

KISHAN CHAND

v.

DELHI ADMINISTRATION AND ANR.

February 20, 1979

[S. MURTAZA FAZAL ALI AND A. D. KOSHAL, JJ.]

Prevention of Food Adulteration Rules, 1955— r. 61—Scope of.

Rule 60 of the Prevention of Food Adulteration Rules, 1955 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. One of the agents mentioned, among others, in the rule is brominated vegetable oils. Rule 61 declares that no emulsifying or stabilising agents shall be used in any food except where they are used as specifically permitted. The proviso to the rule states that certain emulsifying or stabilising agents including brominated vegetable oils shall not be used in milk and cream.

A food inspector visited an Ice-cream factory and collected a sample of chocolate ice cream. In the inventory of the sample prepared by him it was stated that "this is prepared of covering chocolate, vegetable ghee and ice-cream". The Public Analyst, to whom the sample was sent for analysis, stated that the sample was adulterated "as the butyro-refractometer reading at 40°C was found 6.4 in excess and the Baudouin test was found positive of the extracted fat."

The factory, its owner and the employee who sold the ice-cream, were prosecuted under the Prevention of Food Adulteration Act. The trial court acquitted the factory but convicted and sentenced both its owner and the employee.

On appeal the Additional Sessions Judge acquitted both the accused.

On further appeal the High Court acquitted the factory owner but convicted the employee (appellant before this Court). The High Court pointed out that vegetable ghee could not be made to serve as an emulsifying agent because r. 61 forbids addition of brominated vegetable oil to milk or cream and without milk and/or cream manufacture of ice-cream was inconceivable and that the appellant's stand had been that vegetable ghee had been used and not that any brominated vegetable oil got into the ice-cream by way of an emulsifying or stabilising agent.

Allowing the appeal,

HELD : 1 (a) The sample of ice-cream obtained from the appellant was not shown to have been adulterated within the meaning of the Act and the Rules. [316 D]

(b) The prohibition contained in the proviso to r. 61 does not apply to ice-cream, kulfi and chocolate ice cream covered by sub-item A.11.02.08, wherein it is clearly stated that these three milk products may contain permitted stabi-

A lisers and emulsifiers not exceeding 0.5 per cent by weight. Clearly, therefore, brominated vegetable oils could have formed a part of the chocolate ice-cream to the extent of 0.5 per cent by weight, without the article being treated as adulterated under the rules. What the proviso to r. 61 prohibits is the use of certain emulsifying and stabilising agents only in milk and one of its products, namely, cream and not in other milk products such a *malai, dahi, cheese, ice-cream* and chocolate ice-cream. Had the intention of the rule been to prohibit the use of the said agents in all milk products, the expression would have been "shall not be used in milk and milk products" and not "shall not be used in milk and cream". [318 C-E]

B

2. It was for the prosecution to prove affirmatively that the sample 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. 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% by weight. The analyst's report did not indicate the presence in the sample of brominated vegetable oil beyond the prescribed maximum of 0.5% by weight or of un-brominated vegetable oils. [318G-H]

C

D CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 245 of 1975.

Appeal by Special Leave from the Judgment and Order dated 25-3-1975 of the Delhi High Court in Criminal Appeal No. 122/72.

E *Harjinder Singh* for the Appellant.

E. C. Agarwala and *R. N. Sachthey* for Respondent No. 1

V. S. Desai, B. P. Maheshwari and *Suresh Sethi* for Respondent No. 2.

F The Judgment of the Court was delivered by

G KOSHAL, J.—This is an appeal by special leave against a judgment of the High Court of Delhi dated 25th March, 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.

H 2. The facts giving rise to the appeal may be briefly stated. Food Inspector V. P. Anand, (P.W.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 the 22nd May 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 Chocbar 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°C of the fat extracted from ice-cream :—49.4.

Baudouin test of the extracted fat : Positive.

Melting point of the extracted fat :—34°C.”

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

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 months 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 9th March 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

A the ice-cream sold by him. The judgment of the learned
 B Additional Sessions Judge reveals that the contention of the
 C 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."

D 3. 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.

E 4. The case is admittedly governed by the Prevention of Food
 Adulteration Rules 1955 which have been framed by the Central
 F 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 sub-
 stances which, when added to food, are capable of facilitating a uni-
 form dispersion of oils and fats in aqueous media, or *vice versa*, and/or
 stabilising such emulsions. The rule then proceeds to specify nume-
 G rous agents of the type mentioned and they include brominated vege-
 table 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 that 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 pro-
 ducts 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 definitions and
 standards of purity of various kinds of milk.

H 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.”

A

B

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.”

C

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 contain fruits or nuts or both, the content of milk fat may proportionately reduced but shall not be less than 8.0 per cent by weight.

D

E

F

“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 shall also apply to softy ice cream.”

G

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

H

A 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

B 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

C 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 appel-

D lant, 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

E in some other detail.

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

F 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

G 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°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

H 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 un-brominated vegetable oils.

5. 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 in so far as it relates to the appellant is reversed, the conviction recorded against and the 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.

P.B.R.

Appeal allowed.