s. 16(1)(a)(ii) of the PFA Act, in view of exclusion of sale of food articles covered by s. 16(1)(a)(i) from the ambit of s. 16(1)(a)(ii). Precisely the contention urged is that in view of the expression "other than the article of food referred to in sub-clause (i)" mentioned in sub-clause (i), the petitioner could not have been convicted for having sold adulterated "toordhal" without a license. Expatiating further on his argument, the learned senior counsel, relying on s. 7 of the Act, which creates offenses, contents that license is mandated for dealing in food articles and not adulterated food, and therefore, the expression "other than an article of food referred to in sub-clause (i)" clearly would take the case of the petitioner outside

the purview of the penal section, and thus save him from conviction.

9. On the other hand, the learned Public Prosecutor contended that the concurrent findings entered into by the Courts below does not warrant any interference in the facts and circumstances of the instant case. According to the learned Public Prosecutor, it is evident that the petitioner was running the grocery shop without a proper license issued from the local authority and the Courts below have been considerate to convict the petitioner only on that account.

10. In the present revision, the question which arise for consideration is the legality and validity of the order of conviction of the petitioner u/s. 16(1)(a)(ii) since he has been acquitted of the offense u/s. 16(1)(a)(i) of the Act by the learned Magistrate.

11. The facts of the case would reveal that the charge against the petitioner was that he had sold adulterated "toor dhal" without a proper licence and therefore, was liable to be punished u/s. 16(1)(a)(i) of the PFA Act r/w s. 50 of the Rules. In order to appreciate the contentions raised by the learned counsel, relevant provisions of the Act 34 of 1957 will have to be looked into.

12. S. 7 of the Act reads as follows:--

Section 7 - Prohibitions of manufacture, sale, etc., of certain articles of food

No person shall himself or by any person on his behalf manufacture for sale, or store, sell or distribute -

(i) any adulterated food;

(ii) any misbranded food;

(iii) any article of food for the sale of which a license is prescribed, except in accordance with the conditions of the licence;

(iv) any article of food the sale of which is for the time being prohibited by the Food (Health) Authority [in the interest of public health]; [* * *]

(v) any article of food in contravention of any other provision of this Act or of any rule made thereunder; [or]

3. [(vi) any adulterant]

3. [Explanation : For the purposes of this section, a person shall be deemed to store any adulterated food or misbranded food or any article of food referred to in clause (iii) or clause (iv) or clause (v) if he stores such food for the manufacture therefrom of any article of food for sale.]

13. Section 7 provides that no person shall distribute any adulterated food, any misbranded food, any article of food without a license or any article of food, the sale of which is for the time being, prohibited by the authority and any article of

food in contravention of any other provisions of the Act and the Rules and also any adulterant. For contravention of any of the provisions of the Act, the punishment is prescribed u/s. 16 . To appreciate the scope of s. 16 , it is desirable to refer to s. 16 as well.

14. Section 16 of the PFA Act reads as under:--

Section 16 - Penalties

1 [(1) Subject to the provisions of sub-section (1A), if any person -

(a) whether by himself or by any other person on his behalf, imports into India or manufactures for sale, or stores, sells or distributes any article of food--

(i) which is adulterated within the meaning of sub-clause (m) of clause (ia) of section 2 or misbranded within the meaning of clause (ix) of that section or the sale of which is prohibited under any provision of this Act or any rule made thereunder or by an order of the Food (Health) Authority;

(ii). other than an article of food referred to in sub-clause (i), in contravention of any of the provisions of this Act or of any rule made thereunder; or

15. A plain reading of the aforesaid provision clearly indicates that the vendor can be proceeded against for contravention of sub clause (i) and (ii) in a proceeding but the same cannot be concerning the very same adulterated article. Sub clause (i) refers to those articles of food which are adulterated, misbranded or the sale of which is prohibited by the Food Health authority. Sub clause (ii) specifically takes out these articles from its purview and refers to any other article of food. This is explicit from the wording of the different sub clauses and I am of the considered view that no other interpretation can be arrived at. Thus, sub clauses (i) and (ii) read in juxtaposition with each other, will lead only to the conclusion, that a vendor can be punished under sub clause (i) if he sells or stores food which is adulterated, misbranded or the sale of which is prohibited and insofar the latter sub clause is concerned, he can be punished there under if he sells, stores or distributes food articles other than those mentioned in sub clause (i).

16. An understanding of u/s. 2(v) of the Act makes it clear that an authority grants license for sale of food as defined under the said provision and not adulterated food. In other words, if a person deals with food without a license and that article of food is found to be adulterated, then such a person by the tenor of the relevant sub clause of s. 16 cannot be held guilty and convicted under both sub clause (i) and (ii) since as observed earlier, license is granted by the authority for sale of food and not adulterated food.

17. A closer examination of the relevant provisions would reveal that the relevant words in sub clause (ii) are "other than an article of food referred to in sub clause (i)." In other words, sub clause (i) refers to articles of food which are adulterated or misbranded or sale of which is prohibited by the health authority

and sub clause (ii) excludes these items. In other words, a person can be convicted u/s. 16(1)(a)(ii) of the Act only if the two conditions are satisfied. Firstly, that person should be importing manufacturing, for sale or storing, selling or distributing any article of food other than article of food referred to in sub clause (i) of s. 16(1)(a) . Secondly, the act should be in contravention of the provisions of the Act or the rules made thereunder. Unless both these conditions are satisfied, a person cannot be held guilty u/s. 16(1)(a)(ii) of the Act.

18. In *Municipal Corporation of Delhi Vs. Darshan Kumar and Another*, , the question was whether a person selling adulterated milk can be convicted and punished for selling the same without a licence. The Division bench of the Delhi High Court in para No. 7 of the judgment held as follows:--

"It is true that a vendor may be committing more than one offence at the same time. He may be contravening the provisions of this Act or of any rule made thereunder and also being guilty of adulteration or misbranding etc. But the question which arises for determination is whether sub-clause (ii) provides for the punishment of an offence with reference to a particular article of food, which has been found adulterated or misbranded etc. the express words used by sub-clause (ii) - "an article of food referred to in sub-clause (i)" - can by no stretch of imagination be said to have any reference to the offence only and not to the article of food in question. The reason seems to be simple. Whereas discretion in awarding punishment was left to the court in respect of only some offences mentioned in sub-clause (i) punishment of all the offences mentioned in sub-clause (ii) has been left to the discretion of the court. If the intention of the Legislature was, as contended on behalf of the Corporation, that the offender must also be punished with reference to the same article of food which has been found adulterated etc., and in respect of which there had been a contravention of any provision of Act or of rules made thereunder, this could have been achieved simply by deleting the opening phrase completely. Had that been so, a person would have been punished not only for adulteration etc., or of a particular article of food, but also for having contravened the provisions of the Act or the rules made thereunder with reference to the same article. We cannot substitute any other words for the words "an article of food referred to in sub-clause (i)". It has been suggested that whereas section 7 in clause (iii) specifically refers to an article of food being sold under a licence without any contravention of the conditions of the licence, no such distinction has been in clause (ii). In our opinion it was absolutely unnecessary to make such a distinction. Sub-clause (ii) is a residuary clause. If it did not contain the opening phrase, all the offences would have been converted by this sub-clause. And that was the case before the amendment of 1964. But, as we have already explained, the opening phrase takes out the articles of food which have been found adulterated etc. in terms of sub-clause (i). In these circumstances we will be unjustifiably straining the language of sub-clause (ii) to say that a vendor can also be punished for contravening the provisions of the Act or the rules made thereunder where in respect of the same article of food he is being punished for adulteration. We,

therefore, are in respectful agreement with the aforesaid ruling of the Division Bench of the Madhya Pradesh High Court.

It has also been contended on behalf of the Corporation that in case a vendor is found to be selling an adulterated article of food then, in view of our above interpretation, he cannot be prosecuted for selling other articles of food without a licence where licence is required under the rules. That is not so. It may be that a vendor is selling more than one article of food and only one of them has been found to be adulterated. It may also be that a hawker is carrying more than one can of milk and when samples for analysis are taken by the Food Inspectors one of the samples is found upto the mark. In such a situation a vendor can always be prosecuted for selling an article of food without a licence since that article of food in question has not been found to be adulterated etc."

19. Identical question came up for consideration before the Orissa High Court and in *Durga Madhab Behera Vs. State of Orissa*, it was observed as follows:--

"Similar question as in the present case, came up for consideration before the Delhi High Court in the cases of *Municipal Corporation of Delhi v. Doraban Kumar and State*, 1979 (1) FAC 124 (Del) , *Sheo Raj Vs. State and Another*, and *Municipal Corporation of Delhi Vs. Jawala Prashad*, . In all these cases the Court interpreted sub-clause (i) and (ii) and observed that a person cannot be convicted thereunder for sale of very same adulterated food without a licence. This Court had also occasion to deal with the very same question in the case of *Jagannath Singh Vs. The State of Orissa*, . In that case the accused had been convicted under sections 16(1)(a)(i) and 16(1)(a)(ii) of the Act for selling adulterated lozenges. Speaking for the Court Honourable A. Pasayat, J., held that when a person sells adulterated food though he may not have a licence, the proper procedure to deal with such an offence would be by resorting to sub-clause (i) and not sub-clause (ii). In support of such finding he relied upon the aforementioned decision in 1979 (1) FAC 124) and more others. Applying the aforesaid decided principles to the present case, I would hold that the finding of conviction of the accused recorded by the trial court for sale of "Arhar dal" without a licence is unsustainable, being contrary to the provisions of the Act."

20. In *Vasudev Bhutt, Food Inspector, Municipal Corporation Ujjain Vs. Ganpat and another*, , a Division bench of the Madhya Pradesh High Court comprising of Honourable Justice J.S. Varma (as he then was) and Honourable Justice G.G. Sohani had observed as follows:--

"It is thus clear, in the scheme of the Act adulterated milk is also an article of food. It is an article of food referred to in sub-clause (i) of section 16(1)(a) of the Act. Therefore, in a case where a person is prosecuted for selling adulterated milk, even though the sale may be in contravention of the rules under the Act as no licence, as required by the rules, is obtained, the first condition for the applicability of section 16(1)(a)(ii) of the Act is not satisfied. Such a person is liable to be dealt with under section 16(1)(a)(i) of the Act, but not under sub-

clause (ii) of section 16(1)(a) of the Act. There is, therefore, no reason to interfere with the orders of acquittal."

21. Similar views have been taken in *Municipal Corporation of Delhi v. Jawala Prasad*, 1984(1) FAC 299) as well.

22. The upshot of the above discussion is that a person can be convicted u/s. 16(1)(a)(ii) of Act 34 of 1954 only if the following conditions are satisfied.

(a). The accused should be importing, manufacturing for sale or storing, selling or distributing any article of food other than an article of food referred to in sub clause (i) of s. 16(1)(a)

(b). The act should be in contravention of the provisions of the Act or the rules made there under.

(c). In a case where the accused is prosecuted for selling adulterated food, even though the sale may be in contravention of the rules under the Act, the first condition for the applicability of s. 16(1)(a)(ii) cannot be said to be satisfied.

23. In the case on hand, the petitioner was proceeded against for selling adulterated "toor dhal" and also for selling the same without a licence. He was acquitted for the offence punishable u/s. 16(1)(a)(i) of the Act holding that he is entitled to the benefit of warranty u/s. 19(2) of the Act. Without doubt, adulterated "toor dhal" is an article of food referred to in sub-clause (i) of section 16(1)(a) of the Act. In view of the prosecution of the petitioner u/s. 16(1)(a)(i) , the petitioner could not have been convicted u/s. 16(1)(a)(ii) as has been done in this case as the contravention of the provisions of the Act or Rules made there under was in respect of an article of food which was referred to in sub-clause (i). In view of the above, the conviction of the petitioner under S. 16(1)(a)(ii) r/w S. 50 of the PFA Rules cannot be sustained and the same is liable to be set aside. In the result the revision petition is allowed. The conviction and sentence passed against the petitioner is set aside and the petitioner is set at liberty.