

State by Public Prosecutor Vs. Vaithi

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Court : Chennai

Decided On : Sep-10-1982

Reported in : 1983CriLJ1565

Judge : Maheswaran, J.

Appellant : State by Public Prosecutor

Respondent : Vaithi

Judgement :

Maheswaran, J.

1. The State has preferred this appeal against the judgment of the learned Additional Judicial First Class Magistrate, Tiruchirapalli, acquitting the accused who has been charged for an offence under Sections 7 (i) and 16(1)(a) (i) read with Section 2 (ia) (m) of the Prevention of Food Adulteration Act.

2. P. W. 1 Food Inspector of Abishega-puram Town Panchayat, purchased for analysis 750 ml. of milk which is a mixture of cow's and buffalo's milk for Rs. 1.15 from the accused, Vaithi, kept for sale on 26-5-1978, at about 12-30 p.m. at Colony Main Road, Crawford, p. W. 1 divided the milk so purchased into three equal parts and sealed them in three clean dry bottles and sent one such bottle to the Analyst. The report of the Analyst showed that the sample was deficient in solids-non-fat to the extent of at least 41 per cent. The Food Inspector laid the

complaint.

3. The defence was that the milk sold to the Food Inspector was not intended for sale. The Magistrate observed that the accused is not having a licence for sale of milk and that the milk was not intended for sale and in the end acquitted, the accused. The State has preferred this appeal.

4. It is contended by the Prosecutor that once the milk sold for analysis to the Food Inspector is found to be adulterated, the accused would be guilty of contravention of Sections 7 (i) and 16 (1) (a) (i) and Section 2 (ia) (m) of the Act.

5. The counsel for the respondent contended (1) that the milk was not intended, for sale; (2) that there has been no sale of the milk in question as the Food Inspector has only 'taken' a sample and not purchased it; (3) that there is an element of compulsion and therefore there is no sale; (4) that the Health authority himself has not served the notice under Section 13(2), and (5) that the milk purchased has not been stirred at all by the Food Inspector before taking the sample and therefore the sample taken is not the representative of the entire stock.

6. It will be convenient to deal with the second and third, contentions together. In regard to the contention that there has been no sale of milk, it must be pointed out that the evidence of P. W. 1, the Food Inspector, is that he purchased 750 ml. of milk from the accused for Rs. 1.15. Ex. P 2 is the receipt which shows that cash of Rs. 1.15 was received by the accused from the Food Inspector for the sale of 750 ml. of cow's and buffalo's milk. Two witnesses have attested the receipt Ex P 2. One of the attestors is P. W. 2 and he deposes that a sum of Rs. 1.15 was paid, by P. W. 1 to the accused and the accused passed the receipt Ex. P 2 and that he has attested in it. But, strong reliance is placed on Ex. P 1, which is a notice in Form VI which states that the Food Inspector has 'taken' samples of food specified to have the same analysed by the Public Analyst. What the learned Counsel pointed out is that the word 'sale' has not been used in the form and. therefore there is no sale. There is therefore clear evidence of purchase by the Food Inspector corroborated, by the evidence of P. W. 2.

7. His next contention is that the accused has been compelled to give the sample, The learned Counsel for the respondent-accused invited my attention to a ruling of this Court in *In re Rathamani* : AIR1965 All494 . That was a case where a sample of milk was purchased by the Food Inspector and it was found to be adulterated. The defence in that case was that the milk was being taken not for being sold as milk, but in order to manufacture 'tin curd' in the course of the business in which the accused was engaged. Anantanarayanan J. as he then was, took the view that 'it is quite possible, and even probable, that the accused was taking the milk for manufacture of curd which was his business'. The learned Judge referred to *Food Inspector v. Parameswaran*, and relied on certain observations of Raman Nair J. and pointed out that if the vendor is aware that the sale is a forced one, in the sense that an official of the department is compelling the vendor to part with the sample, because of the statutory obligation and further because prevention of the taking such a sample by the Food Inspector is itself an offence under Section 16 (1) (b) of the Act, then there is no 'sale' and that it is only a case of seizure or compulsory acquisition though it may externally wear the form of semblance of a 'sale'. The learned Judge also relied on the observation of Horwill J. in *B. Kanakayya In re* AIR 1942 Mad 609 : 1942 Cri LJ 863, that an intending purchaser cannot use physical force or threats to compel the owner to part with the goods and if he does, the transaction is not a sale. Finally, the learned Judge held that there is no offence under Section 7 (i) of the Act, if there is merely a compulsory seizure of a sample by the officer of the department, because such seizure, even if money be paid therefor, will not amount to a sale.

8. In *Public Prosecutor V. Matha Satyam* a single Judge of the High Court of Andhra Pradesh took the view that if a person in possession of an article of food refuses to receive the price tendered by the Food Inspector, it can be an indication of the fact that he was not selling the article of food, but was only allowing a sample being taken by the Food Inspector so that he may not commit an offence and become liable for punishment under Section 16 (1) and Section 7 of the P. F. A. Act but when a person allows or does not prevent sample of article of food in his possession being taken for analysis and receives the amount tendered to him as cost by the Food Inspector or under Section 10(a) of the Act, it will be presumed that he made a sale of the article for analysis as defined in Section 2

(xiii), but that presumption is rebuttable.

9. With great respect to Anantanarayanan J. as he then was, I am unable to accept the view taken by him in *In re Radhamani* : AIR1965 All494 . The view of Raman Nair J. in *Food Inspector v. Parameswaran*, on which reliance was placed by Anantanarayanan J. in *In re Radhamani* AIR 1965 Mad 146, has not been accepted by the Supreme Court in *Mangaldas Raghavji Ruparel v. State of Maharashtra* : 1966 CriLJ106 . Ramaswami J. in *Public Prosecutor v. Dada Haji Ebrahim* : AIR1953 Mad241 , dissented from the view taken by Horwill J. in *In re Ballamkonda Kankayya* AIR 1942 Mad, 609 : 1942 Cri LJ 863, on which reliance was placed by Anantanarayanan J. RamaswamiJ. took the view that the transaction by which a sample of article of food was obtained by the Sanitary Inspector from the vendor amounts to a sale even though that man was bound to give the sample as tender of the price thereof.

10. *Mangaldas Raghavji Ruparel v. State of Maharashtra* : 1966 CriLJ106 , was a case where Mangaldas, a wholesale dealer, commission agent, exporter, supplier and manufacturer of various kinds of spices doing business at Bombay, was prosecuted along with two others, Daryanomal, who is a grocery merchant at Nasik and one Kodumal, servant of Daryanomal, under Section 16 (1) (a), read with Section 7 (v) of the P. F. A. Act. Daryanomal purchased from Mangaladas a bag of turmeric powder which was despatched through a public carrier. Kodumal received that turmeric powder on behalf of Daryanomal at Nasik Municipality. The Food Inspector purchased from Kodumal 12 ounces of turmeric powder for analysis. After complying with all the formalities the Food Inspector sent a portion of that powder for analysis. The report of the Analyst showed that the turmeric powder was adulterated within the meaning of Section 2 (i) of the Act. The three persons were prosecuted and convicted by the Magistral. The conviction was upheld by the High Court and in the Supreme Court, it was contended on behalf of the appellants inter alia that taking of a sample under Section 10 was not a sale within the meaning of Section 2 (xiii) and therefore Section 7 (v) of the Act was not infringed. An argument was advanced that a contract must be consensual and that this implies that both the parties to it must act voluntarily. The Supreme Court in repelling this argument observed (at p. 113):--

No doubt a contract comes into existence by the acceptance of a proposal made by one person to another by that-other person. That other person is not bound to accept the proposal but it may not necessarily follow that where that. other person had no choice but to accept the proposal the transaction would never amount to a contract. Apart from this we need not, however, consider this argument, because throughout the case was argued on the footing that the transaction was 'sale'. That was evidently because here we have a special definition of 'sale' in Section 2 (xiii) of the Act, which specifically includes within its ambit a sale for analysis.

11. The question whether the transaction in which the possessor of an adulterated food refuses to sell but only lets the sample be taken and no price for the same is paid to him by the Food Inspector amounts to 'sale' within the meaning of Section 2 (xiii) of the P. F. A. Act', was posed before a Full Bench of the Allahabad High Court in *Fakhruddin v. State* 1976 Cri LJ 1210. The learned Judges observed thus (at p. 1214):--

When the Food Inspector, in exercise of his powers under Section 10 of the Act, takes the sample of any article of food from a person, he necessarily makes an offer to purchase the goods. That offer is under compulsion of law bound to be accepted by the person possessing the article of food and contract of sale comes into existence. Under the Prevention of Food Adulteration Act, it has to be deemed to be 'sale'. As soon as the goods are ascertained a transfer of property in the goods takes place and the sale becomes complete even under the Sale of Goods Act.

12. In the instant case, the evidence of the Food Inspector as well as Ex P 2 show that the Food Inspector has paid the price for the sample taken by him, to the accused. There is no evidence that the accused refused to take the money, or that it was not paid to him by the Food Inspector.

13. *State of Tamil Nadu v. R. Krishnamurthi* : 1980 CriLJ402 , was a case where gingelly oil mixed with 15 per cent of groundnut oil was sold as gingelly oil by the accused therein to the Food Inspector, Thanjavur Municipality. The defence in that case was that the accused kept the oil in his shop to be sold not for human consumption, but for external use. He was convicted by the trial Magistrate under

Section 16 (1) (a) (i) read, with Section 2 (ia) (m) of the P. F. A. Act, and sentenced to imprisonment till the rising of court and to a fine of Rs. 200. In appeal, the Sessions Judge acquitted, the accused. The State preferred an appeal, to the High Court, Madras and the High Court confirmed the order of acquittal. The State preferred an appeal to the Supreme Court. Their Lordships of the Supreme Court observed (para11) --

A person selling an adulterated sample to a Food Inspector could invariably inform him that it was not for human consumption and thereby insure himself against prosecution for selling adulterated food. If sale for analysis is an unqualified sale, for the purposes of the Act, there is no reason why other sales of the same article should not be sales for the purposes of the Act. The question may be asked why sale for analysis should be specially mentioned if all manner of sales are included in the definition. It is only to prevent the argument that sale for analysis is not a consensual sale and hence no sale, an argument which was advanced and, rejected in *Mangaldas v. State of Maharashtra* : 1966 CriLJ106 .

These observations of the Supreme Court in *Mangaldas Raghavji Ruparel v. State of Maharashtra* : 1966 CriLJ106 and in *State of Tamil Nadu v. R. Krishnamurthi* : 1980 CriLJ402 , are sufficient to negative the contention of the counsel for the respondent-accused that a sale made under compulsion of law is not a sale. Therefore the sale of milk by the accused to the Food Inspector in the instant case for analysis would be a 'sale' within the meaning of Section 2 (xiii), of the P. F. A. Act.

14. As regards the first contention that the milk was not intended for sale, I may immediately point out that it is immaterial whether the article of food which was sold to Food Inspector was intended for sale, when once it is proved that the accused has made a sale for analysis to the Food Inspector. Further P. W. 1 has stated that the accused told him that he is taking the milk for sale.

15. One other contention is raised by the counsel for the respondent-accused and that is the Local (Health) Authority has not served the notice under Section 13 (2), but only the Food Inspector has served it. There is no substance in this conclusion (contention ?). A perusal of the notice under Section 13 (2) marked as Ex P 10,

shows that it is only the Local (Health) Authority who has signed the notice. The endorsement on the receipt Ex P 11 by the accused does not show that it was the Local (Health) Authority who served it. All that Section 13 (2) says is that after the institution of prosecution against the person from whom the sample of the article of food was taken, the Local (Health) Authority will forward in such manner as may be prescribed, a copy of the report of the result of the analysis to such person from whom the sample of article of food, was taken, informing him that if he so desired, he can make an application to the Court within a period of ten days from the date of receipt of the copy of the report to get the sample of the article of food kept by the Local (Health) Authority analysed by the Central Food Laboratory, and it is not contemplated that the Local (Health) Authority should personally serve the notice under Section 13 (2) of the Act. This contention of the counsel for the respondent which is totally devoid of merits should, fail.

16. It was finally contended that the Food Inspector has not stirred the milk before taking the sample and therefore the sample is not a representative sample of the entire stock. Strong reliance is placed on an unreported judgment in Cr. App. No. 266 of 1979 of this Court. Sathar Sayeed J. following the ruling of a Division Bench of Rajasthan High Court in State of Rajasthan v. Kachab , took the view that 'as there is no stirring of the milk by the Food Inspector, it cannot be said that the sample of the milk sent to the Public Analyst truly represented the milk to be tested.' The learned, Judges of Rajasthan High Court made reference to a book 'A Laboratory Manual of Milk Inspection' by A. C Aggarwala and B. M. Sharma, 4th Edn. 1961, wherein certain guidelines have been laid down for careful and accurate sampling of the milk. They have taken the view that thorough mixing of milk must first be ensured either by stirring with a long handled dipper if the container is big, or by pouring from one vessel to another or by shaking gently. That was a case where the Food Inspector purchased 750 grams of milk from the accused therein for 47 paise and divided it into three equal parts and sealed them after adding formalin and sent one of the sealed bottles to the Public Analyst, Jodhpur, who, on analysis, found sample to be adulterated as it does not conform to the standard prescribed, for cow's milk. The result of the analysis in that case was : fat contents-- 4.2 per cent; solids-non-fats -- 7.8 per cent. It is apparent from the judgment that the sample was also analysed by the Director of Central Food

Laboratory Calcutta, and the analysis by the Central Food Laboratory showed that the sample contained milk fat 3.3 per cent and milk solids-non-fat 6.5 per cent. The learned Judges took the view that as there was no stirring either with a long handled, dipper or by pouring it from one vessel to another, it is possible that the sample of milk might not have been a true representative of the whole body of the milk contained in the container on account of the presence of fat globules or bubbles in it. With great respect to the learned Judges of Rajasthan High Court, I am unable to agree that the accused is entitled to an acquittal merely on the ground that there was no stirring of the milk by the Food Inspector before taking the sample. In my view, it is immaterial whether the sample is a true representative of the whole body of the milk or not, when once the milk sold to the Food, Inspector is found to be adulterated. The same is the view taken by Kader J. in *State of Kerala v. K. C. John*, 1978 2 FAC 275 : 1979 Cri LJ 48 , 17. *State of Kerala v. Alaserry Mohamed* : 1978 CriLJ925 was a case which dealt with the question as to whether non-compliance of Rule 22. Prevention of Food Adulteration Rules, would vitiate the trial or the conviction recorded under Section 16 (1) (a) (i) of the Act. Rule 22 deals with the quantity of sample to be sent to the Public Analyst. The Supreme Court observed (at p. 931)--

A representative sample has got a different connotation, meaning and purpose in commercial transactions. If for instance, an average price is to be fixed for a huge quantity of say, wheat lying in bulk in different storages, then samples must be taken from all the storages to make them a representative sample of the entire quantity for the fixation of the average price. Taking sample from one storage will not be sufficient. In our statute, the ingredient of the offence is, as mentioned in Section 7 of the Act, manufacturing for sale storing, selling or distributing any adulterated food. If the food sold to the Inspector is proved to be adulterated, it is immaterial whether the sample purchased by him is a representative sample or not, of the entire stock in possession of the person. A person who stores or sells such sample is liable to be punished under Section 16 (1) (a) (i) of the Act.

This ruling was obviously not brought to the notice of the learned Judge of this Court who decided Cri. App. No. 266 of 1979. Further, it has not been brought to my notice as to what provision of the Act or the Rules the Food Inspector is said to

have not complied with if he does not stir the milk before taking a sample. It is only when there is an infraction of the rule or the provision of the Act, the order of acquittal can be justified on the ground that there is non-compliance by the Food Inspector of a particular provision of the Act or of the Rules. It is, therefore, clear that if an article of food sold is proved to be adulterated, it does not matter whether the sample purchased by the Food Inspector is the representative sample or not in possession of the person who sells the sample. Any contrary view expressed by me earlier may not be correct in view of the observations of the Supreme Court in *State of Kerala v. Alassery Mohamed* : 1978 CriLJ925 .

18. In the instant case, the sample of milk sold to the Food Inspector was found to be deficient in solids-non-fat to the extent of at least 41 per cent and it is therefore adulterated within the meaning of Section 2 (ia) (m), of the P. F. A. Act.

19. For the foregoing reasons, I am of the view that the judgment acquitting the accused is not correct and has to be set aside. The appeal is allowed and the judgment acquitting the accused is set aside, the accused is convicted of an offence punishable under Section 16 (1) (a) (i) read with Section 7 (i) of the P. F. A. Act, and is sentenced to rigorous imprisonment for six months and to a fine of Rs. 1000 (Rs. one thousand only); in default of payment to undergo rigorous imprisonment for one month.