

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRA-S No.975-SB of 2004

Date of decision: 27th August, 2018

M/s Agro Chem Punjab & another

... Appellants

Versus

State of Punjab

... Respondent

CORAM: HON'BLE MR. JUSTICE FATEH DEEP SINGH

Present: Mr. Denesh Goyal, Advocate for the appellants.

Mr. H.S. Sullar, Dy. Advocate General, Punjab
for the respondent/State.

FATEH DEEP SINGH, J.

This appeal has come about by the convict appellants M/s Agro Chem Punjab Limited and Gurdip Singh Chahal against the impugned judgment of conviction dated 23.04.2004 whereby the Court of learned Special Judge, Kapurthala found the appellants guilty besides other accused for offence punishable under Section 7 of the Essential Commodities Act, 1955 (hereinafter referred to as, 'the Act') and convicted and sentenced M/s Agro Chem Punjab Limited to pay a fine of Rs.5000/- whereas Gurdip Singh Chahal was sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.5000/- and in default of payment of fine to further undergo rigorous imprisonment for two months.

Heard Mr. Denesh Goyal, Advocate for the appellants; Mr.H.S. Sullar, Deputy Advocate General, Punjab representing the respondent/State and perused the records of the case.

The brief facts that are necessitated in this case are that on 02.09.1993, Kuldip Singh, Fertilizer Inspector, accompanied by others inspected the premises of M/s Punjab Agro Industries Corporation Ltd. (for short, 'the dealer firm') in the presence of Ajit Singh, incharge of the dealer firm after taking necessary precautions of serving notice and showing intention to draw samples of the fertilizer lying in the premises of the dealer firm for the purpose of analysis. Out of the fertilizer brand 'Jat Super' single super phosphate 16% W.S. P2 P5 (Granulated) manufactured by M/s Agro Chem Punjab Limited (hereinafter referred to as, 'the manufacturer') they prepared form J and three bags were taken out at random and with the help of probe had drawn the samples and put them in a dry polythene sheet and after mixing them properly divided the constituents into four equal parts. The sample parcel put into dry thick and clean polythene sheets and were tied to make them air tight.

Upon necessary formalities by affixing seal impressions, out of the sample parcels one was handed over to Ajit Singh and his signatures were obtained on form J whereas remaining two portions each with form J and K were deposited with the Chief Agricultural Officer, Kapurthala. One of the samples along with form K was despatched to the laboratory. Upon analysis, it was found that the fertilizer sample did not conform to the specifications laid down and being non-standard, a show-

cause notice along with copy of the analysis report was sent to the accused for keeping, selling and exhibiting for sale the non-standard fertilizer and thus, having contravened Clause 19 of the Fertilizer (Control) Order, 1985 (hereinafter referred to as, 'the Order') were asked to show-cause for commission of the offence punishable under Section 7 of the Act. Thereafter, the present complaint was filed on 05.07.1996 before the concerned Special Judge, Kapurthala. After notice of accusation was served, the accused were put to trial.

In the evidence, prosecution examined PW1 Balwinder Singh, Agricultural Development Officer, who had received the sample and sent it for analysis and who proved having sent the letter of intimation to the accused by way of Ex.PA, notice receipt Ex.PA/1 and for having despatched the sample parcel to the concerned laboratory through accompanying letter Ex.PB, the receipt of sample Ex.PB/1.

PW2 Rajinder Singh, Sub Inspector from the office of Chief Agricultural Officer detailed that while he was posted as beldar, he was handed over the sample of the article for depositing in the laboratory and had done so in an intact state, proving receipt of this deposit Ex.PB/1 and letter accompanying the same Ex.PB. Thereafter, PW3 Fauja Singh proved having despatched and served upon the accused show-cause notice Ex.PD, reply filed by the accused Ex.PE, endorsement of the Chief Agricultural Officer Ex.PE/1, another show-cause notice sent under registered post Ex.PF sent by the office of Chief Agricultural Officer and reply filed Ex.PG; endorsement thereon Ex.PG/1, another show-cause

notice Ex.PH and reply by one of the accused Ex.PJ, endorsement Ex.PJ/1 and reply to the notice by one of the accused Ex.PK. He further proved another show-cause notice Ex.PL sent to one of the accused and its office copy Ex.PM.

PW4 Sarabjit Singh, Agricultural Development Officer, one of the witnesses to this checking/inspection at the premises of the dealer firm and drawing of samples and carrying on necessary procedure in drawing the samples, detailed the same. PW5 Narinder Singh Rurka, retired Chief Agricultural Officer detailed the receipt of the report of analysis Ex.PC, complaint filed by him in official capacity Ex.PP and the letter showing one of the accused to be the responsible officer of the manufacturer Ex.PQ. Lastly, PW6 Kuldip Singh Joura, Agricultural Development Officer brought about corroboration to the earlier stand of the witnesses proving documents Ex.PR, Ex.PS, Ex.PT, Ex.PU; form J and form K as Ex.PN and Ex.PO respectively; letter Ex.PA, receipt Ex.PA/1 and detailing the necessary formalities undertaken in the office regarding the process leading to the filing of complaint. Thereafter, the prosecution evidence was closed.

The entire incriminating evidence proved at the trial, oral as well as documentary, were put to each of the accused in their separately recorded statements under Section 313 Cr.P.C.

On behalf of the manufacturer, its Chief Production Officer denied the allegations and took the plea that the manufacturer had manufactured the product strictly as per the specifications using the most

sophisticated technology and that there has been non-adherence to the mandatory pre-requisites of law in drawing the samples and its testing. Similarly, accused Gurdip Singh Chahal of the manufacturer, though accepted the fact of the manufacturer having manufactured the fertilizer in question but denied that he, at the relevant time, was a responsible person under Clause 24 of the Order and denied the allegations.

In their defence, the accused examined DW1 Gurjit Singh Brar, Agricultural Development Officer proving copy of a letter of the manufacturer Ex.DA and thereafter, examined DW2 Kashmir Singh Clerk of the dealer firm to prove that Ajit Singh accused was a store-man who retired on 31.08.2001 and that this dealer firm was a Government undertaking and thereafter the defence evidence was closed. Subsequent thereto, the impugned findings were got recorded.

Upon hearing arguments, the first and the foremost point raised by learned counsel for the appellants, Mr. Denesh Goyal, Advocate is that accused Gurdip Singh Chahal cannot be termed to be a responsible officer under clause 24 of the Order as, on the date of manufacture he was not an officer responsible for manufacture of the commodities and placed reliance on Ex.DA. Though on behalf of the State, the same is sought to be opposed on the grounds that he was working with the manufacturer and cannot relieve himself of his responsibilities.

It is well enshrined principle of law that evidence of defence is to be reckoned on equal footing with that of the prosecution. Reliance placed on '**Sanjay vs. State of Haryana'** 2005(2) RCR(Criminal) 561.

The document Ex.DA, which as per the own admission of the learned State counsel could not be rebutted, shows that M/s Agro Chem Limited, the manufacturer, vide its letter dated 26.08.1995 has detailed the various persons who were responsible under Clause 4 of the Order and against the name of Gurdip Singh Chahal accused, he was shown to be so from 30.11.1991 to 06.11.1992. Admittedly, the sample was drawn on 02.09.1993 and as per the allegations leveled in the complaint, it is alleged that neither the lot number nor date of manufacture was there on the bags from which the samples were drawn, which is accepted in cross-examination by PW6 Kuldip Singh Joura, Agricultural Development Officer that he had not mentioned in form J that the bag did not contain the lot number and the date of manufacture.

If it was so, then as is there in the provisions of law and which has been duly accepted in the cross-examination of PW3 Fauja Singh from the office of Chief Agricultural Officer that it is mandatory as per the Fertilizer (Control) Order to mention batch number and date of manufacture on the fertilizer bags and if it is not mentioned on the bags then it is the duty of the Fertilizer Inspector to stop fertilizer sale immediately and that the same is to be confiscated to the State for getting the order of the Collector, and the learned State counsel to the very specific query of the Court could not convince it so what steps in this regard have been taken by the Fertilizer Inspector, if it was found to be deficient on that score.

Rather, to the mind of this Court, not only the entire stocks ought to have been seized, the license of the manufacturer, its premises as well as that of the dealer firm should have been cancelled after adopting due process under the law in terms of Clause 19 read with Clauses 21, 28 and 31 of the Order and which has not been accomplished in the present case, are matters which clearly reflect that all was not well with the prosecuting complainant and its functionaries and who have left a huge lacuna in the prosecution allegations and in the discharge of their official duties. Besides this, learned State counsel though has sought to vociferously rebut the submissions of learned counsel for the appellants but has sought to observe that under the provisions of Clause 24 of the Order upon submission of the manufacturer as to the responsible officer of the company, due approval/sanction has to be accorded by the Central Government and which is not coming forth in the evidence of the complainant, are matters of much serious repercussions for the complainant side.

Though it has been sought to be argued by learned counsel for the appellants that single super phosphate which is a fertilizer, does not fall within the purview of the essential commodities, has been rightly displaced by learned State counsel in his submissions on behalf of the State.

Going through the same, Section 2 of the Essential Commodities Act defines the 'essential commodities' and in its explanation includes petroleum and petroleum products. Under Section 2

of the Act, Central Govt. has declared essential commodities and which defines that fertilizers whether inorganic or mixed fall within the definition of essential commodities and which even otherwise as it appears from the stand of the learned counsel for the appellants at the trial, was never raised at the first level of its arguments before the trial Court and therefore, raising such an issue for the first time in appeal is certainly not acceptable in consonance with the settled proposition of law and therefore, this argument of the appellants certainly needs to be brushed aside.

The other angle of the arguments pertains to the interpretation of Section 11 of the Act which lays down that no Court shall take cognizance of any offence punishable under the Act except on a report in writing of the facts constituting such an offence by person who is a public servant as defined under Section 21 of the Indian Penal Code and to which an explanation was subsequently added in the year 1986 by way of Section 12AA which enlarges the scope to include Voluntary Consumer Associations as well. Furthermore, by virtue of Section 12AA of the Act all offences under the Act have been deemed to be triable only by Special Court constituted for the area in which the offence has been committed and under sub-section (1) clause (f), all offences under this Act tried summarily shall be punishable for a term not exceeding two years by the Special Court. Since the present case has been tried as a summons case and the sentence awarded is two years' rigorous imprisonment and the notice of accusation is confined to violation of provisions of Clause 19 of

the Order and commission of offence punishable under Section 7 of the Act, and therefore, is itself suggestive of half-hearted attempt by the complainant to level accusations against the accused side, and rather undermines their own stand of the sample bags having violated the provisions of the Order by not mentioning the batch number and the date of manufacture.

The next most contentious issue pertains to the very argument on the mode of drawing samples from the bagged material. Schedule II under Clauses 28 and 29 of the Order lays down the procedure in such an eventuality and under which following requirements have been enumerated:

“Schedule II (Part A):

Procedure for Drawl of Samples of Fertilizers

1. General Requirements of sampling:

xxxx	xxxx	xxxx
xxxx	xxxx	xxxx

2. Sampling from Bagged Material:

(i) Scale of sampling – (a) Lot (for Manufacturers) – All bags in a single consignment of the material of the sample grade and type drawn from a single batch of the manufacturer shall constitute a lot. If a consignment is declared to consist of different batches of manufacture, all the bags of each batch shall constitute a separate lot.

In the case of a consignment drawn from a continuous process, 2000 bags (or 100 tonnes) of the material shall constitute a lot.

(b) Lot (for Dealers) – The lot is an identifiable quantity of same grade and type of fertilizer stored at an identifiable place subject to a maximum limit of 100 tonnes.

(c) Selection of Bags for Sampling – The number of bags to be chosen from a lot shall depend upon the size of the lot as given in the table below:-

<i>Lot size (No.of bags) (N)</i>	<i>No. of bags to be selected for sampling (N)</i>
<i>Less than 10</i>	<i>1</i>
<i>10-100</i>	<i>2</i>
<i>100-200</i>	<i>3</i>
<i>200-400</i>	<i>4</i>
<i>400-600</i>	<i>5</i>
<i>600-800</i>	<i>6</i>
<i>800-1000</i>	<i>7</i>
<i>1000-1300</i>	<i>8</i>
<i>1300-1600</i>	<i>9</i>
<i>1600-2000</i>	<i>10</i>

All the bags of a lot should be arranged in a systematic manner. Start counting from any bag randomly, go on counting as 1, 2, 3 Up to r and so on, r being equal to the integral of N/n. Thus every rth bag counted shall be withdrawn and all bags shall constitute the sample bags from where the sample is to be drawn for preparing a composite sample.

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3. Sampling Probe:

(i) *An appropriate sampling instrument to be used by the Inspectors for collection of a representative sample is called sampling probe. The probe may comprise of a slotted single tube with solid conetip made of stainless steel or brass. The length of the probe may be approximately 60 to 65 cms and the diameter of the tube may be approximately 1.5 cm and the slot width may be 1.2 to 1.3 cms. The probe may be used if the physical condition of the fertilizers and the packing material permits its use.*

(ii) *In case of High Density Polyethylene Packings and also when the fertilizer material is not in free flowing condition, the use of sampling probe may not be possible, in such a case, selected bags for drawing samples may be opened and the fertilizers may be taken out of the bags and spread on a clean surface and samples drawn with the help of a suitable sampling device which may be made of stainless steel or brass cup.*

4. Drawl of Samples from Bags:

(i) *Drawl of sample and preparation of composite samples. Draw, with an appropriate sampling instrument, (sampling probe) small portions of the material from the selected bags as per procedure in Paras 2(i)(b), 2(ii) and 2(iv)(a). The sampling probe shall be inserted in the bag from one corner to another diagonally and when filled with fertilizer, the probe is withdrawn and fertilizer is emptied in a container/or on polythene sheet/or on a*

clean hard surface and made into one composite sample.

(ii) If the bags do not permit the use of sampling probe empty the contents of the bags on a level, clean and hard surface and draw a composite sample by the process of quartering as described under Para 3(ii) or 5.

5. Preparation of composite sample:

If the composite sample collected from the different selected bags is larger than about 1.5 kg in weight, its size shall be reduced by method of quartering as detailed below:-

Spread the composite sample on a level, clean, hard surface, flatten it out and divide it into four equal parts. Remove any diagonally opposite parts. Mix the two remaining parts together to form a cone, flatten out the cone and repeat the operation of quartering till a composite sample of about 1.5 kg weight is obtained.

6. Preparation of test sample and Reference sample:-

(i) The composite sample obtained above shall be spread out on a clean, hard surface and divide into three approximately equal portions of about 400 gm each in weight. Each of these samples shall constitute the test sample.

(ii) Each test sample shall be immediately transferred to a suitable container as defined under Para 1(e). The slip with detailed description may be put inside the sample bag. Each bag shall also be properly labeled as mentioned in Para 1(f).

(iii) Each test sample container shall then be sealed with the seals of the inspector. If possible, seal of the manufacturer/dealer or purchaser as the case may be, may also be affixed.

(iv) One sample so sealed shall be sent to the Incharge of the Laboratory notified by the State Government under Clause 29 or Central Fertilizer Quality Control and Training Institute, Faridabad for analysis and the second given to the manufacturer or dealer or the purchaser as the case may be. The third sample shall constitute the reference sample and shall be sent by the inspector to his next higher authority for keeping in safe custody for production in Court, if required.

xxxx	xxxx	xxxx
xxxx	xxxx	xxxx”

From a close look into the evidence of the prosecution, upon whom the onus lay heavily to prove its case beyond shadow of reasonable doubt, as laid down in ‘**V.D. Jhingan vs. State of UP**’ AIR **1966 SC 1762**, it is well highlighted from the testimonies of PW4 Sarabjit Singh and PW6 Kuldeep Singh Jaura, both Agricultural Development Officers, does not depict having complied with this mandate of statutory provisions enshrined for drawing samples in such cases. In his cross examination, PW4 admits that it is not mentioned in forms J and K that the fertilizer was mixed properly and divided into four parts and that even form J shows that the samples were taken from three bags but there is no mode of random selection of bags from the heaps in

question, are matters which certainly goes to the roots of the case of the complainant, and accepts that it is not mentioned in these forms the number of bags taken in random from which the samples were drawn and had stated that the samples were drawn by approximation and even no money was paid for taking samples and the fact that the bags were lying on the floor of the store of accused No.1. Furthermore, the cross-examination of PW6, another witness to this process of sampling, leaves no scope to doubt over the veracity of such a process when he admits that he cannot tell as to how many bags were lying in the premises of the accused and could not even say how many bags were received by them and out of which, how many bags have been sold, and even has failed to bring forth a positive assertion whether the bags were stitched at the factory or not. Prosecution story gets a drubbing from the admission of this witness when he accepts that as per the procedure prescribed under the Order, sample is to be drawn only from the bags of the same lot and if the stocks pertain to different batches then bags of each batch are to be segregated. Random number is to be calculated according to the number of the bags of the particular stock and if there are fertilizer bags of different batches, then samples are to be drawn from bags of one batch separated from the rest of the batch numbers. His further admission that in the present case sample has been taken from three bags and the random number as per the formula was 63 and that he had not mentioned either in form J or K regarding the number of the bags selected before the withdrawal of the sample, and which fact is not mentioned either in form

J or in form K that the samples were drawn only out of three bags, and even the requirement of drawing three kilograms of fertilizer from each bag has not been detailed in the writing done by them at the spot, and further that they have not mentioned in the proceedings that the samples were drawn in dry, clean and thick polythene bags or the same were tied to make them air tight. The most fatal admission by this witness is that single super phosphate is hygroscopic in nature and absorbs moisture from the atmosphere. He further accepts the fact that where the sample is not drawn as per the procedure prescribed in Schedule II of the Order, then the active ingredients may vary on analysis. It is there in the admission of this witness that it is not mentioned in the writing in form J that the sample was sealed with his seal bearing impression 'FI' or that of the dealer bearing impression 'PAIC' nor they have written the approximate weight of the sample drawn in form J. Though this witness accepts that he has sent two samples to the office of Chief Agricultural Officer on the basis of letter Ex.PA but when confronted with Ex.PA, accepts that there is mention of only one sample.

In the light of this serious lacuna in the mode of drawing of samples by the complainant side, leaves its indelible mark on the creditworthiness and veracity of the prosecution story. The learned Court below has certainly fallen into an error in not acceding to this material procedural lacuna in the prosecution story which certainly goes to the roots of the case. In the light of what has been detailed and discussed

above and as a cumulative effect of the same, needs acceptance of the present appeal thereby setting aside the judgment of conviction.

The appeal stands allowed in those terms.

(FATEH DEEP SINGH)
JUDGE

August 27, 2018

rps

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No