

**FOOD SAFETY APPELLATE TRIBUNAL
JAIPUR, RAJASTHAN**

APPEAL NO.FA/0001/2017

Rajendra Kumar S/o Shri Tej Singh Sisodiya, R/o House
No. 2-D-41, R.C. Vyas Colony, Bhilwara, C/o Firm M/s
Hotel Apsara, Rajeev Gandhi Market, Bhilwara.

--APPELLANT

Versus

State of Rajasthan, through Commissioner, Food Safety
Food Safety, Office of Chief Medical and Health Officer,
Bhilwara

--RESPONDENT

Present :-

Shri Mayank Gupta, Advocate for Appellant
Shri V.D. Gathala, Advocate for Respondent

JUDGMENT

Date – 11.01.2018

This appeal is preferred under Section 70 of the Food Safety and Standards Act 2006 (hereinafter referred as 'Act of 2006') against the order dated 30.05.2016 passed by Shri Giriraj Kumar, RAS, Adjudicating Officer cum Additional District Magistrate, Bhilwara in Case No.02/2016 in exercise of powers under Section 68 (2) of the Act of 2006, whereby, penalty of Rs.4,00,000/- (Rupees Four Lacs) was imposed against the appellant.

2. Facts in brief:-

- (i) On 13.5.2015, the Food Safety Officer Bhilwara took the sample of 'Paneer' from the firm of appellant i.e. M/s Hotel Apsara, Rajeev Gandhi Market, Bhilwara. The said sample was found sub-standard. After obtaining necessary sanction, complaint against appellant was submitted before Adjudicating Officer, Bhilwara.
- (ii) After inquiry, aforesaid penalty was imposed against the appellant.
- (iii) Aggrieved by the order dated 30.05.2016, appellant preferred this appeal.

3. Grounds in appeal:-

- (i) The appellant is neither manufacturer nor dealer of the food item i.e. Paneer.

- (ii) The appellant purchased milk from Saras and made curd and paneer from that milk. He is not dealer of the paneer. Appellant is running the Restaurant and paneer is used for preparation of vegetable to be served to the customers.
- (iii) On 13.5.2015, another sample of curd was also taken from the firm of the appellant. Same was also found sub-standard, but a penalty of Rs.2000/- was imposed by the Adjudicating Officer. Whereas in this case, a penalty of Rs.4,00,000/- have been imposed without assigning any reason and in flagrant disregard of the provisions of Section 49 of the Act of 2006.
- (iv) It was also contended that no reply was filed in this case before the Adjudicating Officer. Reply was filed in the case of curd which was Case No.01/2016. Same reply has been considered in this case. Hence, reasonable opportunity to defend has been denied by the Adjudicating Officer.
4. In Reply to appeal, it is stated that no appeal was preferred by the appellant against the report of Analyst. It was admitted by the appellant that food item was sub-standard. Therefore, penalty imposed is lawful. Provisions of Section 49 of the Act of 2006 cannot be applied in this case. Because, amount of gain or unfair advantage from the sub-standard product is not quantifiable.
5. Arguments heard. Record of the case thoroughly scanned; meticulously analysed the relevant provisions of law.
6. Shri Mayank Gupta, learned counsel for appellant would reiterate the grounds taken in appeal.
7. Shri V.D. Gathala, learned counsel for respondent supported the impugned order.
8. **Point for determination**
Whether, learned Adjudicating Officer Bhilwara committed an error of law and fact in holding appellant guilty of violation of sub-section 2(ii) of Section 26 of the Act of 2006?
9. **Decision**
Decided against the appellant

Reasons for decision

10. It is just and proper to mention here that appellant also preferred a review of the impugned order before the learned Adjudicating Officer. Same was also dismissed by the learned Adjudicating Officer Bhilwara on 28.12.2016.
11. In the review petition, it was contended by the appellant that impugned order was passed in his absence and perhaps penalty imposed is by mistake.
12. In the order dated 28.12.2016, it is specifically mentioned by the learned Adjudicating Officer that on 30.5.2016 appellant was present in person, therefore, review petition was dismissed.
13. Be it so, it was vehemently argued by learned counsel for the appellant that no separate reply was filed in this case. Appellant submitted reply in case No.01/2016 pertaining to the sample of curd.
14. In this situation, original record of the case no.01/2016 and case No.02/2016 was called. It was found that separate replies were filed in both the cases. In both the cases reply bears original signature of appellant, therefore, there is no force in the argument of learned counsel for appellant that a photocopy of the reply in case no.01/2016 was taken and figure 01 was substituted by figure 02. This contention is factually incorrect. As stated, reply filed by the appellant in both the cases is original reply. Of Course, in case no.02/2016 figure 02 is marked with the fountain pen. Be it so, it cannot be said that no reasonable opportunity of hearing was given to the appellant in this case.
15. Shri Mayank Gupta, learned advocate for appellant would argue that appellant is neither manufacturer nor dealer of the 'Paner', therefore, he cannot be penalized.
16. There is no force in this argument because in *1971(2) Supreme Court Cases 322, The Food Inspector, Calicut Corporation V. Cherukattil Gopalan and another*, it was held by the Hon'ble Supreme Court that purchase by the Food Inspector for analysis amounts to a sale. It is enough if the sale to Food Inspector is proved. The case was under the Prevention of Food Adulteration Act 1954. The provisions of Section 2(1) of the Act of 1954 and Section 3(1)(j),(zr) & (zs) of the Act of 2006 are almost identical. Definition of 'sale' and 'sample' is relevant for the present case. Definition in both the Acts is as under:-

Act of 1954	Act of 2006
<p>S.2(1)(xiii) 'Sale' with its grammatical variations and cognate expressions, means the sale of any article of food, whether for cash or on credit or by way of exchange and whether by wholesale or retail, for human consumption or use, or for analysis, and includes an agreement for sale, an offer for sale, the exposing for sale or having in possession for sale of any such article and includes also as attempt to sale any such article;</p> <p>S.2(1)(xiv) 'sample' means a sample of any article of food taken under the provisions of this Act or of any rules made thereunder.</p>	<p>S.3(1)(zr) 'Sale' with its grammatical variations and cognate expressions, means for sale of any article of food, whether for cash or on credit or by way of exchange and whether by wholesale or retail, for human consumption or use of for analysis, and includes an agreement for sale, an offer for sale, the exposing for sale or having in possession for sale of any such article, and includes also an attempt to sell any such article;</p> <p>S.3(1)(zs) 'sample' means a sample of any article of food taken under the provisions of this Act or any rules and regulations made thereunder.</p>

From the aforesaid comparison, it is crystal clear that definition of 'sale' and 'sample' is almost identical in essence in both the Acts. Therefore, law laid down in 1971(2) Supreme court Cases 322 is squarely applicable in this case.

17. It is not in dispute that 'Paneer' was not sold to the Food Safety Officer, Bhilwara.

18. Learned advocate for appellant replied upon 2017(1) FAC 83, *Madhya Pradesh High Court in Rajwardhan Singhal V. the State of Madhya Pradesh*. In this case, Food Inspector purchased 3 packets of chilli powder from the Hotel of the applicant and violation of rules 32(E), 42(H) and 50 of PF Rules found in this case. It was held that chilli powder was kept in the restaurant for their use in making various edibles preparations and it was not kept for sale. With great respect, law laid down in this case by the Hon'ble Madhya Pradesh High Court is *per incuriam*. In light of the authoritative pronouncement on the subject by Hon'ble Supreme Court, law laid down by Madhya Pradesh High Court is not a good law on the subject.

19. So far as quantum of penalty is concerned, though, the amount of gain or unfair advantage by the sub-standard food product cannot be quantified as a result of contravention by the appellant. But, there is no repetition of contravention by the appellant on record. Moreover, it cannot be said that contravention was within the knowledge of the appellant. Therefore, penalty imposed seems to be excessive.

20. No other argument was advanced before me except the arguments discussed hereinabove.
21. From the aforesaid discussion, it is crystal clear that appeal filed by the appellant is devoid of merit, deserves to be dismissed except on quantum of penalty.

ORDER

22. Appeal against the order of learned Adjudicating Officer Bhilwara dated 30.05.2016 in Case No.02/2016 is dismissed, but the penalty of Rs.4,00,000/- is reduced to Rs.2,00,000/- only. Rest of the order of the learned Adjudicating Officer Bhilwara is upheld and affirmed.
23. Registrar to provide a certified copy of this order to the appellant without any cost.
24. Pronounced on 11.01.2018.

(Umesh Kumar Sharma)
Presiding Officer