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Gauhati High Court

Case No: Criminal Revision No. 616 of 1996

Santosh Kr. Sarma — APPELLANT

Vs

State of Assam — RESPONDENT

Date of Decision: April 19, 2004

Acts Referred:

- Prevention of Food Adulteration Act, 1954 - Section 16, 7

Citation: (2005) 1 GLR 382 : (2005) GLT 494 Supp

Hon'ble Judges: Iqbal Ahmed Ansari, J

Bench: Single Bench

Advocate: S.S. Sharma and K.K. Bhatra, for the Appellant; F.H. Laskar, for the Respondent

Judgement

I.A. Ansari, J.
This revision has arisen out of the judgment and order, dated 06.08.1996, passed by the learned Additional Sessions Judge, Jorhat, in Criminal Appeal No. 29 of 1994, upholding the conviction of the accused-petitioner, namely, Santosh Kumar Sharma, under Sections 7/16 of the Prevention of Food Adulteration Act (hereinafter referred to as "the PFA Act") and sentencing him to suffer rigorous imprisonment for six months and to pay a fine of Rs. 1000/- and, in default of payment of fine, to suffer rigorous imprisonment for a further period of one month.

2. The case of the prosecution against the accused-petitioner, as unfolded at the trial, may, in brief, be stated as follows :

The accused-petitioner owned a sweet shop under the name and style "Santosh Sweets" at AT Road, Jorhat. At his said shop, the accused-petitioner had employed a sales-man, namely, Kishan Sharma, who used to sell there, besides other items, curd made of cow milk. On 24.8.1992, Food Inspector, Sri N.C. Goswami, accompanied by one Sri A.C. Sarma, who too was a Food Inspector, visited the said shop and suspecting that the curd, which was stored and kept for sale there, was adulterated, decided to take sample

therefrom. Sri N.C. Goswami disclosed his identification to the said sales-man, Sri Kishan Sarma, who was present at the shop and running the business of the shop. After giving the said sales-man the requisite Form No. VI under Rule 12 of the PFA Rules, the said Sri N.C. Goswami purchased, in the presence of the witnesses, namely, Sri A.C. Sarma and one Sri Om Prakash Rathi, 750 gms of the said curd from the said sales-man by making payment of a sum of Rs. 15/-. The said sales-man acknowledged receipt of the payment so made. The Food Inspector, namely, Sri N.C. Goswami, divided the sample of curd into three equal parts and, following the procedure contained in the PFA Rules, prepared three samples. In course of time, one of the samples was sent to the Public Analyst, who, upon examining the sample, found the same adulterated, whereupon Shri A.C. Sarma aforementioned, who too was a Food Inspector, took charge of the matter, obtained necessary sanction from the authority concerned and submitted offence report.

3. During trial, while the present accused-petitioner, Santosh Sharma, appeared in the Court, the sales-man, Kishan Sarma, absconded. The trial, however, proceeded against the present accused-petitioner and particulars of offence under Sections 7(i)(v)/16 of the PFA Act were explained to the present accused-petitioner, who pleaded not guilty thereto. The prosecution examined as many as three witnesses including Sri N.C. Goswami and Sri A.C. Sarma. The accused-petitioner was, then, examined u/s 313 Cr.PC and in his examination aforementioned, he denied that he had committed the offence alleged to have been committed by him, the case of the defence being that the present accused-petitioner was not the owner of the shop aforementioned and that the sample of curd had not been taken by the Food Inspector concerned in accordance with law and as the sample, in question, was not a representative sample of the curd, which was allegedly kept stored for sale, the case against the accused-petitioner had not been proved in accordance with law. On conclusion of the trial, the learned trial Court found the accused-petitioner guilty of the offence aforementioned and convicted him accordingly. The sentence, as already mentioned hereinabove, followed. Aggrieved by his conviction and the sentence passed against him, the accused-petitioner preferred an appeal, which too was rejected by the impugned judgment and order, dated 06.08.1996 aforementioned. The accused-petitioner has, now, approached this Court with the help of the present revision petition.

4. I have perused the materials on record including the impugned judgments and orders. I have also heard Mr. S.S. Sharma, learned counsel appearing on behalf of the accused-petitioner, and Mr. F.H. Laskar, learned Additional Public Prosecutor, Assam.

5. At the time of hearing of this revision, though an attempt was made to establish before this Court that in the face of evidence on record, the accused-petitioner could not have been held to be the owner of the shop, in question, the same was, eventually, not pressed. However, great stress has been laid by Mr. Sharma on the plea of the defence that the sample of curd had not been taken by the Food Inspector in accordance with law inasmuch as the curd, in question, though had fully set, as per the evidence on record, the same had not been cut and taken out vertically nor was the curd, if the same had not

fully set, stirred and churned, as a whole, before the sample was drawn. Such a sample could not have been, according to Mr. Sharma, described as a representative sample of the curd and on the report of chemical examination of such a sample, no conviction of the accused-petitioner could have been legally founded.

6. While dealing with the question raised by Mr. Sharma as to whether the sample, in question, was a representative sample, it is of utmost importance to note that so far as the offence report is concerned, it nowhere mentions as to how the sample of the curd was taken inasmuch as the offence report is silent as to whether the sample of curd was taken by cutting the curd vertically or after stirring and churning the same.

7. In the above background, let me come to the evidence of PW- 1 (Sri N.C. Goswami), who had taken the sample. In his examination-in-chief, PW-1 has deposed thus, "Thereafter I purchased 750 grams curd from Kishan Sharma by paying Rs. 15/-.....This curd was mixed properly and by making 3 divisions, and by adding 20 drops of formalin in each of the 3 divisions, the same were filled in 3 clean dry and new polythene bags."

8. How the sample was taken has been explained by PW-1 during his cross-examination this, "Approx 5 kg curd was in one open mouthed container. At the time of taking of sample, the container had curd almost upto its mouth. The accused gave me 750 grams of curd in a steel jar. That jar belonging to the accused. In giving 750 grams curd, some was brought in and taken out. In this manner 750 grams was weighed 750 grams of curd was taken out from 5 kg curd. I did not ask him to give 750 grams curd by cutting vertically. I divided 750 grams curd in 3 equal parts by diving the same by estimate. It is not correct that I did not take the sample of curd in accordance with law."

9. Though the evidence of PW-1 does not give any clear indication as to whether the curd had set or not, the fact remains that from a careful reading of the above evidence of PW-1, it is transparent that the curd was not cut vertically nor was the curd, if the same was in semi-solid state, stirred and churned before the sample was drawn. Far from this, the sample was drawn in smaller quantities until the time the sample of the curd weighed 750 grams and it is only after the sample was drawn that the sample was mixed and divided into three parts.

10. In the face of the above clear and cogent evidence of the very Food Inspector, who took the sample, when I turn to the evidence of PW-2 (Sri A.C. Sarma, Food Inspector) who submitted the offence report, I find that in his examination-in-chief, PW-2 has stated as follows :

"During inspection Goswami told him that he would take sample of curd stored for sale kept in a steel container... On receiving the notice and as told by Goswami, Kishan Sharma brought out the curd container. On being told to give 750 grams curd from the container by mixing the same properly Kishan Sharma gave the same and Goswami filled the same in 3 dry clean polythene packets."

11. During the course of his cross-examination, however, PW-2, for the first time, explained the manner of drawing of the sample in the following words :-

"The curd was in an open steel "Gamola". 750 grams sample of curd in the Gamola was taken after prior proper mixing. 750 gram was given after weighing in a jug, 750 gram was not taken out at a time. Whatever was short was made good by taking out curd by cutting repeatedly to make up 750 grams. After bringing out 750 gram from jug, 3 equal divisions were made. These were divided by a spoon. While mixing, entire curd was mixed by spoon. Food Inspector did not take with him spoon, cup, churner, etc. PW-1 did not take sample by cutting vertically. It is not a fact that sample was not taken in accordance with law."

12. What follows from the above discussion of the evidence on record is that though PW-2 is the person, who submitted the offence report against the accused-petitioner, he (PW-2) did not mention in his offence report that the curd, in question, had set or not nor did he mention therein that the same of the curd, in question, was drawn after cutting the same vertically and/or after stirring and/on churning the same. PW-1, i.e., the person, who had taken the sample, gave, as already indicated hereinabove, no indication that the sample was drawn by stirring and/or churning the curd and/or by mixing the same; rather, the evidence of PW-1 indicated that the sample was drawn without stirring and/or churning and/or mixing the curd and that it was the sample, which was mixed before the same was divided into three parts. It is for the first time in his evidence that PW-2 claimed that the curd was mixed before the sample was drawn. For such assertion, however, no foundation was laid in the offence report.

13. It is trite that where a piece of evidence gives rise to two equally possible views, the view, which supports the case of the defence needed to be adopted. In view of the fact that the consistent evidence of both the witnesses, namely, PW-1 and PW-2 is that the curd was cut with spoon and taken out the same is indicative of the fact that the curd had set. This apart, since the offence report as well as the entire evidence of PW-1 remained completely silent as to whether the curd was stirred and churned, there was no escape from the conclusion that the curd, as a whole, had not been stirred and churned before the sample was taken out and it was as a matter of after-thought that PW-2, during the course of his giving evidence, came out, for the first time, with the bold assertion that 750 grams sample of curd was taken after properly mixing the same. This impression gets re-enforced from the fact that PW-1, while describing in detail as to how 750 grams of curd was taken from the container, which contained as much as 5 kgs of curd, gave no indication at all that while taking out the curd in different quantities from the original container, anything was done by him or the salesman to obtain the curd after stirring and churning the same.

14. Taking of sample of curd stands on a different footing than taking of sample of other food articles. In order to make a sample of curd homogenous and representative of the entire quantity of curd stored for sale, the same needs to be cut vertically if the curd has

set. This apart, irrespective of the fact as to whether the curd has set or not, the curd has to be churned, as a whole, so as to make the same complete homogenous. The sample taken from such churned curd can be regarded as a representative sample. Reference may be made, in this regard, to the case of K. Hari Kumar v. Food Inspector, Punnaloor Municipality, reported in 1996 (2) FAC 294, It was a case, where the trial Court acquitted the accused and the acquittal was upheld by the High Court on the ground that if churning was not done of the entire curd in the container, it was due to the fault of the vendor and not due to any neglect of duty on the part of the Food Inspector. The Apex Court, in the said case, held as follows :

"We have reservations about the legal requirement of stirring and churning to be performed by Vendor. In order to attain homogeneity in curds stirring and churning, as the case may be, becomes necessary for the ingredients of milk solid not fat and milk solid fat getting a uniform consistency in order to determine the percentage in their completeness. Besides, if possible, curds used to be given a vertical cut. In the complaint it is specifically mentioned by the Food Inspector that about 10 litres of curds were lying in the hotel of the appellant in an Aluminium Pot where from he purchased the sample. Nowhere did he mention that the curds were stirred and churned before a sample was taken out or that it was given a vertical cut and was possible to do so at the behest of the appellant or that of the Food Inspector."

15. Reference made by Mr. Sharma to the case of Food Inspector, Municipal Corporation, Baroda v. Madanlal Ramlal Sharma, reported in 1982 (2) FAC 372, is not misplaced inasmuch as it was held in Madanlal Ramlal Sharma (supra) by the Apex Court as follows :

"We are conscious of the fact that in milk and milk products including curd, it I distinctly possible that the fat settles on the top and in order to find out as to whether the milk or its preparation such as curd has prescribed content, the sample must be homogeneous and representative so that the analysis can furnish reliable proof of nature and content of the articles of food under analysis."

16. In Rattan Chand v. UT of Chandigarh (P&H), reported in 1990 FAJ 19, since the complaint/offence report made no mention of the fact of the curd having been stirred before the sample was taken and the claim of having stirred the same was made by the Food Inspector for the first time at the trial, the High Court acquitted the accused by giving him benefit of doubt. On the ground of omission in the offence report of the fact of stirring of the milk drawn as sample, the High Court, in State of Haryana v. Rameswar (P&H), reported in 1987 (1) FAJ 2, too concluded that the possibility that the claim of stirring was an after thought cannot be ruled out.

17. In the case of State of HP v. Mehanga Ram, reported in 1998 (2) FAC 325, the Court observed and held as follows :

".....the purpose of churning the curd is that the same should become homogeneous and representative of entire sample - proper way of taking sample of curd is to divide the set curd vertically and entire one compartment should be taken and then churned and then divided into the parts. Churning should be done thoroughly. Courts have insisted to adopt the vertical method of curd and then the entire cut component on removal after making it homogenous by the process referred to above, is required to be divided into three parts. The object being that all the three parts be equally composed. Stirring is not churning. The former is only rotative process, whereas the latter has the object of inter-mixing all the layers of curd into one consistent substance.

18. Mr. Sharma has also referred to a number of other decisions, namely, Man Singh v. State of Haryana, reported in 1986 FAJ 8, Budh Ram v. State of Haryana, reported in 1986 FAJ 24, Gulshan v. State of Haryana, reported in 1986 FAJ 535, State of Punjab v. Jagannath, reported in 1986 FAJ 557, State of Haryana v. Bhagwan Das, reported in 1987 (2) FAC 38 and Rajpal v State of Punjab, reported in 1984 2 FAC 208. These decisions cannot be said to be irrelevant in appreciating the question, which has been raised in this revision.

19. Turning to the case of State of Assam v. Banwarilal Pipalwa, reported in 1992 (2) GLJ 141, on which decision too, Mr. Sharma places reliance, it may be noted that in this case, this Court quoted with approval the observations made in the case R. Pal v. State of Punjab, reported in 1984 (2) FAC 205. In R. Pal (supra), the Punjab & Haryana High Court held and observed as follows :

"The principal contention raised by the learned counsel for the petitioner is that the sample of curd has not been taken in accordance with the well recognised practice which has hardened into Judge made law. There is catena of precedents that the curd has to be vertically cut and the entire cut compartment has to be taken out and churned and later on divided into 3 equal parts for being put into sample bottles. The Food Inspector has no doubt stated at the trial that before taking the sample, he divided the curd in the kunda into 4 compartments vertically and then churned one of the compartments of curd in a garva to make it homogeneous but in the complaint it is nowhere mentioned that it was done so. Dr. Ram Kumar, PW-2, is also silent on this point. It is a matter of common knowledge that cream accumulates on the top of the curd and if the curd is not properly stirred when the sample is taken, it is bound to be deficient in essential ingredients. The process of churning has not been adopted in the instant case and thus serious prejudice to the petitioner has obviously been caused. The samples taken are not representative of the entire substance as these should have been. In any case, the petitioner has not to suffer for the fault of the prosecution."

20. Quoting the above observations made in R. Pal (supra), this Court in the case of State of Assam v. Banwarilal Pipalwa (supra) held as follows:

"With respect I am in agreement with the above ratio regarding taking of sample of curd as it stands on different footing. In my opinion the above procedure has to be followed at the time of taking sample of curd by the Food Inspector to make it homogeneous as cream accumulates on the top of curd. If this is not followed the sample taken of curd will not be of representative character of the entire article namely the curd."

21. What crystallizes from the above discussion of the evidence on record vis-a-vis the law relevant thereto is that the sample of curd should be obtained, if the curd has set, only after taking out the same vertically. This apart, in order to make the sample a representative sample of the curd, in question, the sample has to be drawn by churning the curd, in question, as a whole and only when the sample is drawn after churning the curd that the sample drawn from such churned curd can be regarded as a representative sample. In the case at hand, as already discussed hereinabove, the offence report is completely silent regarding the factum of churning. Even the evidence given by P.W. 1 also remained completely silent in this regard inasmuch as P.W. 1 who took the sample, nowhere claimed that the curd was churned before the sample was taken out. In the face of these facts, the assertion made, for the first time, in the cross-examination, by P.W. 2 that the curd was churned before the sample was drawn could not have been, in the absence of any other corroborative evidence, readily relied upon. In this regard, as candidly conceded by the learned Public Prosecutor, there was no direct or indirect corroborative evidence on record. The learned trial Court as well as the appellate Court did not, however, take into account these glaringly material aspects of the case.

22. Considering, therefore, the matter in its entirety, I am firmly of the view that on the strength of the evidence on record, it could not have been confidently held that the sample, in question, was a representative sample. This fact alone was enough to accord, at least, benefit of doubt to the accused-petitioner.

23. In the result and for the reasons discussed above, this revision succeeds. The impugned judgments and orders shall accordingly stand set aside. The accused-petitioner, namely, Santosh Sharma is accordingly acquitted of the offence charged with under benefit of doubt. His bail bond shall stand cancelled and his surety shall stand discharged.

24. Send back the LCRs.