

State Vs. Kunchu and ors.

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Court : Kerala

Decided On : Jun-01-1959

Reported in : AIR1960Ker13

Judge : T.K. Joseph and; Velu Pillai, JJ.

Acts : [Prevention of Food Adulteration Act, 1954](#) - Sections 7, 16 and 16(1)

Appeal No. : Criminal Appeal Nos. 323, 329, 330 and 331 of 1958

Appellant : State

Respondent : Kunchu and ors.

Advocate for Def. : V. Rama Shenoi, Amicus Curiae

Advocate for Pet/Ap. : T. Mohamed Ismail, Public Prosecutor

Disposition : Appeals dismissed

Judgement :

Velu Pillai, J.

1. These four Criminal appeals are by the State, and are directed against the judgments in four calendar cases, passed by the Judicial District Magistrate at Palghat, by which he acquitted the second accused in each of them; there are thus four respondents in all these appeals together. They were each charged for an

offence under Section 16(1) read with Section 7 of the Prevention of Food Adulteration Act 1954, Act XXXVII of 1954, referred to hereinafter as the Act, for the sale of milk adulterated with water, in their capacity as servants of their respective masters, who themselves were the first accused in the four cases. The masters were convicted on their plea of guilty; but the acquittal of the respondents was on the ground, that as servants, they are not punishable. When these appeals came before me for hearing, in view of the importance of the questions involved, and of the conflict of opinion in other jurisdictions, they were referred to a division bench for disposal and were accordingly heard by us. The respondents did not enter appearance, and we are thankful to Sri V. Rama Shenoy for presenting the case for them, and for the assistance which he rendered to us at the hearing as *ami-cus curiae*.

2. Section 7 of the Act, so far as it is material reads as follows :

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

(i) any adulterated food :'

and Section 16(1) of the Act, is in the following terms :

(1) 'If any person

(a) whether by himself or by any person on his behalf sells or distributes any article of food in contravention of any of the provisions of this Act or of any rule made thereunder shall be punishable

Though the word 'seller' is not defined, the word 'sale' is defined in Section 2(xiii) of the Act in very wide terms; clearly a seller is one, who effects a sale. It may be assumed, that a servant entrusted by his master with the duty of selling, is, a seller in the sense, that he 'performs the act of selling'. Obviously, the phrase 'by any person on his behalf', occurring in both Sections 7 and 16(1) of the Act, cannot apply to the servant. The question then is, whether he sells 'himself' within the meaning of these provisions. It was beyond controversy, that the expression 'himself or by any person on his behalf' in both Sections 7 and 16(1) applies to the

master, who either sells by himself, or by another, say a servant, on his behalf. But when a servant effects a sale he does so almost invariably on his master's behalf and seldom, if ever 'himself' sells. If it was intended to prohibit a servant from effecting a sale of adulterated food on behalf of his master, and to render him liable therefor, it was only necessary for the legislature to insert the words 'or on behalf of another' after the words 'by any person on his behalf' occurring in both sections. On a plain reading, it is quite clear, that it is only the person who can be deemed to sell himself, or by another on his behalf, who is interdicted from selling by S. 7, and who is made punishable by Section 16(1) of the Act; in other words, it is only he who has, to borrow the language of Rankin, C. J. in *Pearymohan Salia v. Harendranath*, ILR 57 Cal 1084: (AIR 1930 Cal 295). 'a choice of selling himself or by any other person on his behalf', is within the contemplation of the legislature.

3. This mode of construing the above provisions derives support from *Williamson v. Norris*, (1899) 1 QB 7 in which, the respondent, a servant of the House of Commons, sold liquor, which was the property of the House, at a bar within its precincts, the place where it was sold, being not licensed for the purpose. Section 3 of the Licensing Act, 1872 provided, that 'no person shall sell any intoxicating liquor without being duly licensed to sell the same'. Interpreting this section Lord Russell of Killowen, C. J. held that the

'sale which is prohibited, must be a sale by the person, who ought to be licensed. Every one knows that a barman or a waiter is not a person licensed. The sale struck at, is a sale by the master or the principal'.

The respondent was, therefore, acquitted. By parity of reasoning, the expression 'himself or by any person on his behalf' in Sections 7 and 16(1) of the Act must imply, that the 'person' contemplated, is the master or the principal, and not the servant. Though under Section 6(1) of the Bengal Food Adulteration Act, 1919, the servant was also held to be liable by Rankin, C. J. in ILR 57 Cal 1084 : (AIR 1930 Cal 295), his reasoning gives considerable support to the view we are taking. Section 6(1) of the aforesaid Act is in these terms ;

'No person shall, directly or indirectly, himself or by any other person on his behalf sell..... any of the following articles'.

In dealing with the contention advanced on behalf of the accused who effected the sale in the capacity of a certain firm the learned Chief Justice observed as follows :

'No doubt, only a master or principal is a person, who has a choice of selling himself or by any other person on his behalf; and the contention of the defence at first sight, looks like a sound view Ordinarily, one would not refer to a person as 'himself selling' except in a case in which selling by a servant or agent was contemplated as a thing to be negatived.'

'The Magistrate has argued, on general principles that the legislature to effect its purpose, must have intended by the words now under consideration, to make the act of the servant an offence, because the provisions of the law as to abetment would be insufficient to enable the purpose of the prevention of adulteration to be effectively attained. This line of reasoning is certainly precarious. No doubt a desire to prevent the sale of adulterated articles may be attributed to the legislature, but it is a question of the correct meaning of the words used by the legislature -- whether it has thought fit to bring a servant within their scope. It is by no means inconceivable, that an Indian legislature might consider it unfair or inadvisable to penalise the servant, and it is no part of the duty of the court to go beyond the immediate meaning of the words in question.'

It strikes us, that the case in favour of the servant has been very forcibly stated in the above passage but the decision in the case went against the servant partly by adopting the interpretation placed by Lord Coleridge, C. J. in *Hotchin v. Hindmarsh*. (1891) 2 QB 181 on the expression 'no person shall sell' occurring in Section 6 of the English Sale of Food and Drugs Act, 1875, as sufficiently comprehensive to take in a servant, and partly by relying on the first clause of Section 11 of the Bengal Act. which contemplates also an 'agent selling the article.' It may at once be stated, that these two grounds of the decision, have no relation to the language of the provisions in the Act with which we are concerned. It has to be noted, that in *In re, S. Moses*, AIR 1959 Mad 185, a case under the same provisions of the Act we are considering, a division bench of the Madras High Court consisting of Panchupakesa Iyer and Basheer Aha-med Sayeed, JJ. declined to follow ILR 57 Cal 1084 : (AIR 1930 Cal 205).

4. In AIR 1959 Mad 185, Basheer Ahamed Sayeed, J. observed, that some meaning has necessarily to be given to the word 'himself' occurring in Sections 7 and 16(1) of the Act, which cannot apply to a servant, but which applies to a master. It seems unnecessary to recapitulate the several reasons, which induced the learned Judges in AIR 1959 Mad 185, to negative the absolute liability of a servant contended for, and which we adopt. Incidentally, it may be pointed out, that Sri V. Rama Shenoy also drew our attention to Section 17 of the Act, as furnishing an instance in which the legislature made the servant liable thereunder when it desired to do so.

5. A servant would of course be liable under the provisions of the Act, if in a given case, on the facts and circumstances, he can be deemed to sell not on behalf of his master but on his own behalf or by 'himself' as observed by Panchapakesa Iyer, J. in AIR 1959 Mad 185. Also if he 'acted knowingly', he could be convicted in England, of aiding and abetting under the Summary Jurisdiction Act, 1848, 1899-1 QB 7. In India too, a servant who adulterates the food himself, or who knows, or has reason to believe by the exercise of the due diligence, that the food he is selling is adulterated, abets the commission of the offence, and renders himself liable to punishment. But that is not the question here, which is, whether, even in the absence of mens rea a servant can be punished in criminal law. The general rule is that unless mens rea is excluded, either by express words in the statute or by necessary intendment, as an element of the offence, a person ought not to be found guilty under the penal law, *Srinivas Mall v. Emperor*, AIR 1947 PC 135. There may be cases, in which the legislature, in its wisdom, has thought it fit to declare offences, without the element of mens rea in them, but they are by way of exceptions to the general rule. On the provisions of the Act, which are now in question, we are not persuaded, that such an intention to dispense with this element, in the case of a servant, can be attributed to the legislature.

6. The corresponding provision in the Madras Prevention of Adulteration Act, 1918 may now be referred to Section 5(1) reads:

'Every person, who.....

(a) sells any food which is not of the nature, substance or quality of the article demanded by the purchaser, or

(b) offers for sale or sells any food which is not of the nature, substance or quality which it purports, or is reported to be; shall be punished.'

This is wider in scope than the provisions of the Act we are considering, and includes every person, be he master or servant, who does the prohibited act, irrespective of his mens rea. Accordingly, Ramaswami, J. upheld the conviction under Section 5(1) of the Madras Act, of an employee who was working in his father's shop, in *Public Prosecutor v. Pattu Namsimhalu*, AIR 1953 Mad 697. Somasundaram, J. in *Public Prosecutor v. Lourduswamy*, 1957 Ker LT 966: (AIR 1957 Mad 631), maintained the conviction of a servant under Section 16(1) read with Section 7 of the Act; in doing so, he did not construe the language of the Sections, but thought, that being a seller, the servant cannot escape conviction. AIR 1959 Mad 185, cited above, first came up for hearing before the same learned Judge, sitting singly, and doubting the correctness of his own view in 1957 Ker LT 966 : (AIR 1957 Mad 631), he referred the case to a division bench, which ultimately decided it.

7. 1899-1 QB 7 decided on the terms of Section 3 of the Licensing Act 1872, and 1891-2 QB 181, decided on the terms of Section 6 of the Sale of Food and Drugs Act, 1876, have already been referred to. In the latter case Lord Coleridge, C. J. interpreted the provision, also by the context in which it was placed on the statute, and concluded, that 'the person who takes the article in his hand, and performs the physical act of transferring the adulterated thing to the purchaser, is a person who sells within this Section.' This means only, what has been assumed, already that a servant is a 'seller' in one sense. More than this, 1891-2 QB 181, does not help the decision of this case. In *Pharmaceutical Society v. The London and Provincial Supply Association Ltd.*, 1880-5 AC 857. the provisions construed, were Sections 1 and 15 of 31 and 32 Victoria c 121, the relevant parts of which are these :

Section 1, 'It shall be unlawful for any person to sell unless such person shall be pharmaceutical chemist'.

Section 15. 'Any person who shall offend shall be liable to pay a penalty

The dictum in the case was, that

'the act of selling, the act of compounding, and every definite and particular act mentioned, in the statute are struck at, whether the person who does them, is a principal to whom the business belongs, or any one whom he employs to carry on the business'.

As observed in AIR 1959 Mad 185, the provisions in the English Statutes were enacted to suit the conditions of an advanced country like England and the Legislature must have known, that they are hardly suited to the conditions of a backward country like India.

8. We are not very much impressed by the last argument of the Public Prosecutor that, if a servant is not made liable, and he sells on behalf of an undisclosed master or principal, whose identity cannot be discovered, the offence is likely to go unpunished; but this difficulty in the detection of crime, we think is nothing peculiar to offences under the Act. Even so, as we have indicated it was for the legislature to express its intention, if any, in clear language, to make the servant also liable for such offences.

9. We are, therefore of the opinion, that no absolute liability can be fastened on a servant under Section 16(1) read with Section 7 of the Act, and we answer the reference accordingly. It follows, that the respondents in these appeals were rightly acquitted by the court below. These appeals are, therefore dismissed.

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