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(1999) 02 GAU CK 0007

Gauhati High Court

Case No: Criminal Revision No. 155 of 1993

Madan Lal Sharma and Another	APPELLANT
Vs	
State of Assam	RESPONDENT

Date of Decision: Feb. 9, 1999

Acts Referred:

- Prevention of Food Adulteration Act, 1954 - Section 10(7), 16, 17, 17(1), 19(7)
- Prevention of Food Adulteration Rules, 1955 - Rule 9

Citation: (1999) CriLJ 2925 : (1999) 1 GLT 281

Hon'ble Judges: B. Biswas, J

Bench: Single Bench

Advocate: C.R. De and U. Bhuyan, for the Appellant; Govt. Advocate, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

D. Biswas, J.
The appellants Shri Madan Lal Sharma and Shri Kedar Nath Gupta were tried for an offence u/s 16 read with Section 7 of the Prevention of Food Adulteration Act, 1954 (for short "the Act"). The learned Chief Judicial Magistrate, Nagaon convicted both the appellants and sentenced them to undergo R.I. for 6 (six) months and to pay a fine of Rs. 2,000/- each and in default to undergo R.I. for one month more. The Learned Additional Sessions Judge, Nagaon vide judgment dated 2-4-93 confirmed the judgment and order of conviction and sentence in Criminal Appeal No. 1 (N-I) of 1992. Hence this revision has been preferred by the accused persons named above.

2, Dr. N.K. Choudhury, Food Inspector, Nagaon, inspected the premises of M/s. Shiva Hotel and Restaurant situated at Hojai Town and in presence of P. Ws. 2 and 3, Office Peons, purchased samples of cows milk kept in the restaurant for sale from Shri Madan

Lal Sharma, the Manager of the restaurant. The sample of milk purchased was divided into three parts as per provisions of the Act and the Prevention of Food Adulteration Rules, 1955 (for short "the Rules"). One part of the samples was sent to the Public Analyst and the remaining part were sent to the Local Health Authority in accordance with statutory requirements. The Public Analyst reported the said sample of cows milk as adulterated. Accordingly, prosecution was launched against the vendor Shri Madan Lal Sharma and the owner Shri Kedar Nath Gupta. The trial Court recorded the evidences of as many as 4 (four) witnesses on behalf of the prosecution and 2 (two) witnesses on behalf of the accused persons and, on conclusion of the trial, convicted and sentenced the accused appellants as stated above.

3. During the course of argument, the Learned Counsel Shri C.R. De along with Shri U. Bhuyan assailed the judgment of the courts below on the following grounds :--

(a) The alleged adulteration was because of variation in the standard of milk and the offence being technical in nature, the Courts below ought to have taken a lenient view in imposing the sentence.

(b) Non compliance of the provisions of Section 10(7) of the Act.

(c) Non compliance of the provisions of Rule 9(e).

(d) Kedar Nath Sharma, appellant No. 2 not being incharge of the business ought not to have been convicted in view of the provisions incorporated in Section 17 of the Act.

4. The report of the Public Analyst shows that the sample of cows milk was adulterated within the meaning of Section 2(ia)(l) of the Act as it did not conform to the standard prescribed in A. 11.01.11. The relevant part of report, Exhibit- 9, is quoted below :--

I further certify that I have caused to be analysed the aforementioned sample, and declare the result of the analysis to be as follows:--

and am of the opinion that the sample of milk (cow"s) is adulterated.

5. A comparison of the result of the Analyst with the standard prescribed shows that there are variations in different items with added water to the extent of 9.0% approximately. The sample of milk collected therefore appears to be adulterated within the meaning of Section 2(ia)(1) of the Act. Charge was accordingly framed u/s 16 read with Section 7 of the Act. The provisions relating to penalty prescribed in Section 16 provides for punishment with imprisonment for a term which shall not be less than 6 months but which may extend to 3 years and with fine which shall not be less than Rs. 1,000/-. In view of this specific statutory provisions, there appears to be no scope for imposition of punishment less than what is provided in the Act. It was further argued that no injurious or foreign substance was found in it. But the Public Analyst has reported that there was added water to the extent of 9.0% and, this alone is suggestive of the nature of

adulteration. When adulteration of an article is committed within the meaning of Section 2(ia)(1) of the Act, no concession on the ground that the offence committed is technical in nature is permissible. This answers the first point raised by the learned Counsel for the appellants.

6. Regarding non-compliance of the provisions of Section 10(7) of the Act and Rule 9(e) of the Rules the learned Trial Court had taken into consideration the decision of the Supreme Court in Babu Lal Hargovindas Vs. The State of Gujarat, and Shri Ram Labhaya Vs. Municipal Corporation of Delhi and Another, . The Learned Public Prosecutor also relied upon the decision in Shri Ram Labhaya (supra). The learned Counsel for the appellants referring to the evidence on record tried to justify that the Food Inspector, P.W. 1 did not call independent person to witness the collection of sample and thereby violated the mandatory provisions contained in Section 10(7) of the Act.

7. It would appear from the evidence of P.W. 1 that he has requested the customers present in the restaurant premises to witness the collection of sample. On their refusal he also requested 2 (two) persons outside the premises, but those 2 (two) persons also declined to witness the collection of sample. Thereafter P.W. 1 requested P.W. 2, Narayan Chandra Bania and P.W. 3 Madan Chandra Kalita, two peons working in the office of the Local Health Authority to witness the collection, and, accordingly, in their presence he had collected the sample. Both the aforesaid peons examined as P.Ws. 2 and 3 supported P.W. 1 in unambiguous term. Nothing could be elicited out of them in course of their cross-examination to show that there was no attempt made by P.W. 1 to collect independent witness. Shri Ram Shankar Choubey has been examined by the defence as D.W. 2 to counter the evidence of P.W. 1. According to him he was present in the restaurant premises, but the Food Inspector had not requested him to stand as a witness. The preponderance of evidence of D.W. 2 produced by the defence cannot overwhelm the evidentiary value of the statement made by P.W. 1 supported by P.Ws. 2 and 3. Having situated thus, let us refer to the decision in Babulal Hargovind (supra) where the Supreme court held that the trial is not vitiated on account of non-compliance with the provisions of Section 10(7) of the Act. It may affect the evidentiary value of the evidence of the Food Inspector in given cases. If the Food Inspector is believed, his evidence alone can be relied upon to prove that the sample was collected in accordance with the law. This being the principle laid down by the Supreme Court in Babulal Hargovindas" s case and having regard to the evidence of this case as discussed above. I cannot agree with the Learned Counsel for the appellant that the provision of Section 10(7) has not been complied with.

8. In Shri Ram Labhaya Vs. Municipal Corporation of Delhi and Another, referred to by the Courts below and also relied upon by the Learned Public Prosecutor, the Supreme court held as follows :--

4. We are of the opinion, particularly in view of the legislative history of Section 10(7), that while taking action under any of the provisions mentioned in the sub-section, the Food

Inspector must call one or more independent persons to be present at the time when such action is taken. We are, however, unable to agree that regardless of all circumstances, the non-presence of one or more independent persons at the relevant time would vitiate the trial or conviction. The obligation which Section 10(7) casts on the Food Inspector is to "call" one or more persons to be present when he takes action. The facts in the instant case shows that the Food Inspector did call the neighbouring shopkeepers to witness the taking of the sample but none was willing to cooperate. He could not certainly compel their presence. In such circumstances, the prosecution was relied of its obligation to cite independent witnesses. In Babu Lal Hargovindas Vs. The State of Gujarat, it was held by this Court after noticing that Section 10(7) was amended in 1964, that non-compliance with it would not vitiate the trial and since the Food Inspector was not in the position of an accomplice his evidence, alone, if believed, can sustain the convictions. The Court observed that this ought not be understood as minimising the need to comply with the salutary provision in Section 10(7) which was enacted as a safeguard against possible allegations of excesses or unfair practices by the Food Inspector.

9. In State of Assam v. Subarmal Jain (1990) 2 GauLR 99, Dr. Saraf J. of this High Court after referring to the decisions in Ram Labhaya and Babu Lal Hargovindas cases held that the provisions of Section 19(7) is mandatory in so far it relates to the duties of the Food Inspector to call one or more independent persons is concerned and if the Food Inspector fails to do so the Court would be careful, cautious and circumspect in dealing with the evidence of the Food Inspector. Therefore, the evidence on record that the Food Inspector endeavoured to procure independent witness is enough compliance of Section 10(7) of the Act. Failure to obtain an independent witness after such attempt will not vitiate the trial.

10. The learned Counsel for the appellants also argued that the inspection note which the Food Inspector is obliged to maintain as per provision of Rule 9(e) of the Rules was not produced before the Court and therefore the claim by the Food Inspector that he had requested independent person to witness the collection of sample cannot be accepted as final and an adverse inference against the prosecution has to be withdrawn following the view expressed by this High Court in State of Assam v. Radha Oil Industries (1987) 1 GauLR 134 . But the evidence of P.W. 1 having being corroborated by evidence of P.Ws. 2 and 3 shows that the Food Inspector attempted to secure the presence of independent witness. On the face of this, and the inspection note having not been called for by the accused, it cannot be said that the non-production of the same has in any manner vitiated the trial causing prejudice to the accused appellants. This requirements of provision of Rule 9(e) have been dealt with by this High Court in Jitmal Maheswari and Another Vs. State of Assam, and the ratio laid down by the Division Bench of this Court relying upon the decision in Rameswar Rathi v. State of Assam (1993) 1 GauLR 136 is that the provision of Section 10(7) being directory and not mandatory, the production of inspection note to be maintained under Rule 9(e) is dispensable when the evidence on record shows

that a sincere effort was made by the Food Inspector to collect independent witness. In the instant case, as already concluded above, such effort having being undertaken, it can be safely concluded that non-production of the inspection note has not vitiated the trial in the instant case.

11. The Learned Counsel pleaded that the appellant Kedar Nath Gupta who was not incharge of the business should not have been convicted taking into consideration the provision of Section 17 of the Act. The Learned Counsel also relied upon the decision in Smt. Manibai and Another Vs. The State of Maharashtra, In para 5 the Supreme Court held as follows:--

"Company" has been defined in Section 17 to mean any body corporate and to include a firm or other association of individuals. "Director" in relation to a firm has been defined to mean a partner in the firm. There is nothing to show that the business carried on in the shop in question was that of a firm and that Manibai was a partner of the said firm. Even if it may be assumed that the business was owned by a firm or an association of individuals and Manibai was a partner of that firm or member of that association of individuals, Manibai would be liable u/s 17(1) of the Act for the sale which was made by her son Pranjivan only if it was shown that she was in charge of and was responsible for the conduct of the business which was carried on at the shop. There is no evidence to that effect on the record. In the absence of such evidence, no criminal liability for the sale of coconut oil by Pranjivan can be fastened on Manibai under the provisions of the Act.

12. Shri Singh, Learned Public Prosecutor disagreeing with the submission advanced on behalf of the appellants submitted that the instant business carried in the name and style of M/s. Shiva Hotel and Restaurant is a proprietorial concern and therefore provision of Section 17 of the Act is not applicable to it. He has also referred to a decision of Calcutta High Court reported in Nathmal Patodi and Another Vs. The Corporation of Calcutta, in order to justify his submission.

13. The prosecution has examined Shri Nirajan Dutta, P.W. 4, working as a Tax Collector in the Municipal Board of Hojai Town in order to show that Shri Kedar Nath Gupta was the proprietor of the Hotel. He has exhibited the copy of the relevant entry in the Municipal Register as well as the copy of the licence as Exhibit 20 and 21 in support of his evidence. These documents read with the evidence of P.W. 4 show that it was Kedar Nath Gutpa who was the proprietor of M/s. Shiva Hotel and Restaurant from the month of April, 1987 to March, 1988, P.W. 1 deposed that accused Madanlal disclosed to him that he was working as Manager under Kedar Nath, Relying on this evidence both the Courts below came to the finding that Kedar Nath Gupta was the proprietor of the business concerned and rejected his plea that he had rented out the house to the accused Madan Lal Sharma. On a careful consideration the evidence of P.W. 1 and D.W. 1, I do not find any reason to interfere with the concurrent finding of the Courts below. Kedar Nath Gupta being the proprietor of the firm and Madan Lal Sharma being his Manager as evinced by P.W. 1 are liable to punishment for selling adulterated milk. It is made clear that the

provision of Section 17 cannot be applied in a proprietorial concern, and, its affairs being managed by an employee, the relationship between the proprietor and such employee cannot be construed as an "association of individuals" so as to treat it as a "company" as defined in the explanation to Section 17 of the Act. In order to be an "association of individuals", it must be shown that it is a combination of individuals for a common purpose or common action which obviously does not permit the proprietor and his paid employee to be clubbed together. Therefore, the argument that Kedar Nath Gupta was not in charge of the business at the relevant time and, therefore, cannot be convicted is not acceptable in law.

14. It was pleaded by the Learned Counsel for the appellants that the sample was collected in 1987 and after lapse of 12 (twelve) years it would be too harsh to send the appellants to prison. In this connection the law is well settled after the amending Act No.34 of 1976 that the High Court cannot reduce and set aside the minimum sentence of imprisonment in the absence of any specific enabling provision. The Supreme court in the State of U.P. Vs. Hanif, observed that after the Amending Act No. 34 of 76, the minimum sentence prescribed under the Act cannot be interfered with. The same principle has also been reiterated by this Court after elaborate discussion in Para 21 of the lodgment rendered in Jitmal Maheswari (supra). Consequently, I do not find any scope to treat the case leniently because of lapse of time.

15. In the result, the revision petition is dismissed. The conviction and sentence recorded against the appellants are confirmed. The appellants arc directed to surrender before the Court below to serve the sentence. Registry to send down the case record immediately.

Petition dismissed.