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Court : Kerala

Decided On : May-23-2003

Reported in : 2004CriLJ1075; 2003(3)KLT1072

Judge : R. Basant, J.

Acts : Prevention of Food Adulteration Act, 1954 - Sections 10(2); Prevention of Food Adulteration Rules, 1954 - Rule 9

Appeal No. : Crl. R.P. Nos. 996 and 997 of 1994

Appellant : Anas Abdul Khader

Respondent : Food Inspector

Advocate for Def. : P.M. Habeeb, Public Prosecutor

Advocate for Pet/Ap. : B. Raman Pillai and; S. Vijayakumar, Advs.

Disposition : Petition allowed

Judgement :

R. Basant, J.

1. Aggrieved by the verdit of guilty, conviction and sentence under Section 16(1)(a)(i) and Section 7 of the Prevention of Food Adulteration Act, the petitioners (accused 1 and 2) have preferred these revision petitions.

2. The prosecution alleged that accused No. 2 on behalf of accused No. 1, licensee of Sona Restaurant at Paramount Tower, Calicut had sold 750 ml. of milk to the Food Inspector, PW.3, which, on analysis was found not to comply with the standards prescribed for buffalo's milk under the relevant Rules. It was alleged that thereby the accused had committed the offence alleged against them.

3. The accused denied the offeree alleged against them. Thereupon the prosecution examined PWs. 1 to 4 and proved Exts.P1 to 5. PW.3 is the Food Inspector and PW.4 his Peon. The accused No. 1 took the stand that she had no connection with the establishment. Accused No. 2, inter alia, contended that there was no proper sampling. The Food Inspector had no jurisdiction to draw the sample as the milk was not intended to be sold as such milk at the Restaurant. It was further contended that at any rate it must be held that there is no adulteration as the sample does conform to the standards prescribed for cow's milk and the standards applicable for buffalo's milk were wrongly applied to the sample. Another employee of the Restaurant was examined as DW. 1. Ext.D1 menu card of the Restaurant was also produced and marked. A Court exhibit was marked as Ext.C1.

4. The courts below concurrently came to the conclusion that the first accused is the licensee and the second accused an employee under her. The courts found that all the ingredients of the offences have been established satisfactorily. Accordingly, the Courts proceeded to pass the impugned Judgments.

5. Arguments have been advanced before me. Four contentions are raised by the learned Counsel for the accused/revision petitioners. First of all it is contended that there is no evidence to show that the first accused is the licensee. The very suggestion is that the first accused is only the wife of the owner of the Restaurant. Connection between the Restaurant and the family of the accused is thus not disputed. The courts below took Note of Ext. P14 application and Ext.C1 extract. I find absolutely no merit in the challenge raised against the concurrent finding that the accused No. 1 is the licensee in respect of the premises from where the sample was drawn. The challenge on this ground fails.

6. Secondly, placing reliance on the dictum laid in Mohammedkutty v. Food Inspector (1996 (2) KLT 569) it is contended that the sample has not been made homogenous either before or after the purchase. The Food Inspector has no obligation to make the sample homogenous before he purchases the same from the vendor. After purchase it is trite that in respect of certain articles whose nature and constitution is likely to be altered or interfered with, some procedure to make the sample purchased homogenous before it is divided into three parts must be followed by the Food Inspector. In the instant case we have the evidence of the Food Inspector that the vendor poured the milk into a vessel and that sample was divided into three equal parts by him in accordance with the Rules. I have gone through the cross-examination in detail. There was no whisper of a contention that the sample was not made homogenous. When the Food Inspector asserted on oath that the sample purchased was divided into three equal parts and poured into three sample bottles in accordance with the Rules, it must be assumed that the necessary requirements of law have been satisfied by him. In the total absence of any specific challenge about the manner in which the sample was divided into three equal parts, I can find no merit in the challenge made at later stages of the trial on the ground that the samples taken in the three bottles were not homogenous. The challenge on this ground must also hence necessarily fail.

7. Thirdly, it is contended that the proviso to Section 10(2) of the Prevention of Food Adulteration Act has been offended. Under Section 10 of the Act the powers of the Food Inspector are enumerated. I extract Section 10(2) below:

'Section 10(2).- Any Food Inspector may enter and inspect any place where any article of food is manufactured, or stored for sale, or stored for the manufacture of any other article of food for sale, or exposed or exhibited for sale or where any adulterant is manufactured or kept, and take samples of such article of food or adulterant for analysis:

Provided that no sample of any article of food, being primary food, shall be taken under this sub-section if it is not intended for sale as such food.'

8. Section 10(2) invests the Food Inspector with the power and authority to enter and inspect any place, where any article of food is kept for sale. But the proviso to

Section 10(2) contains a mandate that the Food Inspector shall not take any sample of a primary food unless such primary food is intended for sale as such food. The accused contends that the milk found in the premises of the Restaurant was not intended for sale as such milk and was intended to be used for preparation of food articles in the Restaurant. It was, no doubt, intended for sale in the sense that the food items prepared using such milk would be sold. In this view of the matter, following the dictum laid down in Food Inspector, Calicut Corporation v. Gopalan and Anr. (1971 KLT 462) the milk is intended to be sold. But the contention is that the milk was not intended to be sold as such milk. Reliance was placed on two decisions of this Court reported in Food Inspector v. Abdul Khader (1978 KLT 830) and Poulose v. Food Inspector (1992 (1) KLT 522). It is by now trite that the milk is an item of primary food and sample of milk cannot be drawn from a premises unless it is intended to be sold as milk.

9. On the question whether the milk is intended to be sold as milk we have no specific and direct evidence. In the mahazar Ext.P10, there is, of course, a statement that the milk was intended to be sold. But there is no such specific evidence either in the documents or in the oral evidence of witnesses that the milk was intended to be sold as milk. I make it clear that even if the milk were intended to be used for making tea/ coffee/other items of food, which articles were intended to be sold, the milk found in the premises would still qualify to be described as milk intended for sale. The crucial question, I repeat, is only whether the milk was intended to be sold as such milk.

10. The learned Counsel for the petitioners contends that there are many indications which probabilise the case of the accused that the milk was not intended to be sold as such milk. He first of all relied on the menu card, in which milk is not an item offered for sale. He then relied on the admitted circumstance that the sample was found in the kitchen of the restaurant indicating that it was used intended to be for preparation of articles in the kitchen. He also relied on the Public Analyst's report, Ext.P2, which shows that the milk sample contains added sugar. This was of course contrary to the assertions made by PW.3. But the fact remains that the milk found in the kitchen had added cane-sugar in it.

11. The learned Counsel for the accused further contends that at any rate the burden was on the Food Inspector to make necessary enquiries as insisted by Rule 9(f) and satisfy himself that the milk was intended to be sold as milk and was not merely intended to be used for preparation of other articles of food in the kitchen.

12. It must be noted that the Food Inspector is obliged to consider the question and satisfy himself that the milk is intended to be sold as milk in the premises. His jurisdiction to draw sample would depend on such satisfaction. It is not a defence to be raised by the accused. But it is a fact which the Food Inspector has to satisfy himself before he exercises his jurisdiction to draw sample. That is the inevitable conclusion which flows from Section 10(2) and its proviso. No enquiry appears to have been conducted by the Food Inspector under Rule 9(f). In these circumstances the learned Counsel for the accused contends that on probabilities it must be held that the milk found in the premises was not intended to be sold as milk and was intended to be used for the preparation of articles.

13. What was the articles for the preparation of which milk was intended to be used? We have the evidence of the Food Inspector that he found customers consuming tea/coffee. Obviously therefore tea/coffee was being prepared and served in the Restaurant. But the accused and his witness DW. 1 took the stand that no tea or coffee was being prepared in the premises. Milk could have been used for preparation of tea and coffee. But the accused and DW. 1 had taken the stand that the milk was used not for the preparation of tea or coffee, but for preparing pudding. He relied on Ext.D1 to show that cream caramel was offered as dessert in the Restaurant. This is the pudding referred to by DW.1, contends the learned Counsel for the revision petitioners. As against these probabilities the learned Prosecutor contends that 750 ml. of milk has been sold by the accused to the Food Inspector and this indicates that milk was intended to be sold as milk. No objection was raised at the time of sampling that the article/milk was not intended to be sold as milk. In these circumstances the fact that 750 ml. of milk was sold as milk to the Food Inspector without demur must convey eloquently that milk was intended to be sold as milk, it is urged.

14. I have anxiously considered all the relevant inputs. The fact that the milk is not an item of food mentioned in Ext.D1 menu card may not clinch the issue. It cannot be insisted that all articles offered must be shown in the menu card also. Probably, because of this we find the accused and DW. 1 denying the fact that tea/coffee was also offered for sale at the Restaurant. Merely because milk is not an item of food enumerated in Ext.D1 as available at the Restaurant it cannot be concluded that milk was not available for purchase at the Restaurant. But certainly that is an indication which can be used to favour the contention of the accused on broad probabilities. Similarly the fact that milk sample was available in the kitchen-is also one indication which could suggest that milk was kept there to be used for the preparation of other items of food. It may not be convincing, conclusive and clinching. But certainly this is one indication which would show that milk was intended to be used for the preparation of other articles of food. I am in agreement with the learned Counsel for the revision petitioners that in these circumstances the Food Inspector must certainly have enquired and satisfied himself whether the milk was intended to be sold as such milk. We have no entry in any contemporaneous document to show that the milk was intended to be sold as milk and that the Food Inspector had satisfied himself of this crucial fact. On probabilities, therefore, the contention of the accused that the milk was not intended to be sold as such milk appears to be impressive.

15. As against this we have only the circumstance that the milk was actually sold by the accused to the Food Inspector. I am of opinion that this cannot be reckoned as final, clinching, crucial or convincing. In respect of any article other than an item of primary food, it is irrelevant whether such article is intended or offered for sale as such or for preparation of other items of food. Therefore unless a vendor is specifically aware of the provisions of Section 10(2) and its proviso, he need not and cannot raise an objection that the article is not intended to be sold as such. That being the case, I find no merit in the contention that the failure/omission of the vendor to raise an objection that the milk was not intended to be sold as such should be reckoned as relevant, crucial or final.

16. I am in these circumstances of the opinion that the Food Inspector had riot cared to enquire and satisfy himself that the milk was intended to be sold as such.

Though there is no convincing evidence either way, the probabilities, according to me, point to the acceptability of the version of the accused that the milk was not intended to be sold as such.

17. It is true in that the decisions reported in 1978 KLT830 and 1992(1)KLT522, the fact scenario was different. A reading of the said Judgments show that there was virtually no dispute that the milk from which sample was drawn in those cases were not kept for sale as such and was intended to be used for the preparation of tea/coffee. In the case on hand, the facts do not lead the Court to such a clear and safe conclusion. But all the same a very reasonable doubt is raised in the mind of the Court as to whether the article i.e. boiled milk was kept in the kitchen of the Restaurant of the accused after adding sugar to it for the purpose of sale as such milk as contended by the prosecution or for the purpose of making pudding/other preparations, as contended by the accused. At any rate, I am satisfied that it would be absolutely reasonable to concede to the accused the benefit of doubt, which is aroused in the mind of this Court on the basis of unsatisfactory evidence. I particularly take note of the failure of the Food Inspector to make necessary enquiries and satisfy himself of this crucial jurisdictional fact that the milk was kept in the premises of the accused with the intention of being sold as such milk.

18. Lastly and fourthly the learned Counsel for the revision petitioners further contends that the authorities were not justified in assuming that the milk was offered for sale without specifying the source and in applying the standards of buffalo's milk to the sample. Here the facts appear to be of crucial importance. Ext.P2 is the report of the Public Analyst. It shows that milk fat was present to the extent of 4.1 per cent and milk solids not fat was present to the extent of 9 per cent. For cow's milk in Kerala the standards prescribed is 3.5 per cent milk fat and 8.5 per cent of milk solids not fat. If the standards of cow's milk were applied, the article will have to be held to be not adulterated. But so far as buffalo's milk is concerned, the standard prescribed is 5 per cent of milk fat and 9 per cent milk solids not fat. There is deficiency of milk fat if the standard of buffalo's milk were applied.

19. No one has a case that the accused stated that what was sold was buffalo's milk. No one has also a case that the accused represented that he does not know the source of the milk. The Food Inspector does not have a case that he asked for buffalo milk or that his enquiries revealed that it is buffalo milk. He does not have a case that he asked the vendor about the source of milk and the vendor stated that the source is not known to him. Inspite of all these, the standards of buffalo milk were applied.

20. The prosecution relies on Appendix B Entry A 11.01.11, Note (i) in support of the contention that the standards of buffalo milk can be safely applied. The said note reads as follows:

'Note (i).- When milk is offered for sale without indication of the class the standards prescribed for buffalo milk shall apply.'

The learned Prosecutor contends that the milk in this case was offered without indication of the class and hence the standards of buffalo milk must apply. The learned Counsel for the accused relies on Rule 9(f) of the P.F.A. Rules which mandates that the Food Inspector must make such inquiries and inspection as may be necessary to detect the offence. The Food Inspector can either demand a specified article. In the instant case he could have demanded buffalo milk or cow's milk. He did not admittedly do that. If he does not do that, he may demand a sample of an article which he points out. It would appear from the facts of this case that that is what he did in the instant case. Boiled milk was available in the kitchen of the Restaurant and he asked for the same. He did not care to enquire and ascertain what the source of the milk was. He has no case at all (in Ext.P10 or later) that the vendor stated that he cannot specify the source of milk. I am of the opinion that the Food Inspector was obliged and duty bound to make the necessary enquiries to ascertain the source of milk. Only if the vendor stated that it was buffalo milk or pleaded ignorance about the source of the milk or refused to reveal the source presumption under Note (i) referred above should have been invoked. The language of the Note, according to me. does not permit a presumption being drawn unless and before the Court is satisfied that the vendor did offer for sale of milk without specifying the source. What was pointed out by

the Food Inspector was sold by him. In Form 6 notice the Food Inspector recorded that it was boiled milk, which was sampled. In the voucher given also it was stated that price for boiled milk was obtained.

21. The learned Counsel for the accused and the learned Public Prosecutor were requested to work up the position and to bring to the notice of this Court judicial precedents, if any, having a bearing on this aspect. The learned Counsel for the revision petitioner placed reliance on the decision of a Single Bench of Allahabad High Court reported in Hari Krishnan v. State (1980 FAC 452). I am in total agreement with the reasons given by the learned Judge in para 12 of the said Judgment, which I extract below:

'No provision of the Act or the rules framed thereunder has been brought to the notice of the court which makes it obligatory on the vendors of the articles of food to put up a notice-board indicating the components which have gone into the making of a particular commodity. Similarly, no other provision of law has been cited from which it can be concluded that it is obligatory on the part of the vendor of the article of food to give such information to the customers orally without being asked. On the other hand, Rule 9 of the rules framed under the Act deals with the duty of the Food Inspector. The said rule, inter alia, provides that it shall be the duty of the Food Inspector to make such enquiries or inspection as may be necessary to detect the manufacture, storage or sale of articles of food in contravention of the Act, or rules framed thereunder. This rule therefore, makes it obligatory on the part of the Food Inspector to make necessary enquiries ' from the vendors of articles of food in order to enforce the provisions of the Act. If on making such enquiries, the vendor does not make any disclosure, only then the question of raising a presumption under the above said Articles of Schedule B of the Rules would arise. On the other hand, if the Food Inspector does not make any enquiry or if the vendor voluntarily does not state that the milk or curd, as the case may be, is buffalo's milk or has been made out of buffalo's milk, there can be no question of raising a presumption referred to in the aforesaid Articles. In my opinion, the language of Article A. 11.01.11 and A. 11.2.04 is absolutely free from any doubt and does not suffer from any ambiguity. Even if there is any ambiguity or doubt about the meaning of the aforesaid Articles, the same has to be resolved

in favour of the subject. In these circumstances, the curd could not have been said to be adulterated.'

I agree that the rule makes it obligatory for the Food Inspector to make necessary enquiries under Rule 9(f) in order to enforce the provisions of the Act. If only the vendor does not make necessary disclosures or pleads ignorance about the source in such enquiries then only the question of raising a presumption under the Note referred above can arise. No other precedents are brought to my notice. It follows, therefore, that the prosecution and the Courts below were wrong in drawing a presumption tinder Note (i) and applying the standards of buffalo milk to the milk sold. The challenge on this ground also succeeds.

22. On the basis of the above discussions I come to the conclusion that the impugned Judgments do warrant interference. The petitioners/accused are, at any rate, entitled to the benefit of doubt. They are hence found not guilty and acquitted.

23. In the result:

(a) these revision petitions are allowed;

(b) the impugned Judgments are set aside;

(c) the revision petitioners are found not guilty and acquitted of the charges levelled against them.

The bail bonds shall stand discharged and they are set at liberty.

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