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SooperKanoon Citation : sooperkanoon.com/348525

Court : Mumbai

Decided On : Apr-15-1977

Reported in : (1977)79BOMLR372

Judge : Jahagirdar, J.

Appeal No. : Criminal Appeal No. 62 of 1975

Appellant : State

Respondent : Udayram Rupram Oza

Disposition : Appeal dismissed

Judgement :

Jahagirdar, J.

1. This appeal preferred by the State against an order of acquittal passed in respect of an offence under the Prevention of Food Adulteration Act raises an interesting point of law.

2. The respondent-accused was running a hotel known as 'Shankar Vilas Hindu Hotel' situated in Shetiya Market at Patel, Bombay. On September 28, 1973, at about 3.15 p.m. the Food Inspector of the Food and Drugs Administration, visited the shop and after disclosing his identity, asked the accused to give him 60 ml. of buffalo's milk. According to the prosecution, the accused gave the quantity of milk

asked for and received Rs. 2 as price of the same. After following the usual procedure of dividing the sample into three equal parts and adding twenty drops of formalin to each one of the said samples, and after the receipt of the report from the public analyst, to whom one sample was sent, the complainant filed this complaint against the accused, charging him with the offence punishable under Section 16(1)(a)(i) of the Prevention of Food Adulteration Act, 1954.

3. The public analyst's report shows that the sample sent to him contained fat 2.4 per cent. and solids not-fat 8.8 per cent. The sample also contained 2.2 per cent. extraneous water. Since the appropriate rule prescribes that the buffalo milk should contain 6 per cent. of fat, it was found that the sample was deficient in fat by 57.8 per cent.

4. The defence of the accused was that he was not dealing in milk at all and that he did not sell milk in his shop at all, but the milk which was kept in his shop was for the purpose of preparing tea which is sold to the customers. From this it was sought to be contended on his behalf that the technical sale which was effected to the Food Inspector was not a sale within the meaning of that word under the Prevention of Food Adulteration Act. The learned trial Magistrate accepted the defence, especially so when the Food Inspector himself had admitted in his evidence before the Court that when he sought to take the sample from the accused he had protested then and there that the milk in his shop was not meant for sale but only for being used as an ingredient of the tea which he was selling from that shop. The learned Magistrate accordingly acquitted the accused of the offence with which he was charged, by his order dated August 16, 1974.

5. The State has preferred this appeal challenging that order of acquittal and Mr. Barday, the learned Public Prosecutor appearing in support of this appeal, has criticized the judgment of the learned Magistrate by relying upon a judgment of the Supreme Court in *Food Inspector, Calicut v. C. Gopalan* : 1971 CriLJ1277 . According to Mr. Barday in order that the sample taken by the public analyst should amount to a sale within the meaning of Section 2(xiii), it is not necessary that the person from whom that sample is taken should be a dealer in the commodity of which the sample is taken. It is enough if he is a dealer in some

articles and the article from which the sample is taken is kept in the place where the other articles dealt with by him are also kept. Reliance on this decision of the Supreme Court by Mr. Barday is not without justification. The facts of that case are somewhat similar. In that case the accused was the Manager of a tea stall at Calicut. A sample of milk which was taken from him was found to be adulterated. It was contended on behalf of the accused that the milk from which the sample was taken was not meant for sale to the members of the public, but it was being used only for the purpose of the preparation of tea which was sold to the members of the public. Repelling that contention the Supreme Court was pleased to hold by relying upon the definition, of the term 'sale' contained in the Act that even a sale for analysis amounted to a sale under that definition. The Supreme Court also held as follows (p. 1730):.We are also of the opinion that the person from whom the article of food has been purchased by the Food Inspector need not be a dealer as such in that article.

When that judgment is read carefully, it is clear to me that the contention which was raised there was essentially whether a sale of an article, which was not normally the subject-matter of the trade of the accused, to the Food Inspector for analysis would amount to a sale. In view of the wording of the definition contained in the Act, the Supreme Court held that it did amount to a sale. That judgment was by a bench consisting of two Judges.

6. There is however a later decision of the Supreme Court given by three Judges, wherein a detailed analysis of the words 'store' and 'sale' has been given. That is Delhi Municipality v. L.N. Tandon : 1976 CriLJ547 . In this case samples of ice-cream, milk, curd and butter were taken from the hotel run by the accused and after the analysis the public analyst found that they were sub-standard and as such adulterated articles of food within the meaning of Section 2(i)(1) of the Prevention of Food Adulteration Act. It was contended on behalf of the accused that those articles were not sold to non-resident visitors or to the members of the public generally and that the hoteliers provide residential accommodation, services and other amenities including meals only to the resident customers against a composite charge. The articles from which the samples were taken, were part of the general services, which were provided to the resident-customers and no

separate charges were made for the articles as supplied because all these articles were included in a composite bill presented to the customers. It was, therefore, contended on behalf of the accused that this was not an article of food which was sold or which was stored for sale. This contention on behalf of the accused was rejected by the Supreme Court by holding that merely because these articles served were to the resident-customers and were not separately charged, did not mean that they were not stored for sale or were not sold. The composite bill which was presented to the customer did include the cost of the articles which were served as a part of general services to the resident-customers. It was, therefore, held that these articles like ice-cream, milk, curd and butter were stored for sale.

7. However, analysing all the provisions of the Act, the Supreme Court pointed out as follows (p. 623):

From a conjoint reading of the above referred provisions, it will be clear that the broad scheme of the Act is to prohibit and penalise the sale, or import, manufacture, storage or distribution for sale of any adulterated article of food. The terms 'store' and 'distribute' take their colour from the context and the collocation of words in which they occur in Sections 7 and 16. 'Storage' or 'distribution' of an adulterated article of food for a purpose other than for sale does not fall within the mischief of this section.

The Supreme Court also pointed out that the construction which was placed upon the words 'storage' and 'distribution' was the correct one by reference to the other provisions of the Act. In particular, referring to Section 10 of the Act, as it then stood, they pointed out that a Food Inspector could enter and inspect any place where any article of food was manufactured, stored or exposed for sale, and take samples of such articles of food for analysis. If an article of food is not stored in the sense that it was stored for sale, the Food Inspector would not be acting within his powers to enter and inspect that place and take sample of that article. Unless that article is stored for sale, the Food Inspector will not be competent under the law to take a sample or on such sample being found adulterated, to validly launch prosecution therein. In short, they said (p. 624): the expression, 'store' in Section 7 means 'storing for sale', and consequently storing of an adulterated article of food

for purposes other than for sale would not constitute an offence under Section 16 (1)(a).

8. Common knowledge tells us that there are several restaurants and hotels wherein tea or other articles in which milk is used as an ingredient, are sold. If milk is stored or kept in the premises of these restaurants and hotels for the purpose of using that milk as an ingredient in another preparation such as tea or coffee, keeping or storing of that milk will not amount to storage under the Act. If a sample is taken by the Food Inspector under Section 10(2) of the Act, of an article thus kept in a restaurant or hotel, it will not be in valid exercise of powers under Section 10(2). If that is so, it must follow that the forced sale made by the owner of such restaurant and hotel will not amount to a sale within the meaning of Section 2(xiii) of the Act. It is undoubtedly true, as Mr. Barday has pointed out, that the decision of the Supreme Court in *Food Inspector, Calicut v. C. Gopalan*, specifically mentioned that it was not necessary for a person to be a dealer in that article to come within the mischief of the Act; but this later judgment of the Supreme Court, of a larger bench consisting of three Judges, has considered all the relevant provisions of the Act also and in terms of the judgment of the Supreme Court in *Union of India v. K.S. Subramanian : (1977)ILLJ5SC* , I am bound to follow the judgment, in *Delhi Municipality v. L.N. Tandon*.

9. On the facts of this case, therefore, it is clear that the sample which was taken by the Food Inspector from the shop of the accused wherein milk was not kept for sale but for being used as an ingredient in the preparation of tea, was not a sale within meaning of Section 2(xiii) of the Act and, therefore, it does not amount to an offence under Section 16(1)(a) of the Act. The order of acquittal, therefore, passed by the learned Magistrate is correct and is hereby confirmed. The appeal is dismissed. The bail bond of the accused is cancelled.