Bhim Sen

Vs

The State of Punjab

Criminal Appeal No. 139 of 1971

(P. K. Goswami, R. S. Sarkaria JJ)

10.10.1975

JUDGMENT

BHAGWATI, J. -

1. This appeal lies in a very narrow compass and a brief narration of a few relevant facts would be sufficient to appreciate the point which arises for consideration in the appeal.

2. The appellant in the owner of a restaurant called Kailash Restaurant where he manufactures aerated water sold under the name of Fresh Cola. On July 11, 1968, the Food Inspector visited the restaurant of the appellant and took a sample containing 1800 millilitres of aerated water for analysis on payment of a sum of Rs. 2.50 after giving requisite notice to the appellant. This sample of aerated water was divided into three equal parts and each part was bottled in a dry, cleaned bottle and out of the three sample bottles so prepared, one was handed over to the appellant, the other was retained by the Food Inspector and the third was sent to the Public Analyst, Chandigarh. The report of the analysis by the Public Analyst showed that sucrose content in the sample of aerated water sent to him was 0.38 per cent, whereas, according to him, the sucrose content should have been not less than 5 per cent. The sample of aerated water was, thus, in his opinion, adulterated and, in view of this report, a criminal case was filed against the appellant for an offence under Section 7 read with Section 16 of the Prevention of Food Adulteration Act, 1954 for selling adulterated aerated water.

3. During the course of the trial before the Chief Judicial Magistrate the appellant made an application for sending the sample of aerated water which was lying with him to the Director, Central Food Laboratory for a certificate and the Chief Judicial Magistrate accordingly despatched that sample of aerated water to the Director, Central Food Laboratory as required by Section 13, sub-section (2) of the Act. The Director of the Central Food Laboratory analysed the sample of aerated water sent to him and submitted a certificate stating that the sucrose content was absent and there was non-permitted coal tar dye in the sample. The Chief Judicial Magistrate obviously did not take into account the fact that the certificate of the Director, Central Food Laboratory showed the presence of non-permitted coal tar dye in the sample since that did not form the subject-matter of the charge against the appellant, but taking the view that under Item A. 01.01 in Appendix B of the Prevention of Food Adulteration Rules, 1955 the sucrose content should not be less than 5 per cent, the Chief Judicial Magistrate held that the sample of aerated water sold by the appellant to the Food Inspector was adulterated since the sucrose content it was negative and he accordingly convicted the appellant and sentenced him to suffer rigorous imprisonment for one (sic two) year and to pay a fine of Rs. 2,000 or in default to suffer rigorous imprisonment for a further period of four months.

4. The appellant preferred an appeal to the Additional Sessions Judge, but the appeal was successful

only in part. The conviction of the appellant was confirmed and only the sentence was reduced from two years' to one year's rigorous imprisonment and from a fine of Rs. 2,000 to a fine of Rs. 1,000. The appellant thereupon preferred a revision application to the High Court, but the revision application was summarily rejected. Hence the present appeal with special leave obtained from this Court.

5. It is apparent from the record of the case that the conviction of the appellant suffers from a serious infirmity and it is impossible to sustain it. It is indeed surprising how the attention of the Chief Judicial Magistrate or the Additional Sessions Judge or the High Court was not drawn to this patent infirmity which stares in the face. The charge against the appellant was that on July 11, 1968 he sold to the Food Inspector 1800 millilitres of "aerated water" which was found on analysis to have sucrose content of 0.38 per cent as against the prescribed standard of 5 per cent and thereby committed an offence punishable under Section 7 read with Section 16 of the Act. The basis of the charge was that the sucrose content of "aerated water" sold by the appellant should have been at least 5 per cent whereas in fact it was very much less, namely, 0.38 per cent according to the report of the Public Analyst and nil according to the report of the Director, Central Food Laboratory. But, if we look at Item A. 01.01 in Appendix B of the Prevention of Food Adulteration Rules, 1955, it is clear that this postulate on which the charge is based, namely, that sucrose content of "aerated water" should necessarily be less than 5 per cent is incorrect. This item lays down the standard of quality of carbonated water which is the same as aerated water and it says that carbonated water may contain any of the ingredients there enumerated, singly or in combination and one of those ingredients is sugar. It is, therefore, obvious that "aerated water" may contain sugar or may not contain sugar and if it does not contain sugar, it would not in any way detract from the standard of quality prescribed for "aerated water" in his item. It is only the proviso to this item which requires that the sucrose content shall not be less than 5 per cent, but that is in case of "sweetened carbonated water". If what is sold is "sweetened aerated water", then it must contain sucrose of not less than 5 per cent or else it would not be in conformity with the standard of quality prescribed by this item and would have to be regarded as adulterated. But this requirement of sucrose content being not less than 5 per cent does not apply where what is sold is not "sweetened aerated water", but merely "aerated water" which may or may not contain sugar. Here in the present case, the charge against the appellant was not that he sold "sweetened aerated water" nor was any evidence led on behalf of the prosecution to show that what was sold by the appellant was "sweetened aerated water". The charge against the appellant mentioned only "aerated water" and nothing more and that was also the evidence on behalf of the prosecution. Even in the examination of the appellant under Section 342 of the Code of Criminal Procedure it was not suggested to him that he sold "sweetened aerated water". The case which he was called upon to meet was only in regard to sale of "aerated water". It was, therefore, entirely immaterial that the sample of aerated water sold by the appellant contained only 0.38 per cent sucrose, or for the matter of that, no sucrose at all. The so called deficiency in sucrose content did not involve any violation of the standard of quality prescribed for aerated water in Item A. 01.01 and the sample of "aerated water" sold by the appellant could not be condemned as adulterated. The Chief Judicial Magistrate, the Additional Sessions Judge and the High Court were, therefore, clearly in error in convicting the appellant of the offence under Section 7 read with Section 16 of the Act.

6. Before we part with this case, we must refer to one other contention urged on behalf of the appellant in a desperate attempt to sustain his conviction. That contention was that according to the certificate of the Director, Central Food Laboratory, which superseded the report of the Public Analyst, the sample of "aerated water" sold by the appellant contained non-permitted coal tar dye and consequently, it was adulterated and the appellant was rightly convicted for selling it. But the

short answer to this contention is that it did not form the subject-matter of the charge against the appellant nor was it put to him in his examination under Section 342 of the code of Criminal Procedure, and it is, therefore, not open to the State to urge this ground for the first time at this stage in order to support the conviction.

7. We accordingly set aside the conviction and sentence recorded against the appellant and acquit him of the offence under Section 7 read with Section 16 of the Act. The bail bonds executed by the appellant will stand cancelled.

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