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Court : Rajasthan

Decided On : Jan-29-1979

Reported in : 1980CriLJ779

Judge : S.K. Mal Lodha, J.

Appellant : State of Rajasthan

Respondent : Tejmal

Judgement :

S.K. Mal Lodha, J.

1. Against the judgment of acquittal dated July 14, 1977 passed by the Chief Judicial Magistrate, Bhilwara, the State of Rajasthan has preferred this appeal for securing the conviction of the accused-respondent under Section 7/16 of the Prevention of Food Adulteration Act (No. XXXVII of 1954) (for short 'the Act' hereafter).

2. The Food Inspector, Municipal Area, Bhilwara filed a complaint on August 31, 1970 against the accused under Section 16(1) of the Act. According to the prosecution, the accused was carrying on his business in a shop situate inside Sarkari Darwaja, Sadar Bazar, Bhilwara under the name and style of swastik Masala Bhandar. On June 8, 1970, at 5 p. m., the Food Inspector Sardarsingh went there and purchased 450 grams chillies powder from the accused at a price

of Rs. 2.70. The accused was duly informed vide Ex. P1 (Form No. VI) that the chillies powder was being purchased for the purpose of getting it analysed. The chillies powder, purchased from the accused was divided into three equal parts putting each into three separate bottles, which were duly corked and sealed in the presence of Motbir, P. W. 2, Govindram vide Panchanama Ex. P3. One of the bottles was given to the accused and one was sent to the Public Analyst along with the letter Ex. B4 (Form No. VII) dated June 9, 1970 for analysis. The Public Analyst, Rajasthan, Jaipur in his report Ex. P. 5 dated July 2/4, 1970, opined that the sample so taken from the accused was adulterated as it did not conform to the prescribed standard of purity. The result of the analysis, as mentioned in the report, was as under:

Moisture Content : 5.28% Total Ash : 9.60% Ash insoluble in dilute HC1 : 1.40% Nonvolatile ether extract : 22.23% Crude fibre : 28.28% Added colouring matter : Nil Insect infestation : Nil

As the chillies powder was found to be adulterated, the complaint (Ex. D1) was filed after obtaining sanction for prosecution under Section 20 of the Act, from the Administrator Municipal Council, Bhilwara dated August 31, 1970. On March 30, 1971, Sardarsingh, Food Inspector was examined and after hearing arguments, charge under Section 7/16 of the Act was framed by the First Class Magistrate, Bhilwara. The accused denied to have committed any offence and claimed trial. He desired for further cross-examination of Sardarsingh, Food Inspector, which was allowed. The prosecution examined Govindram P. W. 2 to prove Ex. P1, Ex. P2 and Ex. P3. The statement of accused was recorded. In defence the accused examined D. W. 1 Saligram. After concluding the trial and hearing arguments, the learned Chief Judicial Magistrate came to the conclusion that the chillies powder, the sample of which was taken by Sardarsingh P. W. 1, Food Inspector, did not conform to the prescribed standard of purity and it was adulterated. He, however, was of the opinion that the chillies powder was a 'condiment', that requisite quantity of 200 grams of chillies powder was not sent to the Public Analyst for analysis and so there was non-compliance of Rule 22 of the Prevention of Adulteration Rules (hereafter 'the Rules') which deals with quantity of sample to be sent to the Public Analyst. Relying on the decision reported in Rajaldas G.

Pamnani v. State of Maharashtra : 1975 CriLJ254 , he was of the opinion that non-compliance of Rule 22 with respect to the quantity to be supplied caused not only infraction of the provisions but also injustice to the accused. He, therefore acquitted the accused under Section 7/16 of the Act by his order dated July 14, 1977. The State of Rajasthan has, therefore, come up in appeal against the aforesaid judgment.

3. The appeal remained part heard on October 28, 1978. Mr. N.M. Lodha, learned Counsel for the State and Mr. J.M. Bhandari, learned Counsel for the accused-respondent concluded their arguments on November 11, 1978, in which it was stated that he had started Kirana business in a shop in the name and style of Swastik Masala Bhandar in Bhilwara in January, 1970 and closed it in June, 1971, and he is very old and has completed 70 years of age. He has, inter alia, stated that he is a retired clerk. At the request of Mr. D.S. Shishodia, Public Prosecutor and Mr. J.M. Bhandari, learned Counsel for the accused-respondent and in view of Section 20-AA, inserted in the Act by Act No. XXXIV of 1976, with effect from April 1, 1976, additional arguments were heard.

4. Mr. N.M. Lodha, appearing for the State, in the first instance, contended before me that chillies powder is not a condiment as found by the Magistrate. According to him, chillies powder is an essential part of the food and falls under the category 'spices', and, therefore, the complainant was quite justified in sending only 150 grams of chillies powder to the Public Analyat for analysis. In support of his contention, learned Counsel placed strong reliance on the decision of the Gujarat High Court reported in Kalidas Damordardas v. State of Gujarat (1976) 1 FAC 117. Mr. J.M. Bhandari, on the other hand, contended that chillies powder is not a 'spice' but is a 'condiment' and, therefore, the quantity of 200 grams of chillies powder should have been sent to the Public Analyat for analysis, and because of non-compliance of Rule 22, the accused-respondent was rightly acquitted. In this connection, he invited my attention to Jayantilal Kunvarji v. State of Maharashtra (1976) 1 FAC 137 (Bom), Vithal Kalappa Shetty v. State of Maharashtra (1976) 2 FAC 157 (Bom), State of Maharashtra v. A. Mamoo Mohiddin Malbari 1978 Cri LJ 1166 (Bom) and Hans Raj v. The State (1976) 1 FAC 168 (Delhi).

5. In order to appreciate the rival contentions of the parties, it is necessary to refer to Rule 22 of the Rules, relevant part of which reads as under:

R. 22. Quantity of sample to be sent to the Public Analyst:

The quantity of sample of food to be sent to the Public Analyst/Director for analysis shall be as specified below:

Articles of food : Approx. quantity to be supplied
17. Spices : 150 grams
23. Foods not specified : 200 grams
Rule 5 of the Rules is as under:
R. 5 Standards of quantity of the various articles of food specified in Appendix B to these Rules are as defined in that Appendix.

The Entry as regards chillies occurs under the heading 'Spices and Condiments' at Serial No. A.05. Relevant part of this Entry reads as under.

A.05.05-Chillies (Lal Mirchi) means the dried ripe fruits or pods of capsicum annum/Capsicum frutescens L. The proportion of extraneous matter including calyx pieces, loose tops, dirt, lumps of earth, stones shall not exceed 5.0 per cent by weight. The pods shall be free from extraneous colouring matter, coating of mineral oil and other harmful sub-stance. The insect damaged fruit or seeds as the case may be shall not exceed by 5 per cent by weight.

A. 05.05.01-Chillies (Lal Mirchi) powder means the powder obtained by grinding clean dried chilli pods of capsicum frutescens L. Capsicum Annum. The chilli powder shall be dry free from dirt, mould growth, insect infestation, extraneous matter, added colouring matter, 'and flavouring matter. The chilly powder may contain any edible oil to a maximum limit of 2 per cent by weight under a label declaration for the amount and the nature of oil used.' The chilli powder shall conform to the following standards:

Moisture...Not more than 12.0 per cent by weight.

Total Ash...Not more than 8.0 percent by weight.

Ash insoluble in dilute HCL...Not more than 0.5 per cent by weight

Crude fibre...Not more than 3.0 percent by weight.

6. It may be mentioned here that before its amendment in 1968, item No. A.05 of Appendix B of the Rules had the heading of 'spices'. It laid down that standard specified for the various spices given in this clause shall apply to spices in whatever form whether whole or partly ground or in powder form. Under this heading, various articles of food were mentioned. Chillies were mentioned at item No. A.05.10. As stated above, Rule 22 lays down the quantity of sample of food which is required to be sent to the Public Analyst for analysis in respect of various articles of food. Item No. 17 of this rule deals with 'spices' and approximately 150 gms. of it are required to be sent to the Public Analyst. Item No. 23, at the relevant time, was in respect of 'Foods (not specified)' and requires approximately 200 grams of such food to be supplied to the Public Analyst. In 1968, item No. A.05 of Appendix 'B' was amended and the heading was changed from 'Spices' to 'Spices and Condiments'. Certain more items were added to the list of articles of food under this heading. No indication was, however, given as to which of the items shown under 'spices and condiments' were 'spices' and which were 'condiments'. Despite the change having been brought in item No A.05, Rule 22 was not changed. It follows, therefore, that the condiments would fall under the residuary Item No. 23 'Foods (not specified)' and not under 'Spices',. It is worthy of notice that another change was brought in 1974 by adding as many as 14 entries of articles of food and also specifying their quantities to be supplied to the Public Analyst. It is very significant that even then condiments were not specifically mentioned and thus they still continue to fall under the residuary entry.

7. Learned Judge of the Gujarat High Court in Kalidas's case, examined the meaning of words 'Spices' and 'Condiment' as given in Oxford English Dictionary and New Webster Encyclopedic Dictionary, and thereafter, observed:

This shows that anything of pronounced flavour used to season or give relish to food or to stimulate the appetite or to gratify the taste would be a condiment....Chillies are used as condiments and hence, according to the above Dictionaries, they are spices. Mr. thekore is not right when he says that as chillies are used as condiments they cannot be treated as spices, but on the contrary they

fall within the meaning of the word 'spice' only on the ground that they are used as condiments or in other words it is because of the purpose for which chillies are largely used that they fall within the term 'spices'. Even if it is assumed that chillies are condiments they do not cease to be 'spices' within the meaning of the term according to the dictionary. For the reasons stated above, the argument of Mr. thekore that chillies are only condiments and not spices cannot be accepted. It appears that as spices are ordinarily used as condiments they are grouped together under the heading 'Spices and Condiments'.

In this view of the matter, he held that chillies fall under the item 'spices' at Sr. No. 17 of Rule 22 and, therefore, the sample of 150 grams of chillies powder sent to the Public Analyst, for analysis was quite justified. The question: whether chillies powder falls under item No. 17 or under item No. 23, came up for consideration before the Bombay High Court in the decisions referred to above. It was held that chillies powder is not a 'spice' and it is a 'condiment'. The aforesaid decisions of the Bombay High Court and the reasoning given therein were followed by the Delhi High Court in Hansraj's case. The learned Judge, after taking into consideration the history of the relevant Rules, observed as under:

I cannot treat the absence of 'condiments' from Rule 22 as a mere omission, because as late as 1974 Rule 22 was amended and still 'condiments' were not specifically mentioned. In case there was no intention to create any distinction between the two for the purposes of Rule 22, then Item 17 of Rule 22 would have been amended by adding the words 'and condiments' after the word 'spices'. The omission seems to me to be deliberate and not accidental. In these circumstances it is not correct to say that all the articles, which had been mentioned earlier under item A,05 of Appendix 'B', should be treated as spices only.

Learned Judge examined the meaning of word 'condiment' as given in Webster's New Third International Dictionary wherein condiment has been defined as 'an appetising and usually pungent sub-stance of natural origin (as pepper, vinegar or mustard): any of various complex compositions having similar qualities (as curry or chilly powder, pickles, or catsup). On the basis of this definition the learned Judge of the Delhi High Court was of the opinion that chillies powder has always been

treated as a 'condiment' and not as a 'spice'.

8. By 'spices' what is meant is a mixture of several items such as cloves, jira, chilly powder and other articles which go to make 'masala', and, therefore, simply chilly powder without anything more cannot be regarded as spices. It will be useful here to refer to the definition of 'Food'. The 'Food' has been defined in Section 2(v) of the Act. The chillies powder can fall under Cl. (a) of Section 2(v) as it ordinarily enters into, or is used in the preparation of human food. Chillies powder is, therefore food. Cl. (b) of Section 2(v) reveals that flavouring matter or condiments have been put in a separate and different category even they are used in preparing human food, sub-stances mentioned in Clause (b) need not ordinarily entered into or used in the preparation of human food. It is true that they are 'not essentials but they are used for, giving additional flavour to the food This may be the reason for dealing with! them separately. From the dictionary meaning of spice, it is clear that it is' not a sub-stitute for chillies powder but is an additional sub-stance which is ordinarily added to food in its preparation for giving it a special flavour or taste.

9. Following the decisions of the Bombay and Delhi High Courts and the reasons mentioned above, I hold that the chillies powder is not a 'spice' but is a 'condiment;', and, therefore, it falls under item No. 23 of Rule 22 and not under item 17 of Rule 22.

I respectfully dissent from the view taken by the Gujarat High Court that chillies powder falls under the item No. 17 'spices' of Rule 22. In my opinion, therefore, learned Chief Judicial Magistrate was right in holding that chillies powder is not a 'spice' and, therefore, it does not fall under item No. 17 of Rule 22 but falls under item No, 23 'Foods (not specified)'.

10. According to Rule 22, the quantity of food to be sent to the Public Analyst, should be approximately 200 gms., but in this case, admittedly, chillies powder weighing 150 gms. was sent to the Public Analyst for analysis. The learned Chief Judicial Magistrate, relying on the decision reported in Rajaldas G. Pamnani's case, held that noncompliance of Rule 22 caused not only infraction of the provisions but also resulted in injustice. The decision in Rajaldas G. Pamnani's

case was examined by their lordships of the Supreme Court in *State of Kerala v. Alasserry Mohammed* : 1978 CriLJ925 . It was laid down as under:

On a careful consideration of the matter, we have come to the conclusion, and we say so with very great respect, that *Pamnani's case* : 1975 CriLJ254 on the point at issue before us was not correctly decided.

In *State of Kerala's case*, it was held that Rule 22 is directory and not mandatory.

A note of caution was given in the following words in the aforesaid case:

We must hasten to reiterate what we have said above that, even so, Food Inspectors should take care to see that they comply with the Rule as far as possible.

In the second column of Rule 22 expression 'approximate quantity' has been used. While considering this expression, their lordships in the *State of Kerala's case* observed that the expression 'approximate quantity' is meant to convey that the quantity to be supplied must be in the close vicinity of the quantity specified and that so long it is so there is no infraction of the Rule at all. Thereafter it was observed as under:

But the question of non-compliance with the Rule comes in when the quantity supplied is not in close vicinity of the quantity specified and is appreciably below it. Even so, if the quantity supplied is sufficient and enables the Public Analyst to do his duty of making a correct analysis, it should be inferred that the Rule has been sub-stantially complied with, as the purpose of the Rule has been achieved.

A perusal of the report Ex. P5 of the Public Analyst shows that he, on the basis of the quantity of the chillies powder, supplied to him, was able to make a correct analysis and formed the opinion that the sample of the chillies powder sent to him was adulterated and that it did not conform to the prescribed standard of purity. In these circumstances, though the chillies powder is a condiment, and only 150 grams of that were sent to the Public Analyst, still as the Public Analyst was able to form the opinion, Rule 22 was sub-stantially complied with. As the chillies powder, the sample of which was taken from the accused-respondent by the Food

Inspector was adulterated. I have no hesitation in holding that accused-respondent has committed an offence punishable under Section 16(1)(a) read with Section 7(1) of the Act. I, therefore, set aside the acquittal of the accused recorded by the Chief Judicial Magistrate by his order dated July 14, 1977 and convict him for an offence under Section 7(l)/7(1)(a)(i) of the Act. Learned Counsel for the accused-respondent, then, submitted that having regard to the old age of the accused and the circumstances mentioned in his affidavit, which was filed on November 11, 1978, he may be given the benefit of Probation of Offenders Act (No., XX of 1958). He invited my attention to Ghanshyam Das v. Municipal Corporation of Delhi : AIR 1975 SC845 and the decisions of M.C. Jain., J. in Criminal Appeal No. 410 of 1974, Municipal Council, Sri Ganganagar v. Shyamsunder and No. 411 of 1974, Municipal Council, Sri Ganganagar v. Deshraj decided on December 12, 1978. M.C. Jain, J., relying on Ghanshyam Das's case and Municipal Council, Alwar v. Bhulu Ram 1975 WLN (UC) 415, took the time factor into consideration and instead of sending the accused to jail by awarding sentence, released them on probation of good conduct. In the cases before M.C. Jain, J., in Criminal Appeal No. 410 of 1974 offence was committed on September 8, 1968 and acquittal was made on February 13, 1974 and in Cr. Appeal No. 411 of 1974, offence was committed on August 7, 1968 and the acquittal was recorded on December 21, 1973. On behalf of the appellant, reliance was placed on P.K. Tejani v. M.R. Dange : 1974 CriLJ313 and Prem Ballab v. State : 1977 CriLJ12 . It was submitted that the accused-respondent should not be given the benefit of probation.

11. It is relevant here to refer to Section 20-AA, which was inserted in the Act No. XXXIV of 1976. It reads as under:

Section 20-AA. Application of the Probation of Offenders Act, 1958 and Section 360 of the Code of Criminal Procedure, 1973: Nothing contained in the Probation of Offenders Act, 20 of 1958 or Section 360 of the Code of Criminal Procedure, 1973, 2 of 1974 shall apply to a person convicted of an offence under this Act unless that person is under eighteen years of age.

This new Section 20-AA came into force from April 1, 1976. In P.K. Tejani's case, his lordship of the Supreme Court Krishna Iyer, J., speaking for the Court,

observed as under.

The kindly application of the probation principles is negated by the imperatives of social defence and the improbabilities of moral proselytisation. No chance can be taken by society with a man whose anti-social operations, disguised as a respectable trade, imperil numerous innocents. He is a security risk. Secondly, these economic offences committed by white collar criminals are unlikely to be dissuaded by the gentle probationary process. Neither casual provocation nor motive against particular persons but planned profit-making from numbers of consumers furnishes the incentive-not easily humanised by the therapeutic probationary measure.

The decision in P.K. Tejani's case was followed in Prem Ballab's case, and the benefit of Probation of Offenders Act was declined. An additional ground was also taken into consideration by their lordships of the Supreme Court in Prem Ballab's case. It has been held in the said case:

that Section 20-AA providing that nothing contained in the Probation of Offenders Act, 1958 or Section 360 of the Code of Criminal Procedure, 1973 shall apply to a person convicted of an offence under the Act unless the person is under eighteen years of age. This amendment of course would not be applicable in the present case but it shows the legislative trend which it would not be right for the court to ignore.

Having considered the law laid down by their lordships of the Supreme Court in P.K. Tejani's case and Prem Ballab's case relating to the benefit of probation in respect of the economic offence, I am of the opinion that the accused respondent is not entitled to the benefit of the Probation of Offenders Act as adulteration of food is an economic offence prompted by profit motive. In these circumstances, I am not inclined to grant the benefit of Probation of Offenders Act, 1958 to the accused-respondent.

12. Next question that, now, arises is about sentence. At the relevant time when the offence was committed, under proviso to Section 16(1)(a) the court was empowered for any adequate and special reasons to be mentioned in the

judgment to impose a sentence of imprisonment for a term of less than six months or of fine of less than one thousand rupees or of both imprisonment for a term of less than six months and fine of less than one thousand rupees. It is not disputed that in this case, proviso to Section 16(1)(a) as it stood then, is applicable. The offence was committed on June 8, 1970. The judgment of the acquittal was passed on July 14, 1977. It is clear from the affidavit of the accused-respondent, submitted on November 11, 1978, that he is an old man of 70 years and often remains ill. In similar circumstances, advantage of proviso was given by this Court in *State of Rajasthan v. Mansa Ram* 1975 WLN 662 and *Municipal Council, Jaipur v. Sita Ram* 1975 WLN 792.

13. Having he considered all the facts and circumstances of the case and following the aforesaid two decisions of this Court and *Ram Labhaya v. Municipal Corporation of Delhi* : 1974 CriLJ672 . I am inclined to think that a fine of Rs. 1000/- would meet the ends of justice.

14. I, accordingly accept this appeal, set aside the judgment of acquittal dated July 14, 1977 and convict the accused under Section 7/16 of the Act and impose a fine of Rs. 1000/-. In default of payment of fine, the accused-respondent shall undergo rigorous imprisonment for three months. The accused-respondent is directed to deposit the amount of fine of Rs. 1000/- within a month from today, failing which the Chief Judicial Magistrate, Bhilwara will cause the accused to be arrested to undergo the sentence awarded to him in default of payment of fine.

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