

1942

*Present : Keuneman J.*DISSANAYAKA *v.* JOTHIDASA.702—*M. C. Kurunegala, 7,168.*

Defence (Miscellaneous) Regulations 43 (d), paragraphs 9 and 10—Wholesale dealer in sugar—Authority to sell by retail—Sale of bags to boutique-keeper—What amounts to sale by retail.

Sale of three bags of sugar by a wholesale dealer to the owner of a tea boutique is not a sale by retail which is permitted to such wholesale dealer in terms of paragraph 10 of Regulation 43 (d) of the Defence (Miscellaneous) Regulations.

A PPEAL from a conviction by the Magistrate of Kurunegala.

L. A. Rajapakse (with him *Ananda Pereira*), for accused, appellant.

A. C. Alles, C.C., for complainant.

Cur. adv. vult.

November 25, 1942. KEUNEMAN J.—

The accused was charged for a breach of paragraph 9 of the Order made by the Governor under Regulation 43 (d) of the Defence (Miscellaneous) Regulations and published in the *Gazette Extraordinary* No. 8,961 of July 3, 1942.

Paragraph 9 runs as follows:—

“Save as otherwise provided in paragraph 10, no wholesale dealer carrying on business outside Colombo shall sell or supply any sugar to any person unless that person produces to him for inspection at the

time of such sale or supply a certificate under the hand of the Government Agent to the effect that such person is a registered retail trader."

Paragraph 10 is as follows:—

"Nothing in paragraph 9 shall be deemed to prohibit or restrict the sale of sugar by retail at any shop or premises by any wholesale dealer, if that wholesale dealer has been authorised by writing under paragraph 4 (6) to sell sugar by retail at such shop or premises :

Provided that the total quantity of sugar which may be sold by retail at such shop or premises during any period shall not exceed the quantity specified in such writing to be the maximum quantity which may be sold by retail at such shop or premises during that period."

The accused, who is a dealer in sugar outside Colombo, is charged with the sale of 3 bags of sugar to Abdul Samad, who did not at the time of the sale produce a certificate of the Government Agent to show that he is a registered retail trader. In fact, Abdul Samad had no such certificate.

The accused, in his defence, urged that the sale was one permitted by paragraph 10, in view of the fact that while he is a registered wholesale dealer, he had also been authorised by writing to sell sugar by retail. He contends that the sale in question was a "sale by retail".

The evidence of the Price Control Inspector establishes that the accused was a wholesale dealer, and had also been given authority to sell sugar by retail. On July 21, 1942, the accused was authorised to sell 10 bags of sugar by retail within a fortnight.

On July 25, Abdul Samad came to the accused's boutique with Ismail and Ibrahim. Each of the three men purported to purchase a bag of sugar at the rate of Rs. 34.50 a bag, but in point of fact all three bags were purchased by Abdul Samad, who had a tea boutique and needed the sugar for preparing tea there. Ismail and Ibrahim were merely nominal purchasers, and Abdul Samad paid for all three bags. Ismail and Ibrahim are dealers in dry fish, and did not deal in sugar or want the sugar. They were taken to the accused's shop because, according to Abdul Samad, "the accused wanted three persons to buy three bags". I think it must be taken that the accused sold 3 bags of sugar to Abdul Samad, and resorted to a subterfuge to make it appear that he was selling one bag each to three persons.

The question, however, remains as to whether this can be regarded as a "sale by retail". No doubt the accused showed in his return that he had sold the three bags in question out of his retail stock (he had authority to sell ten bags by retail in the fortnight). But this return was made after the seizure of the three bags of sugar, which took place as the bags were being removed from the shop to the bus.

The Order does not define what is meant by "a sale by retail". The term "retail trader" and "wholesale dealer" are defined but these definitions do not help us to solve the problem. In the New Oxford Dictionary the word "retail" is said to mean the sale of commodities in small quantities, while "wholesale" connotes sale in large quantities, in gross, as opposed to retail. I have also been referred by Crown Counsel

to the case of *Treacher & Co., Ltd., v. Treacher*¹. In that case defendant was under covenant not to carry on, or be engaged or concerned or interested in the business of chemists, druggists and soda water manufacturers and general merchants, "so far as the same may be considered retail". He and his partner could not sell sample bottles without "breaking bulk", that is to say without opening a case and taking out a bottle and it appeared there was no limit to the sale of these single bottles. . . . As a general rule 'wholesale' merchants dealt only with persons who bought to sell again, whilst 'retail' merchants dealt with consumers. In this sense of the word, as well as from the fact that defendant and his partners were ready to sell any number of single bottles, the defendant has been guilty of a breach of the covenant" (per *Bacon, Vice Chancellor*). In *Philips v. Parnaby*², the dictum of *Bacon V. C.*, with regard to the difference between wholesale merchants and retail merchants, is emphasised.

Mr. Rajapakse referred me to *Bell's South African Legal Dictionary* (2nd edition) p. 486. "Retail, in small quantities. To sell by retail is to sell in small quantities". As regards quantity, there is a reference to the case of *Bowles v. Stott*³, where *Bristowe J.* said "Now 'quantity' is a relative term. What would be a large quantity for a bachelor, keeping up a bachelor establishment, is a small quantity for a man with a large number of children and dependants. So that quantity taken by itself, is not a conclusive criterion. There may be cases in which mere considerations of quantity would govern the decision, but it is not in itself decisive. It must be looked at in conjunction with all the other circumstances of the case."

But he added later: "It seems to me that if goods are bought for the purposes of a business, that is with a view of making a profit out of them, the presumption, at all events, is that they are bought wholesale and not retail; for, persons who buy for their business usually buy wholesale, and the profits of the business frequently depends upon the difference between the wholesale and the retail prices."

(I am quoting from *Bell's Legal Dictionary* as the case is not available to me.)

No doubt, it is correct that *Abdul Samad* cannot be regarded as a retail trader in sugar. I think the Magistrate was in error in holding him to be such retail trader. The only evidence on the point is that of *Abdul Samad* himself, who said, "I bought this sugar for my tea boutique at *Puttalam*" and "The sugar was for making tea only." There is no evidence that *Abdul Samad* was a seller of sugar as such. See in this connection the case of *Moore v. Pearce's Dining and Refreshment Rooms, Ltd.*⁴. But it is clear that *Abdul Samad* was purchasing the sugar not for the consumption of himself and his family or household, but for the purposes of his business as the owner of a tea boutique. This is a circumstance which is of importance. There is also the fact that the accused did not "break bulk", but sold by the bag. He made no distinction between the owner of a tea boutique and a dealer in dry fish, who did not need any sugar. In fact, he did not, in this case genuinely

¹ (1894) *W. N.* 4.

² *L. R.* (1934) 2 *K. B. D.* 299.

³ (1909) *T. S.* 412.

⁴ *L. R.* (1895) 2 *Q. B. D.* 657.

adopt his own standard of one bag per person, but under the pretence of selling to three persons sold the three bags in reality to one person. No doubt the actual quantity sold is in itself inconclusive, but the quantity sold is substantial, a little less than one-third of the entire stock he could dispose of by retail in a fortnight, and the quantity does not indicate that the transaction was a retail sale.

It would no doubt have been more satisfactory if the Order had provided a certain maximum quantity as constituting a sale by retail. But in the absence of any such definition, I have to consider all the circumstances of the case, and after such consideration I am of opinion that the transaction in question cannot be regarded as a sale by retail. The appeal must accordingly be dismissed, and the conviction and sentence affirmed.

Appeal dismissed.
