(1988) 06 KL CK 0050

High Court Of Kerala

Case No: Criminal A. No. 266 of 1987

G. Sundaresan		APPELLANT
	Vs	
Viswanatha Pillai		RESPONDENT

Date of Decision: June 8, 1988

Acts Referred:

- Prevention of Food Adulteration Act, 1954 - Section 10(7), 11, 11(1), 11(2), 14A

Citation: (1988) 2 KLJ 21

Hon'ble Judges: K.T. Thomas, J

Bench: Single Bench

Advocate: A.M. Shaffique, for the Appellant; M.N. Sukumaran Nair, for the Respondent

Final Decision: Dismissed

Judgement

K.T. Thomas, J.

A vendor is prosecuted for selling misbranded food article to the food inspector. It is alleged that the vendor gave peas dhal to the food inspector as though the same was Toor dhal. The trial court acquitted the vendor and so the food inspector has filed this appeal challenging the acquittal. The appellant food inspector visited the shop of the vendor (who is the respondent) on 21-2-1985 and took sample from dhal stored for sale in the shop. Appellant''s case is that the respondent sold it as toor dhal. When one of the parts of the sample was analysed, the Public Analyst reported that the sample consists "wholly of peas dhal". Ext. P2 is the cash voucher issued by the respondent in which the food article has been shown as toor dhal. The report of the Public Analyst shows that it was peas dhal. Thereupon the complaint was filed against the respondent for selling mis-branded food article, as defined in Clause (ix) of Section 2 of the Prevention of Food Adulteration Act.

2. The respondent''s case is that he sold only dhal which is peas dhal and that Ext. p2 voucher was written by him as dictated to him by the food inspector. Respondent''s further case is that toor dhal was not available in his shop at all, and that he gave

dhal to the food inspector from the stock purchased by him from his dealer as per Ext D. bill. Learned Chief Judicial Magistrate held that the food inspector did not comply with Section 10(7) of the Act, and there was violation of Rule 12 of the Prevention of Food Adulteration Rules. It was further held that Rule 17 was, also contravened by the food inspector and that there is no evidence to show that the requirements in Rule 7 were complied with by the Public Analyst. The trial court did not accept the evidence that the respondent sold the food article representing the same to be toor dhal. On all those grounds the respondent was acquitted by the learned magistrate.

3. Since no independent witness has signed in Ext. P3 mahazar which was drawn up by the food inspector at the time of taking the sample, the court below concluded that Section 10 (7) of the Act has not been complied with. The food inspector as PW. 1 has deposed that he took the sample in the presence of witnesses, but the witnesses refused to put signature in the mahazar. In cross-examination, the defence counsel suggested that two persons who witnessed the sampling refused to sign the mahazar as it contained a recital that toor dhal was sold by the vendor. The aforesaid suggestive question supports the case of the food inspector that two witnesses were called by him, when he took the sample. The requirements in Section 10 (7) would stand substantially complied with if the food inspector calls one or more persons to be present at the time when action is taken, although those persons declined to affix signature in any document prepared by the food inspector, for their own reasons. The object of Section 10(7) is to enable the court to adjudicate upon the propriety of the search or the seizure to determine the authenticity of the sample taken by the food inspector. It is a question of fact in each case as to whether there has been any error or omission in the manner of taking the sample. Prior to the amendment Act 49 of 1964. the section required calling of not less than two persons as far as possible. But, after the amendment the words are "shall call one or more persons to be present at the time when such action is taken and take his or their signatures". Thus, it is now mandatory to call one or more persons when the action is taken. But if the food inspector calls one or two persons, and those persons decline to co-operate, prosecution is relieved of its obligation to take their signature. (Shri Ram Labhaya Vs. Municipal Corporation of Delhi and Another,) and M. Rajan v. Food Inspector, 1982 K L T. 706). On the facts of this case the food inspector did call two persons, but they did not co-operate in putting their signatures. Hence'' the there no violation of Section 10 (7).

4. Contravention of Rule 12 is founded on the admission that Form VI notice (Ext. P1) was served on the respondent before the food article was purchased by the food inspector. According to the learned magistrate the notice contemplated in Rule 12 must be given after the sample is taken, and if such a notice happened to be given before the purchase of the food article from the vendor the whole sampling gets vitiated. Learned counsel for the appellant contended that the aforesaid view is too technical and cannot be allowed to stand '' since no prejudice is caused to the

vendor by giving a notice at a stage earlier than what is provided in the rule. I shall proceed to consider the aforesaid contention now.

5. Rule 12 is extracted below:

12. Notice of intention to take sample for analysis--

When a Food Inspector takes a sample of an article for the purpose of analysis, he shall give notice of his intention to do so in writing in Form VI, then and there, to the person from whom he takes the sample and simultaneously, by appropriate means, also to the persons if any, whose name, address and other particulars have been disclosed u/s 14A of the Act

No doubt a cursory reading of the said rule may indicate that notice envisaged therein must reach the vendor (or the person from whom the sample is taken) before the sample is taken. But the pro forma shown in the Form of the notice would indicate that the notice shall be served only after the sample is taken. The words employed in the pro forma of the notice is evidently consistent with Section 11 (1) of the Act. When a food inspector takes sample of food for analysis, he shall give notice in Writing then and there "of his intention to have it so analysed to the person from whom he has taken the sample and to the person, if any, whose name, address and other particulars have been disclosed u/s 14A". A combined reading of Section 11(1) and the words employed in Form VI (appended to the Rules) would establish that what is contemplated is to give the notice after the sample to taken; The confusion is only on account of the language used in Rule 12. If a food inspector, on reading Rule 12 forms the impression that the notice envisaged therein must be given to the person concerned before the taking of sample, no blame can easily be attributed to him However, the unskillfully drafted rule is no justification to whittle down Section 11(2) of the Act. Even then the question is would the action of the food inspector get vitiated merely because the food inspector gives notice before the taking of sample? In my view, if a food inspector happens to give Form VI notice to a vendor before he takes the sample, it would not vitiate the further proceedings which he adopts. Notice envisaged in Section 11 (1) is intended to inform the persons concerned that the sample will be subjected to analysis. If the person from whom the sample is taken is told in advance that the sample which the food inspector takes will be subjected to analysis no prejudice will be caused to him nor would such an advance notice frustrate the subsequent steps adopted by the food inspector. Noncompliance with Section 11(1) and rule 12 can be inferred in a case where no notice is given to the person from whom the sample is taken either in the first instance or after completing the sampling process. "Taking of sample" involves a number of steps and the procedure is laid down in Section 10 (7) and Section 11 of the Act. Purchase of the food article is only one among the various steps involved in taking sample. It is too technical a view that the notice contemplated in Rule 12 should be served on the person concerned only after making the purchase of the food article. If a food inspector gives Form VI notice to

the person concerned even at the first instance, it would serve the purpose of informing him that the sample when taken would be subjected to analysis. If any such notice is given first, it is unnecessary to give a second notice after completing the procedure for taking the sample Notice given at the first instance would stand good for complying with the statutory requirements contained in Section 11 (I) of the Act. It may be that the most opportune moment for giving Form VI notice is immediately after making purchase of the food article. But to say that such a notice given just prior to the purchase would vitiate the whole sampling process is unrealistic and pedantic. No person can possibly complain that since he did not get a notice immediately after taking the sample from him he is unaware of the design of the food inspector to send the sample for analysis, provided the food inspector has served the notice at least before taking the sample. In Mangaldas Raghavji v. State of Maharashtra (MR 1966 S. C, 128) the Supreme Court has observed that the object of giving notice is to apprise the person from whom the sample is taken of the intention that the sample will be got analysed. Such a procedure is adopted with a view to avoid any plea that a different commodity was sent up for analysis. This would also give him an opportunity to be aware of his rights in advance to have the other part of the sample analysed by the Central Food Laboratory, if need be. In this "case, the notice given to the respondent although the same was served before the actual purchase of the food article, is sufficient in the eye of law. In this view of the position the reasoning of the learned Chief Judicial Magistrate that Section 11 (1) and Rule 12 were contravened cannot be sustained.

6. The evidence in this case does not justify the inference that either Rule 7 or Rule 17 has been contravened. Though PW.1 has deposed that he had taken another sample from the same shop about a couple of hours before taking the present sample, it is his definite case that after completing the sampling process in both the cases, the sealed container of one part of the sample of the food article involved in this case was packed along with a memorandum in From VII and the said packet was sealed. The criticism against PW.1 is that he covered two such sealed packets (one pertaining to the sample taken in this case and the other pertaining to the sample taken from the same shop earlier) together and forwarded them to the Public Analyst. I do not find any force in the contention that, by doing so PW.1 has offended the mandates contained in Rule 17. There is no evidence to show that the Public Analyst did not compare the seal of the container with the outer cover. Regularity of acts performed by the Public Analyst can be presumed. Hence, no inference need be drawn, in the absence of other evidence, that Public Analyst did not make the comparison mentioned in Rule 17. However, the order of acquittal can be sustained on another ground. There, is no satisfactory evidence to prove that what the respondent had offered to the food inspector was toor dhal and not peas dhal. PW. 1, a food inspector as he is admitted that even he was not in a position to discern that the article offered was peas dhal or toor dhal. The article sold to the food inspector was taken from a container which had the label declaration that the

same was dhal. PW. 1 did not say in his evidence that the respondent represented to him that the food article was, toor dhal. Of course, Ext, P2 voucher contains the description of the food article as toor dhal. But such a mention in Ext. P2 is not sufficient to hold that the respondent made representation that he was offering toor dhal. The writing in Ext. P2 as such docs not inspire confidence especially in the light of an obvious over-writing at the crucial place where the word "toor" is written. The respondent has a case that Ext. P2 was written by him as dictated by the food inspector. In this context it is worth noticing that no independent witness was examined by the food inspector to support his case that the respondent offered toor dhal by misbranding. Food inspector has stated that Ext. D1 (the cash bill as per which respondent claims to have purchased the article - from his dealer) was not shown to him at the time of sampling. The credibility of the said version is open to doubt because a food inspector would normally ask the vendor about the source from which the dealer got the article of food and the vendor would have in all probabilities produced the cash-bill-by which he got the stock. The version of the respondent that he produced Ext. D1 for scrutiny when the food inspector took the sample appears to be probable. Ext. D1 shows that dhal was purchased by the vendor from another dealer. Considering those broad probabilities, I am inclined to take the view that the prosecution has not succeeded in proving that the respondent did represent to the food inspector that the food article sold was toor dhal.

In the result, the appeal is dismissed.