

Kishan Chand

Vs

Delhi Administration and Others

Criminal Appeal No. 245 of 1975

(Syed M. Fazal Ali, A. D. Koshal JJ)

20.02.1979

JUDGMENT

KOSHAL, J. –

1. This is an appeal by special leave against a Judgment of the High Court of Delhi dated March 25, 1975 convicting the appellant of an offence under clause (i) of sub-section (1) of Section 16 read with clause (i) of Section 7 of the Prevention of Food Adulteration Act, 1954 (hereinafter called the Act) and sentencing him to rigorous imprisonment for six months and a fine of Rs. 1000, the sentence in default of payment of fine being rigorous imprisonment for three months.

2. The facts giving rise to the appeal may be briefly stated. Food Inspector V. P. Anand, (PW 2) visited the premises of Messrs Mebrose Ice Cream and Frozen Food Co. (which carries on business in Greater Kailash No. 1, a locality of New Delhi and is hereinafter referred to as the Company) on May 22, 1970 and bought for purposes of analysis a sample of chocolate ice cream from the appellant who was one of the employees of the Company. An inventory of the sample was prepared by the Food Inspector and at the foot of the same the appellant made the following endorsement :

A sample of Chocobar Ice Cream (Chocolate Ice Cream) manufactured by Mebrose Ice Cream and Frozen Food Co., M-67, Greater Kailash, given as per above. This Ice Cream Chocolate is of one lot. This is prepared of covering Chocolate, vegetable ghee and Ice Cream.

The sample was forwarded to the Public Analyst who thus details the conclusions arrived at by him on analysis thereof, in report exhibit PE :

Total solids by weight : 45 per cent. Protein by weight : 4.4 per cent. Chocolate : Present.

Butyro-refractometer reading at 40 Degree C of the fat extracted from ice cream : 49.4. Baudouin test of the extracted fat : Positive. Melting point of the extracted fact : 34 Degree C.

3. In his report the Public Analyst further stated that in his opinion the sample was adulterated "as the Butyro-refractometer reading at 40 Degree C was found 6.4 in excess and the Baudouin test was found positive of the extracted fat".

4. A complaint was lodged by the Municipal Corporation of Delhi against the appellant, the Company and its managing partner Avtar Singh in respect of an offence under Section 7 read with Section 16 of the Act. The trial Court acquitted the Company but convicted the other two accused,

sentencing each of them to rigorous imprisonment for six month and a fine of Rs. 1000, the sentence in default of payment of fine being rigorous imprisonment for four months. Both the convicts appealed to the Sessions Court and were acquitted by an order dated March 9, 1972 passed by an Additional Sessions Judge. The Municipal Corporation of Delhi then knocked at the door of the High Court which upheld the acquittal of Avtar Singh but convicted and sentenced the appellant as aforesaid by the impugned judgment, mainly for the reasons reproduced below :

It is established on the record beyond doubt that this endorsement was made by Kishan Chand and it contains an admission that vegetable ghee was used in the preparation of the ice cream sold by him. The judgment of the learned Additional Sessions Judge reveals that the contention of the defence before him was that vanaspati was used in the preparation of the relevant ice cream by way of emulsifier but the plea was misconceived because vegetable ghee cannot be made to serve as an emulsifying agent. A reference to the Prevention of Food Adulteration Rules, 1955 shows that as per Rule 60 'brominated' vegetable oil is one of the recognised emulsifying and stabilising agents but Rule 61 forbids addition of brominated vegetable oil to milk or cream and without milk and/or cream manufacture of ice cream is inconceivable. Moreover, the stand of the accused from the very start has been that 'vegetable ghee' had been used in the preparation of ice cream and not that any 'brominated' vegetable oil got into the ice cream by way of an emulsifying or stabilising agent. The evidence would not countenance the contention raised before us.

5. Having heard learned Counsel for the parties at length we are of the opinion that the sample in question is not shown to have been adulterated within the meaning of the Act.

6. The case is admittedly governed by the Prevention of Food Adulteration Rules, 1955 which have been framed by the Central Government in exercise of the powers conferred on it by Section 23 of the Act and which are hereinafter called the Rules. Rule 60 defines "emulsifying agents" and "stabilising agents" to mean substances which, when added to food, are capable of facilitating a uniform dispersion of oils and fats in aqueous media, or vice versa, and/or stabilising such emulsions. The rule then proceeds to specify numerous agents of the type mentioned and they include brominated vegetable oils. Rule 61 declares that no emulsifying or stabilising agents shall be used in any food except where their use is specifically permitted. A proviso added to the rule states the certain emulsifying or stabilising agents, including brominated vegetable oils, shall not be used in milk and cream. Appendix B to the Rules specifies the standard of quality of various articles of food. Milk and milk products are dealt with in that Appendix under Group A.11 which is divided into various items. Item A.11.01 which is further divided into sub-items A.11.01.01 to A.11.01.11 contains definition and standards of purity of various kinds of milk. Item A.11.02 defines milk products thus :

MILK PRODUCTS means the products obtained from milk such as cream, malai, curd, skimmed milk curd, chhanna, skimmed milk chhanna, cheese, processed cheese, ice cream, milk ices, condensed milk sweetened and unsweetened, condensed skimmed milk sweetened and unsweetened, milk powder, skimmed milk powder, partly skimmed milk powder, khoa, infant milk food, table butter and deshi butter.

7. Then follow definitions of different kinds of milk products in sub-items A.11.02.01 to A.11.02.21. "Cream" is defined as follows in sub-item A.11.02.02 :

CREAM excluding sterilised cream means the product of cow or buffalo milk or of a combination thereof which contains not less than 25.0 per cent milk fat.

Chocolate ice cream forms the subject-matter of sub-item A.11.02.08 which runs thus :

ICE CREAM, KULFI, AND CHOCOLATE ICE CREAM mean the frozen product obtained from cow or buffalo milk or a combination thereof or from cream, and/or other milk products, with or without the addition of cane sugar, eggs, fruits, fruit juices, preserved fruits, nuts, chocolate, edible flavours and permitted food colours. It may contain permitted stabilizers and emulsifiers not exceeding 0.5 per cent by weight. The mixture shall be suitably heated before freezing. The product shall contain not less than 10.0 per cent milk fat, 3.5 per cent protein and 36.0 per cent total solids except that when any of the aforesaid preparations contains fruits or nuts or both, the content of milk fat may proportionately be reduced but shall not be less than 8.0 per cent by weight.

Starch may be added to a maximum extent of 5.0 per cent under a declaration on a label as specified in sub-rule (2) of Rule 43.

The standards for ice cream small also apply to softy ice cream.

8. From the above examination of the provisions of Appendix B to the Rules, it is clearly made out that the standard of purity for each milk product has been separately laid down and that ice cream, kulfi and chocolate ice cream are treated as a class by themselves, which is different, for the purpose of purity from other milk products including cream. The classification employed leaves no room for doubt that when the proviso to Rule 61 states that certain emulsifying and stabilising agents shall not be used in milk and cream, it prohibits the use of those agents only in milk and one of its products, namely, cream and not other milk products such as malai, dahi, cheese, ice cream and chocolate ice cream. Had the rule-making authority meant by the proviso to prohibit the use of the said agents in all milk products, the expression used would have been "shall not be used in milk and milk products" and not "shall not be used in milk and cream". The prohibition contained in the proviso thus does not apply to ice cream, kulfi, chocolate ice cream covered by sub-item A.11.02.08, wherein it is clearly stated that these three milk products may contain permitted stabilisers and emulsifiers not exceeding 0.5 per cent by weight. In equating the words "milk and cream" with milk and all its products, the High Court was clearly in error and this is so in spite of the fact that ice cream, kulfi and chocolate ice cream must have milk or cream as a necessary ingredient. It follows that brominated vegetable oils could have formed a part of the chocolate ice cream sold by the appellant, to the extent 0.5 per cent by weight, without the article being treated as adulterated under the Rules. Before the appellant could be convicted, therefore, it was incumbent on the prosecution to establish that the sample taken from him contained either brominated vegetable oils or other permitted stabilisers and emulsifiers exceeding 0.5 per cent by weight or that it did not conform to the prescribed standard in some other detail.

9. Apart from falling into the error of misreading Rules 60 and 61, the High Court considered the sample taken from the appellant to be adulterated by reason of the stand he had taken from the very beginning to the effect that he had used "vegetable ghee" in the preparation of the chocolate ice cream and because, according to the High Court, "vegetable ghee" was not brominated vegetable oil. This is again an erroneous approach to the problem in hand. It was for the prosecution to prove affirmatively that the sample in question contained an ingredient which made it adulterated and any

stand taken by the accused could hardly be used as evidence, unless its truth was otherwise established which is not the case. All that was made out from the evidence before the court was that the Butyro-refractometer reading at 40 Degree C was higher than the maximum prescribed for milk fat by 6.4 and that the Baudouin test was positive. These two factors indicated that either vanaspati or milk fat to which til oil had been added was one of the ingredients of the sample. There is not an iota of evidence on the record to show whether or not such til oil was brominated, which means that the prosecution had completely failed to prove that the ingredient objected to by it was a substance other than a brominated vegetable oil or that if it was oil of that description its quantity was in excess of 0.5 per cent by weight. The Butyro-refractometer reading did no doubt exceed the maximum of the prescribed standard by 6.4 and the Baudouin test was also positive but these factors did not indicate the presence in the sample of brominated vegetable oil beyond the prescribed maximum of 0.5 per cent by weight or of unbrominated vegetable oils.

10. The sample of chocolate ice cream obtained by the Food Inspector from the appellant not having been shown to be adulterated, the appeal is accepted, the judgment of the High Court insofar as it relates to the appellant is reversed, the conviction recorded against and to sentence imposed upon the appellant by the High Court are set aside and he is acquitted of the charge. The bail bond executed by him shall stand cancelled.

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