

Dalbir Mohammad Vs. State of H.P.

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Court : Himachal Pradesh

Decided On : May-19-2009

Reported in : 2009(2)ShimLC235

Judge : Surinder Singh, J.

Appellant : Dalbir Mohammad

Respondent : State of H.P.

Advocate for Pet/Ap. : Shri. Shrawan Dogra

Disposition : Petition allowed

Judgement :

Surinder Singh, J.

1. Heard and gone through the record. The appellant was convicted by the learned trial for selling the adulterated buffalo's milk and sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs. 2000/-. The learned Sessions Judge in criminal appeal No. 31 of 1999, on 23.3.2002, maintained his conviction under Section 16(1)(a)(i) of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as the 'Act'), but reduced his sentence to six months simple imprisonment from one year rigours imprisonment and maintained the fine. The appellant has challenged his conviction and sentence in this revision petition being

wrong and illegal.

2. In short, the facts are that in the year 1995 Shri B.S. Sidhu was Food Inspector, posted at Chamba. On 15.3.1995, in the morning at about 8 a.m., he found the petitioner selling the buffalo's milk at the place known as 'pucca tala' located within Chamba Town. At that time, he was having 9 liters of buffaloes milk in an iron can of 15 liters. According to the Food Inspector in the presence of Home Guard Constable PW-2 Inder Singh and shopkeeper PW-3 Sunil Kumar purchased 7.50 ml. of buffalo's milk for analysis from the petitioner after stirring. He made the payment Rs. 3.75/-. The milk purchased by him was divided in to three equal parts, thereafter put in three dry clean and empty bottles. 20 drops of formalien were added in each bottles as preservative. Each sample bottles were closed air tight and wrapped in a thick paper with gum. The paper slips having impression CHA-1187 were pasted on each bottle and thereafter sample bottles were sealed with a seal in accordance with the Rules. The accused and witnesses had also signed each of the samples. One part of sample along with Form No. VII was sent through registered parcel to the public analyst Kandaghat for its analysis. One copy of Form No. VII and seal impression were separately sent through registered post to the public analyst. The remaining two bottles along with two copies of Form No. VII and the seal impression were deposited with Local (Health) Authority, Chamba.

3. The public analyst, after examining the sample sent the report Ext. P-4 dated 24.4.1995 to the Local (Health) Authority, whereby he observed that the milk fat content is 3.7% against the minimum prescribed standard of 5% and mil solids not fat content is 6.69% against the minimum prescribed standard of 9%. The sample of the buffaloes milk was opined to be adulterated. On the receipt of the report of the public Analyst, Local (Health) Authority vide letter Ext. P-J dated 12.5.1995 informed the Food Inspector to launch the prosecution. The Food Inspector aforesaid obtained the necessary sanction Ext. P-L from the Chief Medical Officer, Chamba and thereafter informed the Local (Health) Authority. The Local (Health) Authority sent the letter to the petitioner informing about the above fact along with the copy of report of the public Analyst by registered post. Postal receipt dated 30.6.1995 is Ext. PW-4/A.

4. On the complaint filed by the Food Inspector, petitioner was summoned for the offence aforesaid. Accordingly, the notice of accusation under the said Section was put to him, to which he pleaded not guilty and claimed trial. The complainant Food Inspector besides examining himself produced his witnesses and after closure of the prosecution evidence, petitioner was examined under Section 313 of the Code of Criminal Procedure. His case was denial simplicitor and no evidence in defence was led. At the end of the trial, learned trial court while relying upon the evidence on the prosecution convicted and sentenced the petitioner, as aforesaid. His appeal was dismissed by the learned Sessions Judge as such he filed the instant criminal revision petition. Shri Shrawan Dogra, learned Counsel for the petitioner argued with vehemence that from the evidence on record it is apparent that the Food Inspector did not churn and stir the milk while taking the samples thus, the milk sample sent for analysis was not of a representative character and no reliance can be put on the report of the Public Analyst. Further that there was also noncompliance of the provisions of Section 13 (2) of the Act, which vitiates the trial.

5. On the other hand, Shri J.S. Guleria, learned Assistant Advocate General while supporting the impugned judgment of conviction and sentence passed by the learned trial court and as modified in appeal, submitted that the statement of the Food Inspector is confidence inspiring. There is no provision in the Act or Rule framed thereunder specifying the method of taking sample of milk by the Food Inspector. But his testimony shows that while taking the sample, he had properly mixed the milk and further that PW-4 has stated about the compliance under Section 13 (2) of the Act. Therefore, no interference is called for.

6. I have given my thoughtful consideration to the rival contentions of the parties and have carefully gone through the evidence on record. It is true that to take the sample of milk, there is neither any provision under the Act or the Rules framed thereunder, the manner in which the sample has to be taken. But in the context of the present case it is required to be found out whether the procedure adopted by the Food Inspector while taking the sample could bring the milk to its homogeneity before putting in into the sample bottles. Thus, it would be quite relevant to mention here the statement of PW-1 Shri B.S. Sidhu, Food Inspector. He stated

that when the sample was taken from the iron can having capacity of 15 liters, it was having about 9 liters of buffalo's milk therein. To ensure that the sample was of a representative one, he had mixed and shaken the milk and it was thereafter he had purchased 7.50 ml of buffaloes milk. In his cross-examination, he further tried to clarify that before taking the sample, he had shaken the milk in a vessel (dubba) and mixed it with a measure of one liter.

7. Another witness PW-2 Inder Singh though not supported the case of the prosecution yet he only stated that before taking the sample, Food Inspector had shaken the milk but he did say about using the measure; whereas PW-3 Sunil Kumar another independent witness included by the Food Inspector stated that the Food Inspector had neither shaken nor mixed the milk in his presence. Whereas in the Panchnama, there is a reference of stirring. There is no consistency in the statements and they have gone hay-way thereby contradicting each other on material points making the case of the prosecution a suspect. It is a settled law that in order to ensure that sample was a representative one, proper stirring of the milk is required. If it is not properly churned and stirred and the sample is taken, it cannot be called to be a representative sample.

8. In *State of Himachal Pradesh v. Prem Chand* 1990 (1) PFA 68 the Hon'ble Single Judge of this Court while relying upon the judgment of the apex Court in *Food Inspector, Municipal Corporation, Baroda v. Madan Lal Ram Lal Sharma and Anr.* 0065/1982 : 1983 CriLJ337 ; held that before a sample of milk can be treated to be a representative sample, it should be established on record that quantity of the milk was properly churned to make it homogeneous. In *State of Himachal Pradesh v. Joginder Singh* Latest HLJ 2006 (HP) 712 this Court also held that merely by shaking 20 kg milk in its container will not make it homogeneous. It has to be properly stirred with a rod or a ladle. In *Madan Lal Ram Lal Sharma's* case (supra), the Supreme Court was conscious of the fact that in milk and milk preparations including curd, it is distinctly possible that the fat settles on the top and in order to find out whether milk or its preparation such as the curd has prescribed content, the sample must be homogeneous and representative so that the analysis can furnish a reliable proof of nature and content of the article of the Food under analysis. For this purpose churning was held to be one of the mode of

making the sample homogeneous and representative.

9. Of course, neither Act nor Rules prescribes that the churning must be done by some instrument and that churning done by the hand or in this case by a measure would not provide a homogeneous and representative sample, but in the case in hand, it is manifestly clear that the Food Inspector also did not say what was the length of the measure of one liter which was used for mixing the milk, whether it was long enough which could go to the bottom of the container and the entire milk could be churned/stirred and mixed up from top to bottom. He is stated to have put the milk in a vassel (Dubba), when and why is not explained by him. All these questions remained unanswered. The Food Inspector was duty bound to ensure the sample which he took was representative and homogeneous sample of the entire milk.

10. Thus, the statement of the Food Inspector failed to prove specifically in the light of the evidence discussed above that the milk was made homogeneous by him. There is no evidence which can be taken to establish that the sample taken was of a representative character.

11. Another equally important witness in the instant case is PW-4 Gian Chand, Dealing Assistant from the office of Chief Medical Officer, examined to satisfy the compliance of Section 13 (2) of the Act. He has stated that after obtaining the sanction to prosecute the petitioner, the Food Inspector was informed and thereafter he had sent the intimation with respect to the launching of the prosecution to the petitioner along with a copy of the report of the Public Analyst by post and he proved the postal receipt Ext. PW-4/A which fact is disputed in his cross-examination. Food Inspector (PW-1) stated that after receipt of the sanction, he launched the prosecution and vide letter Ext. P-H informed the Local (Health) Authority and requested that a copy of the public Analyst report be sent to the accused-petitioner as required under Section 13 (2) of the Act for further action.

12. Sub Section 2 of Section 13 of the Act reads as under:

(2) On receipt of the report of the result of the analysis under Sub-section (1) to the effect that the article of food is adulterated, the Local (Health) Authority shall,

after the institution of prosecution against the person from whom the sample of the article of food was taken and the person, if any, whose, name, address and other particulars have been disclosed under Section 14-A, forward, in such manner as may be prescribed, a copy of the report of the result of the analysis to such person or persons, as the case may be, informing such person or persons that if it is so desired, either or both may 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 analyzed by the Central Food Laboratory.

13. From the above it is obvious that the accused person is required to be made aware of his right by sending him the copy of the report of the public Analyst informing him that if he so desires, he may 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 analyzed as aforesaid.

14. The above provision is mandatory. In this case there is no evidence that the petitioner was made aware of this right to get examined the second sample within 10 days from the date of receipt of notice to this effect. Thus, the petitioner was deprived of his valuable right and this defect vitiates his conviction. The way, the copy of the report of the public Analyst was sent to the petitioner without complying the provisions of sub Section 2 of Section 13, cannot be said to be a compliance of the Section aforesaid and the reliance can be put on *Sashikant and Co. and Ors. v. The State of Orissa* 1988 (1) FAC 10 Orissa and *State of Maharashtra v. Hanmantsa Ganpatsa Katwa* 1989 (1) FAC 285.

15. The learned courts below neither looked into the case from the above point of view with respect to the stirring and churning of the milk viz-a-viz the statement of witnesses on record and also did not examine the case keeping in view the provisions of Section 13 (2) of the Act in the light of above observations which is mandatory in nature, despite the fact that prosecution case was assailed on both these points.

16. Thus for the above reasons, the judgment of conviction and sentence passed by the learned trial court and upholding his conviction and partly allowing the

appeal, as aforesaid are wrong and illegal. Therefore, the judgment of conviction and sentence passed by the learned trial court and affirmed in appeal, as aforesaid are set aside.

17. The revision petition is allowed. Consequently, the petitioner stands acquitted of the charge against him. Fine amount, if deposited by him be returned to him forthwith. The petitioner is also discharged of the bonds entered upon by him at any stage of the proceedings of this case. Send down the record.

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