

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: 27th October, 2009*
Judgment Delivered on: 04th November, 2009

+ **CRL.R.P.619/2002 & Crl.M.A.Nos.772-773/2002**

MITHILESH

..... Petitioner
Through: Mr.M.K.Singh & Mr.Vishal Gera,
Advocates.

versus

STATE

..... Respondent
Through: Mr.Manoj Ohri, APP

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

1. On 11.2.1993, Food Inspector S.K.Sharma under the supervision of Dr.Pawan Vats had lifted a sample of chilly power from an open container from the shop of Mithilesh being run in the name and style of M/s Mithilesh General Store, 96A, MIG Flats, Opposite GTB Hospital, GTB Enclave, Shahdara, Delhi. The sample was of 450 gms.; it had been lifted after proper homogenization and put into three dry and clean glass bottles in equal parts; thereafter packed, fastened and sealed.

2. The public analyst vide report dated 7.4.1993 had opined the sample as adulterated because it contained salt as an adulterant. The report reads as under:

"Moisture	-	8.22%
Total ash	-	7.44%
A insoluble in dil. Ncl.	-	0.34%
Non volatile other extract	-	20.97%
Crude fibre	-	19.25 %
Test for coaltar dye	-	negative
Test for starch	-	negative
Insect & Fungus	-	nil
Microscopy	-	Chillies structures seen.
Test for sodium chloride	-	positive
Sodium chloride (common salt)	-	2.54%"

3. The petitioner exercised his right under Section 13 (2) of the Prevention of Food Adulteration Act (hereinafter referred to as PFA Act). The second sample was examined by the Director of the Central Forensic Laboratory (CFL) and the said report is dated 30.6.1993. The sample examined was opined to be adulterated on two counts:

- (a) Total ash content exceeds the maximum specified limit of 8.0% by weight.
- (b) It is not free from the presence of sodium chloride.

The contents of the report reads as under:

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| "1. | Physical appearance - | Chilli powder free from insect infestation and mould growth. |
| 2. | Moisture - | 6.32% |
| 3. | Total ash - | 9.72% by weight |
| 4. | Ash insoluble in dilute HCl | 0.89% by weight |
| 5. | Non-volatile ether extract | 18.31% by weight |
| 6. | Crude fibre | 22.09% by weight |
| 7. | Test for presence of added starch | Negative |
| 8. | Test for presence of sodium chloride | Positive |
| 9. | Sodium chloride content | 2.5% by Weight |
| 10. | Test for presence of colouring matter | Negative |
| 11. | Test for presence of turmeric | Negative |
| 12. | Microscopic examination of the sample revealed the presence of structures of chilli only." | |

4. The trial court vide impugned order dated 30.3.2002 had held that the petitioner had violated the provisions of Section 2 (ia) (a) (m) and was held guilty for the offence punishable under Section 7 read with Section 16 (1) of the PFA Act. Vide order of sentence dated 6.4.2002, he was sentenced to undergo RI for a period for one year and to deposit a fine of Rs.3000/-; in default of payment of fine, to undergo SI for three months.

5. This judgment was the subject matter of an appeal before the Additional Sessions Judge who vide impugned order dated 30.7.2002 dismissed the appeal; no modification was made in the sentence either.

6. On behalf of the petitioner two broad submissions have been made before this court.

(I) It is submitted that sodium chloride (salt) is a Class I preservative; this is evident from Rule 53 of the PFA Rules, 1955. There are two classes of preservatives mentioned in Rule 53; Class I preservative includes common salt. Under Rule 54 and Rule 55 there are certain restrictions imposed on the use of class II preservatives; these restrictions are indicative of the intention of the Legislature; i.e. on their free use; preservatives enlisted in the Class I category are those items which are essential for the health and well-being of an individual; that is why there are no restrictions imposed upon this category i.e. on Class I preservatives; this is also so specifically stated in Rule 53. Salt

essentially being a preservative cannot become an adulterant. Attention has also been drawn to the definition of 'adulterant' as contained in Section 2(i) and 'adulterated' as contained in Section 2 (ia) of the PFA Act. It is stated that unless the substance is injurious to the health of a person, it cannot be an adulterant and this is evident from the reading of sub-clause (b), (c), (d), (e) and (h) of Section 2 (i) (ia); all other categories as contained in Section 2 (1) are cases of mis-branding/mislabelling which is the second category of offences for which an offender can be prosecuted under the PFA Act. It is submitted that in the process of the analysis of a sample the substance gets burnt and the total quantity of ash detected in the sample also includes the salt content in it. The salt content has to be subtracted from the total ash. It is pointed out that in the report of the public analyst the total ash detected was 7.44% which is within the prescribed standard of 8% as contained in A.05.05.01 i.e. the prescribed standard of chillies in appendix B of the PFA Rules. In the report of the Director, CFL, the total ash detected is 9.72%; sodium chloride is 2.50% and if 2.50% is subtracted from 9.72%, the ash content would be 7.22% which would be well within the prescribed standard of 8%. Counsel for the petitioner has placed reliance upon a judgment of a coordinate bench of this court reported in Kanshi Nath vs. State 124 (2005) DLT 413 to support this submission; attention has been drawn to para 4 sub para 1; it is

submitted that in the said case, the expert from the CFL department i.e. the Director in his cross-examination had admitted that sodium chloride is a class I preservative; it is an inorganic salt and attributes towards total ash only. On this analogy salt is liable to be deducted from the total ash content; ash content as per the report of the Director, CFL would then be 7.22%; the sample of the chilli powder would thus conform to the prescribed standard.

(II) The second argument advanced by the learned counsel for the petitioner is on the sample not being a representative sample. It is pointed out that the variations in the report of the public analyst and the report of Director CFL are significant variations and applying the test as laid down in Kanshi Nath's case (supra) a $\pm 0.3\%$ variation on either side is by itself sufficient to enure for the benefit of the accused. For the same proposition reliance has also been placed upon another subsequent judgment of this court reported in CrI.A.54/1990 decided on 24.1.2008 titled as State vs. Mahender Kumar. It is submitted that in this case as well the ingredients in the two reports i.e. the report of the public analyst and the report of the CFL having a significant difference, being more than the prescribed difference of $\pm 0.3\%$; the samples were held not to be representative samples entitling the petitioner to an acquittal on this ground as well.

7. The record has been perused and the submissions and the counter-submissions advanced by the parties have been noted.

8. Rule 53 of the PFA Rules defines common salt as a Class I preservative. The prescribed standard for chillies is contained in A.05.05.01 in appendix B of the PFA Rules. The standards contained therein have been perused. They read as under:

(i) Moisture	Not more than 11.0 per cent by weight
(ii) Total ash on dry basis	Not more than 8.0 per cent by weight
(iii) Ash insoluble in dilute HCL on dry basis	Not more than 1.3 per cent by weight
(iv) Crude fibre	Not more than 30.0 per cent by weight
(v) Non-volatile ether extract on dry basis	Not more than 12.0 per cent by weight
(vi) Salmonella	Absent in 25g

9. This table does not make any reference to salt. The standard prescribed for edible common salt which includes an iodized salt is contained in A.05.05.01 of the PFA Rules. The very fact that chillies and iodized salt have different prescribed standards under the PFA Rules means that each has to conform to its own category; one cannot overlap into the other. The public analyst and the Director, CFL while examining this sample of chilli powder has detailed 12 categories; there is a separate column for total ash and a separate column for sodium chloride; if sodium chloride was a part and parcel of the total ash as has been argued by the counsel for the petitioner, there would not have been any need for having a separate category for these two contents i.e. the total ash content and the sodium chloride content.

10. The report of the public analyst had opined the sample to be adulterated as it contained salt as an adulterant. Learned counsel for the petitioner has not been able to point out any provision in the PFA Act or the Rules to show that the presence of salt in a sample of chillies is permissible. The proviso of Rule 53 reads as:

“Provided that the article of food to which a Class I preservative has been added conforms to the specifications laid down in Appendix “b”.

11. Specifications in Appendix “B” contained in A.05.05.01 do not permit presence of salt. PW-2, the food inspector in his cross-examination has in fact stated that common salt is not permitted in lal mirch powder.

12. Definition of “adulterated” as contained in Section 2 (ia) (k) and (m) are also relevant.

Section 2 (ia) (k) reads as:

(k) If the article contains any prohibited preservative or permitted preservative in excess of the prescribed limits;

Common salt is not prohibitive preservative yet what is the prescribed limit of a permitted preservative could not be shown by the counsel for the petitioner.

Section 2 (ia) (m) reads as under:

(m) If the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities not within the prescribed limits of variability but which does not render it injurious to health:

Clause (m) postulates a situation where the articles fall below the prescribed standard even if it is not injurious to health. It is clear from this provision that if salt is added to chillies even if it would not be rendered injurious to health, nevertheless the quality/purity of the article would fall below the prescribed standard/its constituents as prescribed in A.05.05.01 limit. It would be adulterated.

13. Considering the various sub-clauses of clause (ia) of Section 2 above, it appears that an article of food may be considered adulterated for various reasons or causes and the same article of food may be covered by any one or more of the sub-clauses of clause (ia) above. While it may be that an article of food in a particular case, may not be covered by more than one provision of the said sub-clauses but if it is covered by the provision of even one of the sub-clauses like sub-clause (m) as is in the present case, it shall, in the opinion of this court be sufficient to consider the article of food as adulterated and accordingly even though it may be said that mere addition of common salt to the chilli powder did not render it injurious to health, it was nevertheless adulterated within the scope and meaning of sub-clause (m) of clause (ia) of Section 2 of the Act. This court is, therefore, unable to accept the submission for the petitioner that the chilli powder in question was not adulterated. The learned courts below have rightly held that the chilli powder in question was adulterated.

14. It also cannot also be lost sight of, being common knowledge that price of red chilli powder is much higher as compared to price of common salt; unscrupulous persons in order to increase the weight of lal mirch powder could well add common salt to increase its weight.

15. In the judgment of Kanshi Nath (*supra*) an argument had been propounded that sodium chloride being a class I preservative

is liable to be deducted from the total ash which argument had been countered by the counsel for the State; the same had, however, been left open and no final decision had been taken in the matter. In that case, the sample of dhaniya powder had been held to be adulterated because of presence of sodium chloride which had been defined as a 'foreign ingredient'.

16. First submission of the learned counsel for the petitioner is without any merit.

17. The judgment of Kanshi Nath (*supra*) relied upon by the learned counsel for the petitioner to support his second submission that his sample is not representative sample is also without merit; the said case is distinct on its own facts.

18. In MCD vs. Bishan Sarup 1972 FAC 273, a full bench of this court had held that once the Director of the CFL has issued a certificate in terms of Section 13 (5) of the PFA Act, the certificate is final and conclusive evidence of the facts stated therein; i.e. in regard to the contents of the sample actually examined by the Director and nothing more. The full bench had further held that

“Even after this certificate, it is open to the accused to show that in the facts of a given case and on the concrete objective grounds that he may prove on the record the sample sent for analysis to the Director could not be taken to be a representative sample of the article of food from which it is taken and if this contention is found to be correct, conviction based on the certificate will not be sustainable.”

It is, thus, clear that although in terms of Section 13 (3) of the PFA Act Director's certificate would supersede the Public

Analyst's report, the difference in the two can still be looked into by the courts for ascertaining as to whether the samples were representative or not.

19. In *Kanshi Nath* (supra) there were three arguments which were advanced before the court; it was the second argument of the petitioner which had found favour with the court and it had been held that the sample not being a representative sample, petitioner was entitled to a benefit of doubt. The issue before the said court was the variation in the content of the sodium chloride and the admission by the Director, CFL in his cross-examination that a sample to be representative if examined by two different experts cannot have a total variation of $\pm 0.3\%$ in its sodium chloride content. It was on this count the court had held that where the sodium chloride content in the two reports is more than $\pm 0.3\%$ the sample can be discarded as being non-representative.

20. In the instant case, the difference in the sodium chloride in the two samples is only .04% and not covered in the $\pm 0.3\%$ variation; what has been argued is the variation in the contents of the total ash, crude fibre and the non-volatile other extracts. These were not under consideration in the *Kanshi Nath* judgment; the ratio of that judgment is inapplicable to the facts in this case.

21. The second judgment relied upon by the counsel for the petitioner i.e. *State vs. Mahender Singh* was an appeal by the State against an order of acquittal passed by the Sessions Judge.

The parameters and considerations weighing before an Appellate Court while considering an appeal against an acquittal are different and distinct from the parameters and considerations which are taken into account when the Appellate Court is dealing with an impugned judgment where a person has been convicted. In an appeal against an acquittal, the court will interfere only if there is a perversity or a total miscarriage of justice; it was in the light of these principles the said judgment was delivered. Said judgment would also be inapplicable.

22. The food inspector Virender Singh PW-2, another food inspector S.K. Sharma PW-3 and Dr.Pawan Vats PW-4 have all categorically stated that after the sample was lifted, it was kept in clean and dry glass bottles; same was taken after proper homogenization with the help of a clean and dry karchhi. No suggestion to the contrary has also been given to these witnesses by the learned defence counsel that the samples were not representative samples.

23. The second argument of the learned defence counsel is also without force.

24. However, on the quantum of sentence, this court has taken due regard of the fact that the petitioner herein was a petty shop keeper. Matter relates to the year 1993 i.e. dating back to sixteen years; petitioner has suffered incarceration of about 12 days out of the period of sentence of one year which had been awarded to

him. There is no overemphasizing the fact that speedy trial which is the essence of justice has been lost. The Supreme Court in Braham Das vs. State of Himachal Pradesh AIR 1988 SC 1789 had held that 8 years having been lost, where part of the sentence had been undergone, the petitioner had been sentenced to the period already undergone by him. In Veer Singh Chauhan vs. State of Delhi 1994 (2) CCC 253, the revision had come up for hearing after seven years; the court reduced the sentence to the one already undergone i.e. of a period of 3 months.

25. In the instant case, the offence relates to the year 1993. The nature of offence i.e. the sample having been found to be adulterated in terms of Section 2 (ia) (m); the period of 12 days of incarceration already undergone by the petitioner who would as on date be about 47 years of age, he having rooted himself in society, the ends of justice would be met if the sentence is reduced from RI one year to a period of RI three months. No modification is made in the fine which has been imposed.

26. The bail bond and surety bond stand cancelled. The petitioner is directed to surrender forthwith to suffer the remaining sentence.

(INDERMEET KAUR)
JUDGE

04th November, 2009
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