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Om Prakash Modi Vs. State

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Court : Kolkata

Decided On : Feb-06-2004

Reported in : 2004(2)CHN560

Judge : Asit Kumar Bisi, J.

Acts : Essential Commodities Act, 1955 - Section 7(1); ;Code of Criminal Procedure (CrPC) , 1973 - Section 251; ;West Bengal Wheat and Wheat Products (Licensing, Control and Prohibition of Certain Classes of Commercial Transactions) Orders, 1973

Appeal No. : C.R.A. No. 485 of 1987

Appellant : Om Prakash Modi

Respondent : State

Advocate for Def. : Kabita Mukherjee, Adv.

Advocate for Pet/Ap. : Ashim Kr. Roy, ;Rupa Bandopadhyay, Advs.

Disposition : Appeal allowed

Judgement :

Asit Kumar Bisi, J.

1. This appeal by the appellant is directed against the judgment and order of conviction and sentence passed by the learned Judge, Special Court, Asansol on 23.11.87 in T. R. No. 8 of 1987 corresponding to D.E.B.G.R. case No. 84 of 1985. By the impugned judgment and order the learned Trial Judge found the accused guilty of the offence punishable under Section 7(1)(a)(ii) of the E. C. Act, convicted him thereunder and sentenced him to suffer rigorous imprisonment for three months and also sentenced him to pay fine of Rs. 1,000/- in default to undergo further rigorous imprisonment for fifteen days.

2. As per the prosecution case on 18.11.85 on source information the complainant S.I. Benoyananda Chakraborty, D.E.O., Raniganj with D.E.B. forces of Raniganj visited the shop and godown of the accused Om Prakash Modi styled as M/s. Muralidhar Mohanlal at 10 a.m. On checking in the godown the total stock of 444 bags containing 444 qntls. of wheat had been found in actual stock there but on verification of the stock register and the stock cum price board produced by the accused on notice opening balance was found to be written as 423 bags of wheat weighing 423 qntls. 21 bags of wheat which had been found to be stored there in excess of the stock shown in the documents had not been accounted for. On demand the accused failed to produce any document for the said 21 bags of excess wheat nor could be give any satisfactory explanation for possession of the said excess stock of wheat. The accused was found to have contravened the provision of paragraph 12 of the West Bengal Wheat and Wheat Products (Licensing, Control and Prohibition of Certain Classes of Commercial Transactions) Orders, 1973 and the D.E.O, seized the total 444 bags of wheat and the stock cum price board in presence of the witnesses. Thereupon being empowered the informant D.E.O. investigated the case and submitted chargesheet against the accused.

3. The accused pleaded not guilty to the accusation. The summary trial was held. On conclusion of the trial the learned Trial Judge found the accused guilty of the offence punishable under Section 7(1)(a)(ii) of the E.C. Act (as amended) and convicted and sentenced him in the manner indicated above.

4. Being aggrieved by and dissatisfied with the judgment and order of conviction and sentence passed by the learned Trial Judge the accused as appellant has preferred the instant appeal alleging inter alia that the impugned order of conviction and sentence is bad in law and the same is liable to be set side.

5. The sole point arising for decision in the instant criminal appeal is whether or not the findings of the learned Trial Judge resulting in conviction and sentence of the appellant are legally sustainable in the face of the materials on record.

6. The learned Advocate for the appellant has pointed out at the outset that examination of the accused appellant under Section 251 of the Code of Criminal Procedure was not properly done as a result of which prejudice had been caused to the appellant and such incurable irregularity vitiates the trial. He has drawn my attention to the relevant order dated 5.5.87 passed by the learned Trial Judge wherefrom it appears that the learned Trial Court examined the accused appellant under Section 251 of the Code of Criminal Procedure in the following manner as stated in the said order :

'The accused Om Prakash Modi's plea under Section 251 Cr. P. C. was taken by stating the particulars of accusation of the matter in the language understood by him and asking him whether he pleads guilty of the accusation or defence to make. The accused pleads not guilty to the accusation by saying

7. The learned Advocate for the appellant has cited Dilip Kumar Das and Anr. v. State of West Bengal reported in 2000 C Cr LR (Cal) 460 where at the time of recording of the plea under Section 251 of the Code of Criminal Procedure the learned Trial Judge merely recorded in the order sheet that substance of accusation had been explained. It further appears that in the case of Dilip Kumar Das (supra) the learned Trial Judge did not explain to the accused the particulars of offence for which he was to be tried but merely chanted the provisions of law. In such context it has been held at page 462-463 (para 8):

'Section 251 of the said Code is a surrogate for a formal charge. The purpose of framing a charge and/or explaining the substance of the accusation for which the accused is going to be tried is to appraise the accused of the facts for which he

can prepare his defence in the trial. In other words he must be made aware of the allegations levelled against him. So that he can prepare an effective defence. From the perusal of the order sheet of the learned Judge recording the plea under Section 251 of the Code it appears that the learned Judge had merely recorded in the order sheet that substance of accusation has been explained which cannot be regarded as proper and necessary compliance of the mandatory provisions of Section 251 of the said Code. The learned Judge did not explain to the accused the particulars of the offence which he was to be tried but merely chanted the provisions of law which to my mind is not proper compliance of Section 251 of the said Code. Certainly, there has been prejudice caused to the accused/petitioners which was not a curable irregularity under Sections 464 & 465 of the Code of Criminal Procedure'.

8. It has been urged by the learned Advocate for the appellant that ratio of the decision of this Court in Dilip Kumar Das (supra) applies with full force to the case in hand since in the instant case the particulars of the accusation had not been stated to the accused appellant when his plea under Section 251 of the Code of Criminal Procedure was recorded. The learned Advocate for the State respondent, on the other hand, has contended that the order passed by the learned Trial Judge reveals that the particulars of the accusation had properly been stated to the accused appellant when the learned Trial Judge examined him under Section 251 of the Code.

9. On hearing the rival contentions raised by the learned Advocates for the parties and going through the materials on record I find that though it has been stated by the learned Trial Judge in his order dated 5.5.87 as quoted above that the accused Om Prakash Modi's plea was taken by stating the particulars of accusation of the matter in the language understood by him there is nothing in the said order or anywhere in the record to show what were the particulars of the accusation stated to the accused appellant when such plea was taken nor there is anything to indicate in what language the particulars of accusation had been stated to the accused appellant. Thus it is quite evident that there was no proper compliance with the mandatory provisions of Section 251 of the Code of Criminal Procedure. This in my view is an incurable irregularity causing prejudice to the accused

appellant.

10. Another noticeable feature emerging from the materials on record is that in the instant case PW. 3 Benoyananda Chakraborty who was D.E.O., Raniganj at the relevant time lodged the written complaint marked Ext. 3 with the Officer-in-Charge, Raniganj P.S. on the basis of which the case was started. The evidence of PW. 3 clearly indicates that he came to Raniganj P.S. and submitted written complaint along with the seizure list and jimmanama and produced the accused whereupon the case was endorsed to him for investigation. Thus it is manifestly clear that PW. 3 Benoyananda Chakraborty the D.E.O., Raniganj who was the informant and conducted the search and seizure investigated the case himself. The learned Advocate for the appellant has rightly contended that such procedure adopted by the Investigating Agency has always been deprecated by the Hon'ble Supreme Court as also by other High Courts. In support of his contention he has cited Suresh Kumar Mittal and Anr. v. State of West Bengal reported in 2001(1) CHN 494. It is no doubt settled law that when the investigation of the case was undertaken by the informant himself that was an infirmity which reflects on the credibility of the prosecution case. In Bhagwan Singh v. State of Rajasthan reported in : 1976 CriLJ713 the Supreme Court observed as under :

'We may first refer to a rather disturbing feature of this case. It is indeed such an unusual feature that it is quite surprising that it should have escaped the notice of the Trial Court and the High Court. Head Constable Ram Singh was the person to whom the offer of bribe was alleged to have been made by the appellant and he was the informant or complainant who lodged the First Information Report for taking action against the appellant. It is difficult to understand how in these circumstances Head Constable Ram Singh could undertake investigation? In fact, Head Constable Ram Singh, being an officer below the rank of Deputy Superintendent of Police, was not authorised to investigate the case but we do not attach any importance to that fact, as that may not affect the validity of the conviction. The infirmity which we are pointing out is not an infirmity arising from investigation by an officer not authorised to do so, but an infirmity arising from investigation by a Head Constable who was himself the person to whom the bribe was alleged to have been offered and who lodged the First Information Report as

informant or complainant. This is an infirmity which is bound to reflect on the credibility of the prosecution case'.

11. So in view of the authority cited above it can well be held that the procedure adopted by the Investigating Agency in the instant case gives rise to an infirmity which disastrously affects credibility of the prosecution case. The learned Advocate for the State respondent has endeavoured to point out that such irregularity does not vitiate trial unless there is miscarriage of justice. In support of such contention reliance has been placed on the decision of the Supreme Court in Muni Lal v. Delhi Administration reported in : 1971 CriLJ1153 wherein it has been held by the Supreme Court at page 1527 (para 14) that where cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the preceding investigation will not vitiate the result unless miscarriage of justice has been caused thereby and the accused has been prejudiced. In Muni Lal (supra) some of the statements were written by the Subordinate Officer at the dictation of the authorised officer. It is in such context the Supreme Court has observed that mere fact that some of the statements were written by the Subordinate Officer at the dictation of the authorised officer does not amount to investigation by unauthorised officer. The facts and circumstances of Muni Lal (supra) as cited by the learned Advocate for the State respondent are inapplicable in the facts and circumstances of the present case.

12. Let me now advert to the factual aspect of the case. As per the prosecution case on 18.11.85 at about 10 a.m. PW. 3 the D.E.O. along with D.E.B. forces paid surprise visit to the shop and godown of the appellant. On checking in the godown of the appellant from 10.30 a.m. to 11.30 a.m. the total stock of 444 bags containing 444 qntls. of wheat was found in actual stock in the godown but on verification of the stock register and the stock cum price board produced by the appellant opening balance was found to be written up as 423 bags of wheat weighing 423 qntls. The leaned Trial Judge in his judgment has relied on the evidence of PW. 1, PW. 2 and PW. 3 and found that there was an excess stock of 21 bags of wheat in the godown of the accused on 18.11.85 at the time of raid. The seizure list marked Ext. 1 reveals that 444 bags of wheat, stock register, cash memo book, rate and stock board and licence for wheat and wheat products had

been seized by PW. 3. It appears from the seizure list that those articles and documents were seized in the godown of the appellant situated at 38, N.S.B. Road, Raniganj, Dist. Burdwan. The evidence of PW. 3 coupled with the seizure list (Ext. 1) further indicates that Promode Sarogi and Kedar Nath Sen were the seizure witnesses. But none of them was examined as witness for the prosecution nor any plausible explanation has been offered for their non-examination. It transpires from the evidence of PW. 1C/178 Samarendra Nath Ghosh who accompanied PW. 3 to the shop and godown of the appellant that the seizure of wheat with other things had been made in the godown of the accused and at n6 other place. Cross-examination of the D.E.O. PW. 3, however, reveals that the stock board, register, cash memo and licence were seized from the shop of the accused and 444 bags of wheat were seized at the godown. PW. 3 further stated in cross-examination that the seizure list was prepared in the shop of the accused and the distance between the shop of the accused and his godown would be quarter of a mile. On being asked in cross-examination PW. 3 could not recollect whether all the wheat bags were weighed. Thus I find glaring discrepancy in the above evidence so far as the place of seizure is concerned. The learned Trial Judge has ignored this discrepancy treating it as a minor one but in my view such discrepancy is vital in nature and affects the prosecution case to a considerable extent.

13. It is interesting to note that the D.E.O., PW. 3 who was the informant and the Investigating Officer was subsequently declared hostile by the prosecution and he denied the prosecution suggestion that the column of 'today received' in the stock and price board was not there in the stock board on that day and that he had falsely stated that it was there in the stock board on the date of raid but was not filled up.

14. The materials on record make it quite evident that the appellant Om Prakash Modi himself was examined as D.W. 3. He stated in his evidence that on 17.11.85 the closing stock was 423 bags. He proved the entry bearing his handwriting in the stock register maintained in regular course of business for wheat and the said entry dated 17.11.85 proved by him has been marked Ext. C. It further transpires from the testimony of D.W. 3 that on 18.11.85 he noted that closing stock of

17.11.85 in the stock board as the opening stock of the day and the opening stock for wheat was written as 423 bags and on that date he received 21 bags of wheat at his godown from Jaiswal Traders. As per his version the 21 bags of wheat reached his godown at about 10.30 a.m. and at that time he was in the shop. It further appears from his evidence that he made entry with regard to receipt of 21 bags in the column of 'today received' in the stock board. Nothing credible is elicited in cross-examination to outweigh this part of evidence of D.W. 3.

15. D.W. 1 Om Prakash Show is one of the partners of Jaiswal Traders, Raniganj. It is gathered from his evidence that on 18.11.85 21 bags of wheat had been sent to the godown of the accused. He proved the credit memo marked Ext. A. It further transpires from his evidence that the above consignment as per the said credit memo was despatched from his godown to the purchaser on 18.11.85 at about 9.30 a.m. and the price of the consignment was received by his firm on 23.11.85 and 24.11.85. The endorsement of his elder brother on the back of Ext. A was proved by him and marked as Ext. A/1. It further transpires from the evidence of D.W. 1 that on that particular day a challan was also prepared for the goods in triplicate carbon copies and one such challan was kept by them till money was received. The carbon copy of the challan proved by D.W. 1 has been marked Ext. B, In cross-examination this witness denied the prosecution suggestion that the documents marked Exts. A and B were manufactured by them to save the accused person from this case. D.W. 2 Tapan Kumar Halder is an employee of Jaiswal Traders, Raniganj. It appears from his evidence that he brought the challan and credit memo dated 18.11.85 in original book from his firm.

16. From the evidence, oral and documentary, adduced on behalf of the appellant in the course of trial it is manifestly clear that the appellant received 21 bags of wheat in his godown on 18.11.85 after the same had been purchased from Jaiswal Traders on credit and since the said 21 bags of wheat had been received in the godown of the appellant on 18.11.85 the account of such purchase and storage of wheat had to be written up by the appellant at the end of business hours on 18.11.85 in terms of paragraph 12 of the West Bengal Wheat and Wheat Products (Licensing, Control and Prohibition of Certain Classes of Commercial Transactions) Orders, 1973. It is to be borne in mind in this context that the closing

stock of 17.11.85 was the opening stock of 18.11.85 which was shown by the appellant. The materials on record, as already pointed out, indicate in clear terms that 21 bags of wheat had been received in the godown of the appellant during business hours on 18.11.85. As per the requirement of paragraph 12 of the said Orders, 1973 the accounts relating to storage of the said wheat were required to be written up by the appellant at the end of that day i.e. 18.11.85. In other words the closing stock of that day which was 18.11.85 would have to be shown as the opening stock of the next day which was 19.11.85. It passes my comprehension how in the face of such materials on record the learned Trial Judge held that the accused had in his possession of 21 bags of wheat and that too from before 18.11.85 and that it was not shown in his stock register (Ext. C) on the previous date as closing balance and also as the opening balance of 18.11.85. Since the materials on record make it manifestly clear that the appellant received 21 bags of wheat on 18.11.85 there was no occasion for the appellant to include those 21 bags of wheat in the closing balance in the stock register on 17.11.85. The learned Trial Judge as it appears viewed the matter from wrong angle and ignoring the vital contradictions and legal infirmities of the prosecution case he pondered on imponderables and consequently fell into error in coming to the conclusion that the accused appellant did not comply with the provisions of paragraph 12 of the West Bengal Wheat and Wheat Products (Licensing, Control and Prohibition of Certain Classes of Commercial Transactions) Orders, 1973. The findings of the learned Trial Judge resulting in conviction and sentence of the appellant are utterly unsustainable and the impugned order of conviction and sentence of the appellant is liable to be set aside.

17. The appeal is accordingly allowed. The impugned order of conviction and sentence passed by the learned Judge, Special Court, Asansol on 23.11.87 in T.R. No. 8 of 1987 corresponding to D.E.B.G.R. case No. 84 of 1985 is set aside. The appellant be set at liberty forthwith if not wanted in connection with any other case.

18. Let a copy of this judgment along with the Lower Court Records be sent down to the learned Court below forthwith.

19. Xerox certified copy of this judgment, if applied for, be given to the parties after observing the required formalities as expeditiously as possible.

Asit Kumar Bisi, J.

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