

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble **Justice Prasenjit Biswas**

CRA 390 Of 1987

Dwarika NathKundu

-Versus-

The State of West Bengal

For the Appellant : **Ms. Monami Mukherjee, (Amicus Curiae)**

For the State : **Ms. Faria Hossain, Ld. APP
Ms. Suparna Chatterjee.**

Hearing concluded on : **07.05.2025**

Delivered on : **22.05.2025**

Prasenjit Biswas, J:-

1. This appeal is filed at the instance of the convict and is directed against a judgment and order of conviction passed by the learned Judge, Special Court (E.C. Act) in connection with Special Case No. 33 of 1986.

2. On 14.05.1986 at about 11:00 a.m. D.E.O Naihati Zone along with his raiding team investigated the stationary Shop of Sri DwarikaNathKundu of

Gouripur Market, P.S. Naihati and found the said person is possessing and dealing in Baby Food in his stationary shop under retailer license no. 25/BFR/NHT/85 dated 24.12.1985. At the time of inspection it was found that the accused displayed stock and price list as 36 bottle horlicks, 39 lactogen, 12 tins cerelac 28 amul spray baby food against which 2 tins amul spray is found excess as per stock register. It is further stated in the written complaint that the accused while issuing cash memo to the customers did not mention the license number as well as did not take signature on cash memo as required as per provision of para 6(3) of the Control order. It is said that the accused violated the condition and proviso entailed in para 6(5) of the W.B. Baby Food Control Order, 1966. The articles were seized from the shop of the accused under the seizure list in the presence of the witnesses. A case was started against this accused. After completion of investigation charge sheet was submitted against the appellant under Section 7(1)(a)(ii) of the E.C. Act for violation of para 6(5) of the W.B. Baby Food Control Order, 1966.

3. The case came up for hearing before the learned Special Judge under E.C. Act on the aforesaid charge. The prosecution examined 6 witnesses. Neither any oral nor any documentary evidence was adduced by the side of the defence. After conclusion of the trial the learned Special Judge found the appellant guilty and convicted and sentenced him to suffer rigorous imprisonment for 6 months and to pay a fine of Rs. 5,000/-, in default to undergo further rigorous imprisonment for 2 months.

4. On being aggrieved by such order of conviction and sentence the instant appeal has been filed. Hence the hearing.

5. The question for consideration before this Court is whether the prosecution was able to prove their case and whether the judgment under appeal can be sustained under law.

6. Ms. Monami Mukherjee, Learned Amicus Curiae, said on behalf of the appellant that the learned Special Judge failed to consider that the same person has conducted the raid, lodged complaint and made prayer for confiscation of seized articles, took up investigation and ultimately submitted the charge sheet. So, as per submission of the learned Amicus Curiae that there is every chance of false impleadment of any person with any offence. Reliance has been placed by the learned Advocate upon the decision rendered by the Coordinate Bench of this Court in **Akbar Sk. Vs. The State of WB**¹. It is said by the learned Advocate that the learned Special Judge erred in relying upon the cash memo book when the same has not been proved at all.

7. The attention of this Court is drawn by the learned Advocate to the Section 17(c) and 17(e) of the W.B. Baby Food Licencing Order, 1966. It is said that as per provision of the said order before entering into the shop for conducting search he has to record reason to believe that the provision of that order is being or is about to be contravened in respect of such stock or any part thereof by the person and if the said provision is not complied by the raiding team then the entire search and seizure would be illegal and it may vitiate the conviction. It is said that PW 6 did not follow the provision as enunciated in the said order of 1966 before conducting search and seizure.

¹ **2000 SCC online Cal 483**

8. To buttress her submission the learned Advocate cited two decisions reported in **(1979) 2 SCC 115 (K.L. Subbayya Vs. State of Karnataka)** and **1990 C.Cr.L.R (Cal) 197 (New Roy Trading Co. & Ors. Vs. State of West Bengal & Ors.)** It is said by the learned Advocate that the zimmadar was not cited in the case as prosecution witness. PW2 and PW 5 stated in their cross-examination that on the relevant date and time raid was held in the two shops including the shop of this accused simultaneously. In this case no seized article was produced before this Court. It cannot be ascertained as to what quantities of articles was seized from the shop of this accused and from the other shops named and styled as 'Kundu Brothers'. So, there is absence to that extent that how much articles were seized from the accused. So, as per submission of the learned Advocate that the case of the prosecution is totally doubtful and the impugned judgment and order of conviction passed by the learned Special Judge may be set aside.

9. Ms. Faria Hossain, Ld. APP appearing on behalf of the State submits that there is no illegality or material irregularity in the impugned judgment and order of conviction passed by the learned Trial Court. It is said on behalf of the State that all the witnesses cited on behalf of the prosecution stated that this accused person violated the provision of the West Bengal Baby Food Control Order, 1966. Search and seizure was proved by the prosecution. At the time of hearing attention of this Court is drawn to the relevant portion of the impugned judgment and order where learned Trial Court quoted the provision of clause 5 of the license. So, it is said that the learned Special Judge rightly passed the impugned judgment after proper appreciation of the evidences brought on record by the side of the prosecution. There is nothing in the record for which the impugned judgment and

order of conviction passed by the learned Trial Court may be interfered with. So, it is prayed that the instant appeal filed by the convict appellant may be dismissed outright.

10. I have considered the rival submissions advanced by both the parties. Perused all the relevant materials as gathered in the record.

11. It is admitted position that this appellant convict had stationary shop having a retailer license no. 25/BFR/NHT/85 dated 24.12.1985. It is said in the written complaint by the defacto complainant (PW6) that at the time of inspecting the shop of this appellant it was found that he displayed stock and price list as 36 bottle horlicks, 39 lactogen, 12 tins cerelac, 28 amul spray baby food against which 2 tins amul spray is found excess in stock register. It is said in the written complaint that those articles were seized under preparation of seizure list and it was kept in zimma of one Mohon Kumar Pandit but the said zimmadar Mohon Kumar Pandit was not cited as witness to the prosecution. It is further revealed from the contentions of the written complaint that at the time of inspection/raid this appellant was not present there in but his employee Mohon Kumar Pandit was there. The seizure was made in the presence of PW2 (Ram Adhar Singh) PW3 (Durga Prasad) and PW4 (Gouri Sankar Shaw) amongst them PW4 is independent seizure list witness, whereas PW2 is one of the members of the raiding team. PW2 stated in cross-examination that there was also raid on the relevant date and time in another shop named and styled as "Kundu Brothers" along with the shop of this appellant simultaneously. PW5 also stated in the same line of PW 2 in cross-examination that on the relevant date there was raid in another shop. Therefore, it cannot be ascertained as to what quantity of articles was seized from the shop of

the appellant and from the shop named and styled as “KunduBorthers”. Moreover, it cannot be ascertained as to whether any cash memo was at all seized. So, there is a doubt as to how much articles were seized from the shop of the appellant.

12. PW3 Durga Prasad stated in his cross-examination that he could not say wherefrom the register and cash memo book were seized but this witness was not declared hostile by the side of the prosecution. PW4 stated in cross-examination that he could not say whether any article was seized from the shop of the appellant convict or not.

13. It is stated in the written complaint that at the time of inspection of the shop of the appellant he was not present in his place of business and in his absence his employee Mohon Kumar Pandit was running the shop to whom the seized articles were given zimma after preparation of a zimmanama. So, it is not ascertained as to who displayed the stock cum rate board and therefore the mensrea of the appellant was not proved.

14. As per provision of the para 17 (c) and 17(e) of the West Bengal Baby Food Licensing Order, 1966 that before entering into search/raid the complainant has to record reason to believe that the accused has contravened in respect of stock or part thereof. Otherwise, the entire search and seizure would be vitiated.

15. I have already said that PW2 and PW5 stated in their cross-examinations that on the relevant date and time, search was conducted simultaneously in the shop of this appellant convict along with another shop named and styled as “Kundu Brothers” but it was not ascertained from which shop how much quantities of articles were seized. Moreover, those seized articles were not produced before this Court. In this case PW6 lodged a complaint, made payer for

confiscation of seized articles, took up investigation and ultimately submitted the charge sheet. In this case there is a chance of false impleadment of a person with an offence and that may vitiate the trial. The independent seizure list witnesses (PW3 and PW4) did not support the story of the prosecution and they were not declared hostile. These witnesses did not say anything in their depositions from where the articles were seized and also stated in their cross-examination that they could not say wherefrom the register and cash memo were seized. Thus their testimony cannot be said to be trustworthy and reliance cannot be placed upon their evidence.

16. Under such circumstances and discussion made above I am constrained to hold that the prosecution has miserably failed to establish its case to that extent that from whose shop the alleged recovery was made.

17. In view of above facts and circumstances the impugned judgment and order of conviction passed by the learned Special Judge is liable to be set aside. Accordingly, it is struck down.

18. In the result the appeal **succeeded**.

19. The impugned judgment passed by the learned Trial Court is hereby set aside. The accused would be released from bail bond forthwith.

20. Let a copy of this order along with TCR be sent down to the learned Trial Court immediately.

21. Urgent Photostat certified copy of this order, if applied for be given to the parties on payment of requisite fees.

(Prasenjit Biswas, J.)