THE DEFENCE OF WARRANTY IN FOOD ADULTERATION CASES

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On the 6th of April 1994 Shyam Sundar Maheswari of Titabor, a grocer, sold 750 gms of Arohar Dal to the Food Inspector for analysis. Eventually on the adverse report of the Public Analyst he was prosecuted for an offence under Section 7 read with section 16 of the Prevention of Food Adulteration Act, 1954 (PFA Act hereinafter). During the trial M/s Gopal Bhander was impleaded as the dealer on the allegation that the offending Arohar Das was purchased by Shyam Sundar from M/s Gopal Bhander. Principal defence of Shyam Sundar was the defence of warranty under Section 19(2) of the PFA Act. Trial Court acquitted M/s Gopal Bhander. The defense of warranty cut no ice with the trial Court and he was, on conviction, awarded the standard sentence of six months' imprisonment and a fine of rupees one thousand. His appeal was also dismissed and Shyam Sundar Maheswari reached the High Court via Section 397 read with Section 401 of the Code of Criminal Procedure. Thus was born Criminal Revision Petition No.229/1997 decided on 05.04.2005, a day preceding the eleventh anniversary of the sale of Arohar Dal by Shyam Sundar Maheswari. The defence of warranty pleaded by him did not prevail in the High Court as well. In the Judgment of the said Criminal Revision, as yet unreported, an earlier Judgment of the High Court dealing with the plea of warranty placed by the learned counsel for the petitioner namely Nirmal Poddar –Vs- State of Assam, 2003(3) GLT 455 was considered but was distinguished. The judgment followed M/s Muralidhar Shyamlal –Vs- State of Assam, AIR 1996 SC 1429. Nirmal Poddar (Supra) also mentions another Supreme Court Judgment namely P. Unni Krishnan –Vs- Food Inspector, Palghat Municipality AIR 1995 SC.C 1983. This quartet of precedents, two from the Gauhati High Court and two from the Supreme Court, appears to throw considerable light on the hazard on the way of relying on precedents in deciding a case. What follows is an attempt at exploring and understanding the hazard.

1. That Statute Law

The Statute Law providing for the defence of warranty is contained in Section 14 and 19 of the PFA Act and Rule 12-A of the PFA Rules, 1955. In the original PFA Act extant since 01.06.1955 Section 14 had nothing to do with warranty at all. The section underwent two major amendments. First by the amending Act 49 of 1964 the provision for giving of a "warranty in writing in prescribed form" by the manufacturer, distributor or dealer to the vendor was introduced. This provision came in to force with effect from 01.03.1965.

Secondly, by the amending Act 34 of 1976 a proviso has been added to Section 14. The proviso in Section 14 came into force with effect from 01.04.1976. The proviso undoubtedly constituted the most drastic change in the Statute Law as to the defence of warranty in offences under PFA Act. A look at a little history behind this proviso at this stage seems apposite. The reason for insertion of the proviso by Act 34 of 1976 can be extracted from the report of joint parliamentary committee thus. Section 14 of the PFA Act imposes an obligation on the manufacturers, Distributors or Dealers to give a warranty in writing in respect of nature and quality of the article food sold to a vendor. During the course of evidence before the joint committee the retailers represented that the obligation was not being followed by the Manufacturers and Dealers and as a result the vendors had to suffer. The committee recommended insertion of the proviso to remedy the situation. That is how the proviso containing a legal fiction came to be added to section 14 of the PFA Act. Section 19(2) of the PFA Act with only consequential amendments in tune with the amendments to Section 14 has been there in the original PFA Act since 01.06.1955. Rule 12-A the third limb of the Statute Law dealing with the defence of warranty also has undergone resultant changes over the years. A conjoint perusal of the aforesaid provisions of the PFA Act and the PFA Rules, mindful of the amendments made from time to time as indicated above, would yield the following statement of the law as to the defence of warranty.

(i) The "written warranty in the prescribed form" (Sec.19 (2) of the PFA Act) and "warranty in writing in the prescribed form" (Sec.14 of the PFA Act) may be given either separately or in the bill, cash memo or label (Rule 12-A). Irrespective of the fact whether it is given separately or in the cash memo etc the warranty must reflect the contents of Form VI-A. But on or after 01.04.1976 a bill, cash memo or invoice in respect of the sale of any article of food given by the manufacturer or distributor of, or dealer in, such article to the vendor shall be deemed to be a warranty by virtue of the legal fiction enacted in the proviso to Section 14 of the PFA Act. A deemed warranty need not fulfill the prescriptions of Form VI-A. Thus a decision on a plea of warranty will turn largely on the date of the sale of the article of food to the Food Inspector. As a

corollary a Judgment involving a plea of warranty contained in a cash memo relating to a period before 01.04.1976 even if it be of the Supreme Court cannot be used as a precedent while deciding a case turning on the plea of warranty based on a cash memo where the offence took place after 01.04.1976. The proviso to Section 14 does not cover the label on the container. Therefore unlike a cash memo a mere label bereft of the contents of Form VI-A will not be a warranty within the Law even after 01.04.1976.

(ii) To complete this section a few words about legal fiction seems to be necessary. The purpose for which a legal fiction, as in the proviso to Section 14 of the PFA Act, is created is of utmost importance in understanding and interpreting the legal fiction. By enacting a legal fiction the legislature bids everybody to treat an imaginary state of affairs as real. There cannot be half way measure in the play of this imagination and all the necessary consequences flowing from the fiction must also be imagined. The purpose for creation of the legal fiction has already been indicated by referring to the joint committee report. A mere cash memo obviously is not a warranty without the contents as in Form VI-A. But it has to be imagined to be the warranty by force of the legal fiction if issued on or after 01.04.1976.

2. <u>The Quartet</u>

In P. Unni Krishnan (supra) decided on 15.02.1995 the date of the offence has not been indicated. But from the date of disposal and the No. of the Criminal Appeal which is Criminal Appeal No. 538/1991 it may be a safe assumption that the date of sale/offence would be after 01.04.1976. The date of offence in Muralidhar Shyamlal (supra) is 01.02.1984. The date of ofence in Nirmal Poddar (supra) decided on 18.09.2003 is 17.05.1989. Lastly, the date of offence in Shyam Sundar (supra) is 06.04.1994. Thus a common feature of all the four cases is that the legal fiction in the proviso to Section 14 of the PFA Act could govern the plea of warranty in all of them. Surprisingly the two Supreme Court Judgments did not even mention the proviso far less interprete it. The two High Court cases, again surprisingly despite quoting in full Section 14 alongwith the proviso did not highlight its use nay even in one case failed to use it. Generalities apart a closer examination of the quartet yields the following :

(i) In P. Unni Krishnan (supra) the provisions of Section 19(2) of the PFA Act and Rule 12-A were quoted and then in para 4 occurs the sentence which may be quoted –"In the instant case there was a Bill <u>Ex/DI which contained the warranty</u>"

(*underlining supplied*). Then in para 5 occurs the sentence quoted in Nirmal Poddar (supra) thus " In every case the accused cannot be expected to verify further whether the contents of the label on the tin and those <u>in the Bill containing the warranty are</u> correct or not" (*underlining supplied*). From these it appears that in P. Unni Krishnan (supra) though apparently a case dealing with a Bill issued after 01.04.1976 the Supreme Court appears to have failed to apply the legal fiction under the proviso to Section 14 whereunder the Bill is the warranty and it need not contain the warranty in the prescribed form under Rule 120A. Indeed, as indicated earlier the Judgment not to speak of applying the proviso did not even notice its existence. To that extent P. Unni Krishnan (supra) can hardly be called a precedent for deciding Nirmal Poddar (supra) where a cash memo was proved obviously not containing any warranty in prescribed Form VI-A. The Sessions Judge refused to accept this as the warranty failing to apply the proviso. The High Court, however, as it appears from para 8 and 9 of the Judgment in Nirmal Poddar (supra) correctly applied the proviso to Section 14 of the PFA Act.

(ii) **The most important feature of Muralidhar Shyamlal (supra) appears to have gone unnoticed by the High Court in Shyam Sundar (supra). In Muralidhar Shyamlal (supra) no cash memo was filed in the case. See para 9 of the Judgment. Para 8 of the Supreme Court Judgment in question has been quoted in full in Shyam Sundar (supra). Even a portion of para 8 has been underlined for emphasis. However, Shyam Sundar (supra) failed to notice that the observation in para 8 are in respect of "the memo of the sample taken by the Food Inspector", quoted at the end of para 7 of the Supreme Court Judgment. The Food Inspector while taking a sample has to give notice of his intention under Rule 12 of PFA Rules and the notice has to be in Form VI. One item in form VI is "Details of Food". A conjoint reading of Rule 12 Form VI and para 7 and 8 of the Supreme Court Judgment leaves no doubt at all that the Food Inspector had filed up the Column "Details of Food" from the label of the Mustard Oil tin there. A "Label" does not fall within the legal fiction in the proviso to Section 14 of the PFA Act. But a warranty may be contained in the label as well under Rule 12-A. The Supreme Court, in the circumstances, was requested to look for the warranty in the label but the words quoted did not contain the words in Form VI-A. Legal fiction being inapplicable to a label the observations of the Supreme Court in respect of label cannot be applied to a case where a cash memo within the proviso is being dealt with. The words underlined in the quotation from the Supreme Court Judgment in Shyam**

Sundar (supra) relate to the label. The Supreme Court in para 9 of the Judgment has again referred to the memo mentioned in para 7 thereof by calling it the "Panchanama". It appears from a perusal of para 9 of the Supreme Court Judgment that the learned counsel there relied on AIR 1970 S.C. 520. It was contended before the Supreme Court by reading the evidence there that the warranty can be spelled out from the cash memo mentioned in the evidence through the cash memo itself was not produced as was done in AIR 1970 S.C. 520, AIR 1970 S.C. 520 is the Judgment in Criminal Appeal No. 147/1967 and was decided on 14.08.1969. Under the Statute extant at the relevant time the cash memo must contain the warranty clause as in Form VI-A otherwise it was of no use and the language of the cash memo was very vital. In Muralidhar Shyamlal (supra) there was no cash memo produced and the Supreme Court in effect held that AIR 1970 S.C. 520 cannot be applied. Incidentally that was a Judgment of a Three Judge Bench. Evenso, since the proviso to Section 14 was not brought to the notice of the Supreme Court in Muralidhar Shyamlal (supra) the ibservation in para 9 saying-

> *"..... we cannot make any guess as to what would be the nature of the language used in cash memo"*

seems to have been made per incuriam. It needs no reiteration that a cash memo issued after 01.04.1976 has to be dealt with under the proviso by applying the legal fiction whereunder as long as it is a cash memo its language need not contain the warranty because the cash memo itself is the warranty.

(iii) In the light of the foregoing analysis the statements in para 11 of Shyam Sundar (supra) namely,

"*The exhibit "Ka" does not contain any endorsement/certificate required to be given as per Form VI-A".*

AND

"*Further the said cash memo, in question the exhibit "Ka" does not contain the necessary warranty clause as required under Rule 12-A as prescribed in Form VI-A"*

appear to have been influenced by the law before 01.04.1976. These statements as reasons, amongst others, for refusal to accept the plea of warranty are in the teeth of

the law under the proviso to Section 14 of the PFA Act. Similarly the opening statement in para 12 of Shyam Sundar (supra) namely; "In view of the above proposition of law laid down by the Apex Court, there must be specific mention in the warranty as envisaged in Form VI-A, by the dealer or distributor or manufacturer that the article of food sold was in the same nature and quality of the article of food as the case may be", will fly in the face of the relevant law of warranty applicable to a cash memo issued on or after 01.04.1976 when the proviso to Section 14 is in force. As indicated earlier "proposition of law laid down by the Apex Court" was in relation to a label on the container and does not relate to a cash memo and cannot be a precedent to determine the plea of warranty in the case.

(iv) It appears that the learned counsel for the petitioner in Shyam Sundar (supra) could not press the proviso to Section 14 of the PFA Act sufficiently to impress upon the High Court that though Nirmal Poddar (supra) contains distinguishing features as most couple of cases would do it should not be brushed aside because the core of the law applicable that is the legal fiction under the proviso has been correctly appreciated and applied. From the two Judgments of the High Court it is not possible to say whether P. Unni Krishnan (supra) and Muralidhar Shyamlal (supra) were cited by the learned counsels or were the product of Judges, "own researches". Many Modern Judgements, unlike older ones, do not say anything about the source of the precedent used. Lord Denning one of the greatest Judges of England had a habit of making his "own researches". But the habit was deprecated by his brothers in the House of Lords. The following may be extracted from Part Seven with the heading. The Doctrine of precedent from the Discipline of Law by Lord Denning –

> **"***Thus rebuked, I may as well make a confession. On many occasions I have done my own researches and given an opinion in matters on which the Court has not had the benefit of the arguments of counsels or of the Judgment of the Court below. I have done this because counsel vary much in their ability and I do not think that their clients should suffer by any oversight or mistake of counsel. If it is a new point or new matter which could alter the outcome of the case, then the right course is to inform counsel and put the case in the list for further hearing".*

The reason for Judges' "own researches" as indicated by Lord Denning is unexceptionable. But unaided research may sometimes produce a result opposite to the reason referred to by Lord Denning.

3. <u>The concluding comments</u>

Only the legal limb of the defence of warranty has been considered here. The other limb of the defence, that is storing of the article properly and selling it in the same state as the vendor purchased it from the manufacturer, Distributor or Dealer, being matters of fact no question of precedent arises on this aspect. Evenso, it must be stated at the end that from a perusal of the remaining reasons on facts given at para 11 of the Judgment in Criminal Revision No.249/1997, there can be hardly any doubt that Shyam Sundar Maheswari did not deserve the protection of the defence of warranty.

4. The Postscript

It may also be mentioned here that apart from Nirmal Poddar (supra) there are three other Single Bench decisions of the Gauhati High Court where a cash-memo within the proviso to Section 14 of the PFA Act was dealt with. These decisions are reported in 2004 (1) GLT 17, 2004(3) GLT 27, and 2004 (Supp) GLT 171.