

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ WP.(CrI.).No.1511/2009

% Reserved on: 8th February, 2010
Date of Decision: 19th February, 2010

YOGENDER SINGH & ORS. Petitioners
! Through: Mr. Kamal Sawhney, Adv.

versus

\$ STATE & ANOTHER Respondents
^ Through: Mr. Akshay Bipin, ASC

* **CORAM:**
HON'BLE MR. JUSTICE V.K.JAIN

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

: **V.K. JAIN, J.**

1. This is a writ petition under Articles 226 & 227 of the Constitution of India for quashing the FIR registered against the petitioners under Section 7 of the Essential Commodities Act, 1955.

2. On 25th of April, 2008, on receipt of complaint regarding supply of sub-standard/inferior quality of food articles to Fair Price Shops from Food Corporation of India Godown, Maya

Puri, the officials of Food & Supplies Department of Government of NCT of Delhi carried out an inspection of those godowns. Wheat loaded in two trucks positioned in FCI Godown, which had been released for delivery to PDS outlets, appeared to be of inferior quality. Samples were, therefore drawn from both the truck and were sealed. The officials of Delhi State Civil Supplies Corporation, which is the agency that collects foodgrains from FCI godowns and transports it to Fair Price Shops all over Delhi, also drew samples from Unit Nos.4 & 10 of FCI godowns. All the samples were sealed. Though petitioner No.1 Yogender Singh, who was the Depot Manager of FCI Godown, Mayapuri, claimed that the wheat lying in Unit No.10-B and in open area in front of Unit No.4 were dumped stocks, not meant for issue for public distribution, he could not produce any document in support of his claim. The samples were duly sealed with seal of CFS and sent to PFA Laboratory for testing. As per the Test Report, none of the samples confirmed to the standard norms as extraneous matters, including mineral and damaged grains exceeded prescribed maximum limit, and further samples were also found to be insect-infested and fungus-

infested. The case of the prosecution is that petitioner No.1 Yogender Singh was the Depot Manager and Quality Controller of FCI Godown, Mayapuri. The petitioner No.2, Ramesh Chander Chopra is stated to be the Manager(Quality Control) of Unit No.10 & 10B at Mayapur, whereas the petitioner No.3, Fakir Chand is stated to be the Manager(Quality Control) of Unit No.4 of the aforesaid Godown. The chargesheet against the petitioners has already been filed during the pendency of the proceedings. The petitioners are seeking quashing of criminal proceedings instituted against them primarily on the following grounds:

- (i) The specimen seal impressions were not sent to the Public analyst, as required by Rule 18 of the Prevention of Food Adulteration Rules, 1955, hereinafter called the 'Rules' and, therefore, the Public Analyst could not compare the seals on the polythene bags in which the samples were kept with the specimen impressions;
- (ii) The polythene bags used for keeping the samples were not appropriate container and consequently there was violation of Rule 14 of the Rules;

(iii) The chargesheet having being filed on 11th November, 2009, the right of the petitioner to get the second sample sent to the Central Food Laboratory, in terms of Section 13(2) of the Prevention of Food Adulteration Act, 1954, hereinafter called the 'Act', was defeated since the wheat taken as sample had become unfit for consumption by that time and, therefore, it did not remain possible for the petitioners to show that the wheat at the time of taking samples, was not adulterated.

Applicability of PFA Act and Rules:

3. The first question which comes up for consideration in this case is as to whether the safeguards provided in Prevention of Food Adulteration Act and the Rules framed thereunder and the rights conferred by the Act on a person accused of having committed an offence punishable under that Act are available to a person who is accused of having committed an offence punishable under Section of the Essential Commodities Act.

4. The object behind making adulteration of food and foodstuff punishable with imprisonment was to prevent

danger to human life and health by sale of unwholesome articles of food. The basic aim was to ensure purity in the articles of food meant for sale to others. The object behind enactment of the Essential Commodities Act on the other hand was to regulate the production, supply and distribution of specified commodities which were considered to be essential to the citizens. In spite of difference in the objectives sought to be achieved by these Acts, it will be difficult to say that regulation and control of production, supply and distribution of essential commodities would not include control on the quality of the food articles which are supplied to the consumers through the channels of Public Distribution System. It is, therefore, very much open to the Government, to pass Orders which would ensure that the food articles, including wheat, which are supplied to the beneficiaries of the system are wholesome and of good quality and are not likely to cause any danger to their life and health. It is with a view to ensure the quality of the food products which are supplied to the consumers that clause 6(4) of Public Distribution System(Control) Order, 2001, hereinafter called the 'Order', issued in exercise of the powers conferred

upon the Central Government under Section 3 of the Essential Commodities Act, provides that the Authority or the person who is engaged in the distribution and handling of essential commodities under the Public Distribution System shall not willfully indulge in substitution or adulteration or diversion or theft of stocks from Central Godown to Fair Price Shop premises or at the premises of Fair Price Shop. The expressions 'diversion' and 'substitution' have been defined in the explanation below Clause 6.(4) of the Order. The expression 'adulteration' has, however, has not been defined either under the Order or under Essential Commodities Act. Hence, in order to find out whether any essential commodity supplied under Public Distribution System is adulterated or not, one will necessarily have to go by the definition given to the term 'adulteration' in the PFA Act. Presumably, the rule making Authority also intended the same when it chose not to define the expression 'adulteration' in the Order.

5. The Order does not prescribe the manner in which sample has to be taken for the purpose of ascertaining whether the food article in question is adulterated or not. The Order does not prescribe, what types of containers are to

be used for the purpose of keeping the sample. It does not prescribe the method of sending the sample to the laboratory. Neither the Essential Commodities Act nor the Order issued thereunder confers any right such as the right given to an accused under Section 13.(2) of the PFA Act. Thus, neither the Essential Commodities Act nor the Order alleged to have been contravened by the petitioners prescribes either the machinery or the procedure for determining whether the essential commodity suspected to be adulterated was, in fact, adulterated, or not. On the other hand, the PFA Act and the Rules prescribe a comprehensive procedure for such matters, including the method of taking samples, sending the samples to the laboratory and analysis of that sample by the laboratory, besides conferring of statutory right upon the accused to get the second sample analysed by Central Food Laboratory. In the absence of the Essential Commodities Act and the Order issued thereunder providing any procedure in respect of such matter and at the same time also not excluding the procedure prescribed and the safeguards and the right conferred under the PFA Act and the Rules, it would be difficult to say that the procedure prescribed in the PFA

Act and the Rules, and the rights and safeguards provided in the Act and the Rules are not available to a person who is accused of having violated the provisions of the Essential Commodities Act by contravening Clause 6.(4) of the Order which prohibits adulteration of any article which is supplied to the consumer through Public Distribution System.

6. If the procedure prescribed under the Act and the Rules are not adopted and the safeguards and the rights which are available to a person accused of an offence punishable under the Act, are not made available to a person who is accused of adulteration of food articles supplied through the Public Distribution System, not only would it be discriminatory to those who are prosecuted under the Essential Commodities Act, vis-à-vis, those who are prosecuted under the PFA Act, despite nature of the offence committed by them being the same and the offence under both the Acts being punishable with mandatory imprisonment, it will also give an arbitrary power to the Prosecuting Agency to prosecute one person under the provisions of the Act and the other person, who is similarly situated, having committed the same offence, under the provisions of the Essential Commodities Act. The

inevitable result would then be that a person who is prosecuted under the provision of the PFA Act will be entitled to all the rights and safeguards provided under the Act and Rules made thereunder, whereas no such benefits would be available to a person who is prosecuted under the provisions of the Essential Commodities Act despite both of them having committed the same offence, i.e., distribution, supply, etc. of an adulterated food articles. The procedure bereft of the safeguards and rights made available under the Act and the Rules made thereunder would in that case be violative of Article 14 of the Constitution of India being discriminatory in nature as the persons who are similarly situated would be governed by different procedure and the rights and benefits which are available to one set of persons will not be available to the other set of persons, despite the offence committed by them being essentially the same.

7. In “***Municipal Corporation of Delhi Vs. Shiv Shanker***”, 1971 (1) SCC 442, the issue before the Hon’ble Supreme Court was whether the respondent who had been granted a licence for selling vinegar under the provisions of Fruit Products Order, 1955, made by the Central Government

under Section 3 of the Essential Commodities Act, could be prosecuted under the PFA Act for selling adulterated vinegar. The contention before the Hon'ble Apex Court was that the Fruit Products Order, 1955 had the effect of repealing the provisions of the Act, in so far as the sealing of vinegar was concerned. Repelling the contention of respondent, the Hon'ble Supreme Court, inter alia, observed:

“The provisions of the Adulteration Act and of the Fruit Order to which one attention was drawn seem to be supplementary and cumulative in their operation and no provision of the Fruit Order is shown to be destructive of or fatal to any provisions of the Adulteration Act or the Rules made thereunder so as to compel the Court to hold that they cannot stand together. If the Adulteration Act or Rules impose some restrictions on the manufacturer, dealer and seller of vinegar then they have to comply with them irrespective of the fact that the Fruit Order imposes lesser number of restrictions in respect of these matters. The former do not render compliance with the latter impossible, nor does compliance with the former necessarily and automatically involve violation of the latter. Indeed, our attention was not drawn to any provisions of the Adulteration Act and Rules, compliance with which would result in breach of any mandate, whether affirmative or negative, of the Fruit Order. We are, therefore, unable to find any cogent or convincing reason for holding that the Parliament intended by enacting the Essential Commodities Act or

the Fruit Order to impliedly repeal the provisions of the Adulteration Act and the Rules in respect of the vinegar in dispute. Both the statutes can function with full vigour side by side in their own parallel channels. Even if they happen to some extent to overlap, Section 26 of the General Clauses Act fully protects the guilty parties against double jeopardy or double penalty. This section lays down that where an act or omission constitutes an offence under two or more enactments then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished under either the same offence. If, therefore, the provisions of the Adulteration Act and those of Fruit Order happen to constitute offences covering the same acts or omissions then it would be open to the prosecuting authorities to punish the offender under either of them subject to the only condition that a guilty person should not be punished twice over.”

8. The Hon’ble Supreme Court was of the view that the Scheme of the Act and the Rules can without difficulty fit into the Scheme of Fruit Products Order issued under the Essential Commodities Act. In the present case also, no provision of the Essential Commodities Act or the Order would be violated if the procedure prescribed in the Act and the Rules made thereunder are adopted and the safeguards and the rights provided to an accused under the PFA Act are made available to a person who is prosecuted under the

provisions of the Essential Commodities Act, for adulteration of an articles which is sold through the Public Distribution System. Therefore, there is no escape from the conclusion that not only the procedure prescribed in the Act and the Rules made thereunder for the purpose of taking samples, including the containers to be used for keeping samples, packing and sealing of samples, sending of seal impression to the Public Analyst and comparison of those impressions by him with the impressions on the samples, but the right granted to the accused under Section 13.(2) of the Act to apply to the Court to get the sample of food article analysed by the Central Food Laboratory would also necessarily be applicable and available in a prosecution of this nature. In this regard, I may also refer to the decision of Madras High Court in “**S.Arunachalam & Others Vs. State**”, 1993 (2) PFAC 139 (Madras), and the decision of the Hon’ble Supreme Court in “**State of Madhya Pradesh Vs. Swaropchandra**”, (1996) 11 SCC 175. In the case of S.Arunachalam(supra), the petitioner was alleged to have contravened Clause 11 of the Tamil Nadu Scheduled Articles (Prescription of Standard) Order, 1977 read with Section 7(1)(a)(ii) of Essential

Commodities Act by selling adulterated gingili oil and coconut oil. The petitioner filed an application under Sections 10,11 and 13(2) of the PFA Act read with Section 7(3)(b) of the of the Tamil Nadu Scheduled Articles (Prescription of Standard) Order, 1977, for forwarding second sample to the Central Food Laboratory for analysis. The Special Court rejected his application on the ground that Section 13(2) of the Act was not applicable as Section 7(3)(b) of the Tamil Nadu Scheduled Articles (Prescription of Standard) Order, 1977 made only the provisions of Section 10 & 11 of the Act applicable to such provisions. After noticing that the very object of obtaining three samples indicated that the legislature had preserved the right of the accused to have one of the samples analysed by Central Food Laboratory, the High Court held that if the right to have the second sample analysed from Central Food Laboratory was denied to the petitioner, the very object behind taking three samples would be defeated. While allowing the petition, the High Court, inter alia, observed as under:

“In other words, proper sampling and the report of the Public Analyst constitute the basic foundation for initiating prosecution,

be it under the Act or the Order. If there is a denial of the right conferred under Section 13(2) of the Act, it will be difficult, if not impossible, to sustain the prosecution. There cannot be a better example of prejudice to the case of the accused, if his request forwarding a second sample to the Central Food Laboratory, is not acceded to, though mandated by law.

The right given to the accused is not only for his satisfaction and proper defence, but to serve a clinching purpose as well, which may benefit even the prosecution, since the certificate of probably a greater expert is accepted by the Court as conclusive. Provisions of Food Adulteration Act have vested such a right for getting the second sample analysed, not only to benefit the prosecution but to benefit the accused as well. If as held by the learned Special Judge, the accused has no right to have yet another sample forwarded to the Central Food Laboratory, there was no need to have obtained three samples.

9. It is true that as far as the Order alleged to have been contravened by the petitioners is concerned, it does not make any provision of the PFA Act applicable to prosecution for contravention of the Order, whereas in the case before the Madras High Court, the Order did make the provisions of Section 10 & 11 of the PFA Act specifically applicable but, that, to my mind, would be of no consequence when a person is accused of adulteration of food article. What is important

is that in the absence of either Essential Commodities Act or the Order issued thereunder excluding the applicability of the provisions of the PFA Act and the Rules framed thereunder, the procedure prescribed therein needs to be applied and the safeguards and rights provided to an accused under the Act need to be extended to a person who is prosecuted under the Essential Commodities Act for adulteration of a food article. In fact, even if the Orders issued under the Essential Commodities Act were to prescribe a procedure which was less favourable to an accused as per the procedure prescribed under the Act and the Rules framed thereunder and/or it were to exclude the safeguards and rights which are made available to an accused under the Act, the Order itself would incur the risk of being struck down as discriminatory and violative of Article 14 of the Constitution of India by meting out different treatment to those who are similarly situated.

10. In the case of Swaropchandra(supra) one truck carrying timber was seized under the M.P. Van Upaj (Vyapar Viniyaman) Adhiniyam, 1969, and the truck was confiscated since its value was not paid. The power of seizure was challenged in the High Court, which held that since the Act

did not provide power of confiscation of the truck, it was not permissible for the Vigilance Forest Officer to impound the truck. On behalf of the State it was contended before the Hon'ble Supreme Court that since Section 52 of the Forest Act as amended by State Amendment Act 9 of 1965 gave power for confiscation of the vehicle used for transportation of various produce, there was no necessity to expressly provide for such a power in M.P. Van Upaj (Vyapar Viniyaman) Adhiniyam, 1969. The respondent, on the other hand, contended that since the Act specified detailed procedure and it also identified the Special Forest Produce which could be confiscated, the legislature by necessary implication did not intend confiscation of the vehicle etc. used for transportation of forest produce. It was further contended that no express power having been given by the legislature to the officer to confiscate the vehicle used for transportation of the specified forest produce, the High Court was right in directing release of the vehicle. Accepting the contention made on behalf of the State, the Hon'ble Supreme Court, inter alia, held as under:

“In our view, the High Court was clearly in

error in reaching the conclusion that there is no such provision under the Act. It is seen that the Act occupies the field in respect of the specified matters enumerated thereunder. In view of the fact that the Forest Act, as amended under the State Amendment Act 9 of 1965 has already occupied the field for confiscation of the vehicles etc., it is not necessary, again to provide the same procedure under the Act.”

11. In the present case also since the legislature had already prescribed a detailed procedure in the Act and the Rules made thereunder as regards the manner of taking samples, their packing and sealing, sending them for analysis, as also regarding carrying out of analysis by the Public Analyst, the Government, while issuing the Order did not feel any necessity of prescribing a separate procedure for these purposes. Similarly, since the right to get the second sample analysed from Central Food Laboratory had already been conferred under Section 13.(2) of the Act, there was no need for the Central Government to specifically confer such a right upon a person who is prosecuted for contravention of the Order. Had the intention of the Government been otherwise, it would have expressly excluded the provisions of the Act and/or Rules while issuing the Order.

Contravention of Rule 14

12. Rule 14 of the PFA Rules which prescribes the manner of sending sample for analysis reads as under:

“Manner of sending sample for analysis – Samples of food for the purpose of analysis shall be taken in clean dry bottles or jars or in other suitable containers which shall be closed sufficiently tight to prevent leakage, evaporation, or in the case of dry substance, entrance of moisture and shall be carefully sealed.”

13. Rule 16 of the rules which prescribes the manner of packing and sealing samples, to the extent it is relevant, reads as under:

“16. Manner of packing and sealing the samples: - all samples of food sent for analysis shall be packed, fastened and sealed in the following manner namely: -

(a) The stopper shall first be securely fastened so as to prevent leakage of the contents in transit;”

14. Admittedly, the officers who took samples from the truck as well as from the godowns of FCI used polythene bags for the purpose of keeping the wheat drawn as sample. As noted by the Public Analyst, all the polythene bags were loose when received by him. The contention of the petitioner is that polythene bag was not a suitable container envisaged in

Rule 14 and the provisions of Rule 14 being mandatory, the prosecution is liable to be quashed on this ground alone. In support of his contention, the learned counsel for the petitioners has referred to the decision of a Full Bench of Punjab & Haryana High Court in “**State of Punjab Vs. Raman Kumar**”, 1998 Cr1.L.J. 737, and the decision of the Gujarat High Court in “**State of Gujarat Vs.** (2008) 1 PFAC 397 (Gujarat).

15. In the case of Raman Kumar(supra), sample of red chilly powder was taken in a wrapper of strong thick paper. The issue before the Full Bench of the High Court was as to whether a polythene containers or a wrapper of strong thick paper were covered under the definition of ‘other suitable container’, given in Rule 14 of the Rules. The High Court, after examining the Scheme of the Rules held that container or a wrapper of strong thick paper dos not confirm to definition of container given in Rule 14. During the course of judgment, the High Court, inter alia, observed as under:

“The only point to be determined is as to whether a polythene container or a wrapper of strong thick paper can be called suitable containers as defined in Rule 14 of the Rules. Rule 14 provides that samples of food

for the purpose of analysis shall be taken in clean dry bottles or jars or in other suitable container, which shall be evaporation, or in the case of dry substance, entrance of moisture and shall be carefully sealed. A reading of the rule gives us a clear impression that other suitable containers mentioned in the rule connotes that it should be as hard as bottles and jars and also could be closed sufficiently right to prevent leakage, evaporation and in the case of dry substance entrance of moisture. The words bottles and jars are generally understood as closed bottles or glass jars.

When interpreting other suitable containers, the provisions contained in Rule 14 of the Rules have to be read as a whole and the words suitable container takes the hue from the words used in the rule itself. The words bottles or jars mentioned before other suitable container in Rule 14 itself indicates that a suitable container should be as hard as a closed bottle or as a glass jar. The expression used in Rule 16(a) which reads as under: -

“16(a) The stopper shall first be securely fastened so as to prevent leakage of the contents in transit.” is so indicative of the fact that the container stipulated in Rule 14 will have a stopper also. With the advancement of time some other containers are also available which are as hard as closed: though they may be made of some other hard substance like tin, hard plastic or other material like the one in which we get tooth paste, cream etc. In sum and substance a suitable container as defined in Rule 14, should be of an impervious character which should be closed sufficiently

tight and carefully sealed to prevent leakage, evaporation or entrance of moisture.

The polythene bags or a thick paper have got a chance of being pierced. They are most susceptible to moisture, rodents, pests and can even burst with a little more pressure put on them. Such type of containers are not in a position of being closed tightly to prevent leakage etc. A thick paper packet has the chance of even being completely wet and again is unable to prevent entering moisture into it. There are every chances of such type of containers being affected as stated above not by design but even by chance when in transit i.e. after the sample is taken by the Food Inspector in such containers and thereafter it reaches the laboratory for final analysis.

The legislature in its wisdom has used the expression a suitable container in Rule 14. This expression must be given its cogent and reasonable meaning on the one hand and should be interpreted in a manner so as to ensure the implicit protection available to an accused under these provisions on the other hand. Suitably of a container emphasis the need that such a container should be one which would prevent leakage, evaporation and entrance of moisture. In other words, suitable container must also exclude the possibility of its being tampered with in the ordinary course of nature. Once the container satisfies these conditions it would be a suitable container and then the concerned Inspector is obliged to satisfy the requirements of Rule 16 of the Rules with regard to collection and sealing of the sample.

16. The High Court found itself in disagreement with the

view taken by Andhra Pradesh High Court in “**Food Inspector Bhimvaram_Municipality Vs. Kopouravari Venkateswarulu**”, 1994 CrL. L.J. 414, which had taken a view that a polythene bag was a suitable container. I Find myself in full agreement with the view taken by Punjab & Haryana High Court as regard nature of the container envisaged in rule 14 of the Rules. The polythene bag, if used for keeping the sample of foodgrains, runs the risk of its getting torn or otherwise damaged, particularly while in transit. In fact, such bags may get damaged or torn even while they are in the custody of the Local Health Authority or they are in Malkhana, as the case may be. If that happens, there is a strong possibility of moisture etc. entering the bag thereby affecting the quality of the food article kept in it. Entry of moisture may result in rendering a food substance such as wheat, unfit for human consumption. If the bags are torn or damaged that may facilitate entry of pests etc. in the bags, thereby rendering them unfit for consumption and becoming adulterated product within the meaning of the Act. Since Rule 16 of the Rules specifically provides for fastening of the stopper of the container used for keeping the sample

and there being no stopper in polythene bag compliance of this requirement will not be possible and, therefore, this could never have been the intention of the legislature to treat polythene bags as a 'suitable container' within the meaning of Rule 14 of the Rules.

17. The next question which comes for consideration is whether contravention of Rule 14 by itself, without anything more, is a good ground for quashing the prosecution at the very threshold. The contention of learned counsel for the petitioner was that the provisions of Rule 14 being mandatory, the petitioners need not show any prejudice to them on account of its breach and the prosecution is liable to be quashed on this ground. In support of his contention that the provisions of the Rules are mandatory, the learned counsel for the petitioners has relied upon the decision in the case Champa Lal (supra), where it was found that the vessel had not been cleaned and it was observed by the High Court that Rule 14 of the Rules was a mandatory provision.

18. The counter argument can be that if there was no damage to the polythene bag used for keeping the sample of wheat and, consequently, no prejudice was caused to the

petitioners on account of such bags being used as containers, it will not be appropriate to let a person accused of such a serious offence go scot free merely on account of violation of this Rule.

19. It would be appropriate to note here that when the Public Analyst examined the samples sent to him, he found not only insect-infestation and fungus-infestation, he also found other extraneous and foreign matters(unorganic), including mineral matters besides damaged grains exceeding the prescribed percentage in some of the samples. These foreign and extraneous things, including damaged grains, could not have entered the wheat only on account of its having been kept in polythene bags, when the bags were not found torn, damaged or pricked when they were received by the public analyst.

20. Rule 14 of the PFA Rules not only prescribes use of dry bottles, jars or other suitable containers for taking samples, it also requires the container to be dry at the time sample is kept in it, besides requiring it to be closed sufficiently tight in order to ensure that there is no leakage, evaporation, etc. and in the case of dry substance, moisture does not enter the

container on account of its not being properly closed. The purpose behind these safeguards is to ensure that the sample of food article sent for analysis is not rendered adulterated merely on account of the nature of the container used for this purpose or its not being dry or its being improperly closed. It would, in my view, be necessary for the accused to show not only the contravention of the rules but also the prejudice which may have been caused to him on account of the contravention. It would not be in the interest of justice to acquit an accused or quash proceedings against him merely on account of a theoretical contravention of rule 14 even if no prejudice is possibly have been caused to the accused on account of such a contravention. The aim and objective behind enactment of PFA Act being to ensure that human life and health is not endangered on account of consumption of adulterated food, the person accused of adulteration should not be let off merely on account of technical contravention when it has not resulted in any prejudice to the accused.

21. The food article in this case being wheat, leakage, if any, from the polythene bags could not have resulted in adulteration such as presence of extraneous and foreign

matters, including mineral matters, besides damaged grains in the samples. Of course, if moisture enters the polythene bag in which the wheat is kept, that also may make it adulterated on account of the percentage of moisture exceeding the limit prescribed in this regard. But, in the present case, the moisture was found within the permissible limit in all the samples analysed in the Laboratory. Even if the percentage of moisture is found higher than the prescribed limit, and the excess moisture is attributed to improper or of insufficiently closing of the bags, the petitioners would still be guilty of adulteration on account of presence of other extraneous and foreign matters, including the mineral matters, besides damaged grains, exceeding the prescribed percentage in some of the samples. In the case of Champa Lal(supra), the vessel in which sample was taken having not been properly cleaned, the adulteration found in the sample could be attributed to the dirty vessel used for taking the sample. But, in the case of a solid substance such as wheat, no prejudice is caused to the accused merely on account of use of polythene bags when the bag sent found to be torn or damaged and the adulteration found in the

Laboratory cannot be attributed to use of such a bag or its being inadequately tightened. It would also be pertinent to note here that though as per the Report of Public Analyst, the polythene bags received by him were loose, we do not know, at this stage, whether or not, the bags were loose to such an extent that moisture could have entered the bags, thereby rendering the samples unfit for human consumption. This is a matter which can be answered only by the Public Analyst when he comes in the witness box, but more importantly, the moisture found in the samples being within the prescribed limit and the presence of foreign extraneous matters, including mineral matters and damaged grains not being attributable to use of polythene bags, it would be difficult to quash proceedings merely on account of the technical violation of Rule 14 by use of polythene bags instead of solid containers such as a bottle or a jar.

Contravention of Rule 18

22. Rule 18 of the Prevention of Food Adulteration Rules, 1955 reads as under:

“18. Memorandum and impression of ideal to be sent separately.—A copy of the memorandum and specimen impression of

the seal used to seal the packet shall be sent, in a sealed packet separately to the Public Analyst by any suitable means immediately but not later than the succeeding working day.”

23. The Public Analyst has specifically recorded in all his Reports that the sample was received with a seal of Inspector whose impressions had not been sent separately and the number written on the polythene bag was illegible. This is not the case of the prosecution that in fact the seal impression were separately sent to the Public Analyst and that the endorsement made by the Public Analyst in this regard is not correct.

24. The learned Additional Standing Counsel pointed out that there was a slip inside the samples, as has been noted by the Public Analyst and the Specimen Seal Impressions may have been given by the Investigating Officer on those slips. A perusal of the Report would show that the Public Analyst has not recorded anywhere as to whether there were any specimen seal impression on the slips found inside the samples and, if so, what those seal impression were. Presuming that the slips kept inside the samples contained specimen seal impressions, it is obvious from the Report of

the Public Analyst that he did not compare those impressions with the seal impressions found on the samples received by him. In any case, once the bags containing wheat samples were opened by the Public Analyst, the seal impressions put on the bags would necessarily be destroyed and, therefore, it is not possible for him to compare the seal impressions on the polythene bags with the specimen seal impressions found on the slips kept inside the samples. The rule making Authority was very much conscious of this aspect when it prescribed that the seal impressions will be sent separately to the Public Analyst in a sealed cover and the Public Analyst will compare the seal impressions on the samples with the specimen seal impressions sent separately to him. It is not possible for the Public Analyst to abide by the mandate of the rule unless the specimen seal impressions are received by him before he opens the bags containing the samples sought to be analysed by him.

25. As regards the necessity of sending the specimen seal impressions separately from the samples, the Hon'ble Supreme Court in "***State of H.P. Vs. Narendera Kumar & Another***", (2004) 4 SCC 567, inter alia, observed as under:

“.....The expression ‘separately’ has to be understood on a conjoint reading of Rules 7, 17 and 18, Rule 7 postulates that Public Analyst on receipt of the packet containing the sample for analysis has to compare the seals on the container and the outer cover with specimen impression received separately and has to note the condition of the seals thereon. Reading Rules 17 and 18 together, it is clear that the word ‘separately’ used in Rule 18 has been intended to convey the sense that the copy of the memorandum and the specimen impression of the seal has to be sent independently of the articles that are required to be sent under Rule 17.....”

26. The purpose of prescribing that the specimen impression of the seal used to seal the packet will be sent separately to the Public Analyst and that too in a sealed cover, by the succeeding working day, is to ensure that the sample which reaches the Public Analyst for the purpose of carrying out analysis, is the very same which was taken by the Inspector, on the spot. Unless the specimen impression of the seal are sent to the Public Analyst, he cannot compare them with the seal impression found on the sample received by him. Consequently, it cannot be said with certainty that the samples sent to the Public Analyst were the same which were lifted by the Inspector from the spot.

27. No doubt, one can argue that it is possible for the

prosecution to produce the Inspector and other officials to prove that the samples which were duly sealed on the spot, were kept by them in safe custody and there was no tampering with the seals before the sample reached the Public Analyst. It can also be contended that the Inspector being a public servant there can be no reason for him to tamper with the seals and replace the product kept inside the container. Rule 7.(1) of PFA Rules specifically stipulates that on receipt of a package, containing a sample for analysis from Food Inspector or any other person, the Public Analyst or an officer authorized by him shall compare the seals on the containers and the outer cover with specimen impression received separately and shall note the condition of the seals thereon. The legislative intent, as gathered from Rule 7 when read with Rule 18, obviously is not to rely solely upon the testimony of the Inspector, to ensure that there was no reasonably possibility of the sample having been tampered with, by removing the seals. The Public Analyst being an independent person, the rule making Authority, in its wisdom, chose to seek confirmation from him by requiring him to compare the seals on the container and the outer

cover with the specimen seal impressions required to be sent separately to him in a sealed cover. If the Court relies solely upon the testimony of the Inspector in this regard, it would not be in consonance with the mandate of the Rules and would nullify the provisions contained in rule 7.(1) of PFA Rules. The cases of prosecution for adulteration cannot, in this regard, be treated at par with the cases such as prosecution under NDPS Act where there is no statutory requirement of sending the specimen seal impressions to the Laboratory separately, in a sealed cover, and requiring the Analyst to compare the seal impressions on the sample with the Specimen Seal Impressions received by him, it is only as a matter of prudence and caution that the court normally insists upon the prosecution proving that the specimen seal impressions were sent to the Laboratory and the seal impressions on the samples and the Specimen Seal Impressions were one and the same. Considering the object, which is sought to be achieved by insisting upon sending the Specimen Seal Impressions to the Public Analyst in a separate sealed cover, and then requiring the Public Analyst to compare the seals on the container and outer container

with the seal impressions received separately and to note the condition of the seals thereon, the provisions of Rule 18 are mandatory in nature and such contravention of this rule by itself would lead not only to acquittal but, in appropriate cases, also to quashing of the criminal proceedings instituted against the accused. The prejudice to the accused in case of such a contravention is implicit in the contravention itself, since the possibility of replacing of the sample after tampering with the seals cannot be ruled out in such a case.

28. In “**State (through Drugs Inspector, Delhi Administration) Vs. Hukam Chand**”, CrI.A.177/82 decided by this Court on 21st September, 2007, the Report of Public Analyst did not specify whether he had compared the seals on the sample bottles with the specimen seal impression sent to him separately. It was held by the trial court that it could not be said with certainty whether the samples analysed by them were the same samples which had been collected from the accused. The view taken by the High Court was endorsed by this Court which also observed that the Report received from the Government Analyst in violation of the Rule will not be a worthy piece of evidence for the purpose of criminal

prosecution.

29. In “***State of Maharashtra Vs. Raj Karan***” , 1987 (Supp) SCC 183, the respondent was acquitted on the ground that Rule 18 of PFA Rules was mandatory and there was non-compliance of the requirement of the Rule. In that case, the case of the prosecution was that the memorandum and the specimen impressions of the seal used to seal the bag were sent by registered post to the Public Analyst. In the absence of postal receipt, the appellate court did not believe the version of prosecution in this regard. The finding given by the appellate court was that the prosecution had failed to establish that the memorandum and specimen impressions of the seal had separately been sent to the Public Analyst. Accepting the contention of the respondent that the requirement of the Rule was mandatory, the Hon’ble Supreme Court held that since there was non-compliance of the requirement, the prosecution had to fail. The acquittal of the respondent was, accordingly, held justified. In the present case, the prosecution does not even claim to have sent the Specimen Seal Impression to the Public Analyst. Hence, the case of the petitioners stands on a stronger footing.

Therefore, I have no hesitation in holding that since the provisions of Rule 18 are mandatory and the prejudice to the petitioners is inherent in the very contravention of this nature, the prosecution is liable to be quashed on this ground alone. No useful purpose will be served from continuing the criminal proceedings when the fate of the trial is known at the very outset and the trial, if allowed to proceed, will only be a mock trial, at the end of which the petitioners are bound to be acquitted on account of breach of this mandatory requirement of PFA Rules.

Denial of Right under Section 13.(2) of PFA Act.

30. Section 13.(2) of Prevention of Food Adulteration Act reads as under:-

“13.(2) On receipt of the report of the result of the analyst under sub-section (1) to the effect that the article of food is adulterated, the Local (Health) Authority shall, after the institution of prosecution against the persons from whom the sample of the article of food was taken and the person, if any, whose name, address and other particulars have been disclosed under Section 14A, forward, in such manner as may be prescribed, a copy of the report of the result of the analysis to such person or persons, as the case may be, informing such person or persons that if it is so desired, either or both of them may make an application to the

court within a period of ten days from the date of receipt of the copy of the report to get the sample of the article of food kept by the Local (Health) Authority analysed by the Central Food Laboratory.”

31. The contention of the learned counsel for the petitioners is that since the shelf-life of the wheat kept in polythene bag is only about 35 days and the charge-sheet has been filed more than 1-1/2 years after taking of samples, the second sample, if examined by Central Food Laboratory pursuant to the right exercised by the petitioners under Section 13(2) of PFA Act, is bound to be found unfit for analysis and, therefore, on account of delay in filing the chargesheet, it is not possible for the petitioners to show that the samples of wheat when lifted from the trucks at FCI Godowns were not adulterated. The petitioners, according to him, have, therefore, been denied an opportunity statutorily given to them by Section 13.(2) of PFA Act, to prove, by sending the second sample to Central Food Laboratory, that the Report of Public Analyst was not correct. It would not be pertinent to note that the Report of Central Food Laboratory supersedes the report of Public Analyst, as provided in Section 13.(3) of PFA Act. It is also to be noted here that the

right conferred upon the accused by Section 13.(2) of the Act cannot be exercised unless and until the prosecution is instituted against him. The learned counsel has referred to a study stated to have been conducted in a programme of ICAR, in support of his plea that wheat in a polythene bag can be stored only for 35 days.

32. As noted earlier, when the samples were sent to the Public Analyst, they were found to contain extraneous and foreign matters, including mineral matters and damaged grains, exceeding the limit prescribed for such matters. At this stage, in the absence of opinion of the Public Analyst, or Central Food Laboratory, it is difficult to accept that, if the samples taken on 25th April, 2008 are now examined by Central Food Laboratory, it will not be possible for the Laboratory to ascertain the percentage of foreign extraneous matters, including mineral matters and damaged grains, in them. The quantity of these substances/matters in the samples of wheat taken on 25 April, 2008 is not likely to increase with the passage of time. Therefore, it may not be possible for the petitioners to say that, even if at the time of examination of samples by Central Food Laboratory, the

percentage of these matters/substances in the sample of wheat is found to be more than the prescribed limit, their quantity in the wheat at the time of taking sample could have been less than what is found by Central Food Laboratory. At this stage, it is difficult to accept that on account of the passage of time the food article such as wheat is bound to become so unfit for analysis that the petitioners will be deprived of an opportunity to show that the report of Public Analyst as regards the quantity of these matters/substances in the samples was inaccurate. It will not be appropriate for this Court to take a final view on this matter, in the absence of evidence of an expert or the report of Central Food Laboratory to this effect.

33. Yet another important aspect in this regard is that the petitioners are yet to exercise the right conferred upon them under Section 13.(2) of PFA Act. Without exercising the option available to them, they cannot claim quashing of proceedings instituted against them merely on account of delay in filing the chargesheet, on the ground that the sample of wheat, if now sent to Central Food Laboratory, was bound to be found unfit for analysis. It is only when the option

available to the accused is exercised and the second sample is sent to Central Food Laboratory and if either the sample is found unfit for analysis or adulteration found by the Central Food Laboratory is attributable to delay in carrying out of analysis, that he can claim prejudice to him on account of his inability to show that at the time the sample was taken, it was free from adulteration. In taking this view, I am fortified by the decision of the Hon'ble Supreme Court in "***Babu Lal Hargovindas Vs. State of Gujarat***" , 1972 FAC 18. In that case, the Hon'ble Supreme Court found that accused had an ample opportunity to make an application to the Court for sending the sample to the Central Food Laboratory for analysis. He did not avail of this opportunity. In this context, their Lordship observed that it was not open to the accused to contend that he had no opportunity to send the sample to the Director, Central Food Laboratory under Section 13(2) of the Act as the accused had failed to make any application to the Court for sending it. In that case, it was contended on behalf of the accused that from the date of taking the sample till the date of launching the prosecution, there was considerable delay. He claimed that the inordinate

delay to forward the sample for analysis to the Director, Central Food Laboratory caused considerable prejudice to him. The contention was rejected, with the following observations:

“Thus, it is settled law that the appellant was a right under Section 13(2) to avail of sending the sample in the custody of the Court for analysis by the Central Food Laboratory after the prosecution was laid or immediately after notice was received by him in the case, by making an application to the Court.....”

.....Under these circumstances and following the consistent law laid by this Court, we are of the considered view that since admittedly the appellant had not availed of the remedy under Section 13(2) to send the sample of the article of food for analysis by the Central Food Laboratory, it cannot be held that the appellant suffered prejudice on account of delay in laying the prosecution.”

34. Similar view was taken by the Hon’ble Supreme Court in “**Ajit Prasad Ram Kishan Singh Vs. The State of Maharashtra**”, 1972 FAC 545, where the Hon’ble Apex Court, inter alia, held as under:

“It is clear from sub-section that the appellant should have made an application after paying the prescribed fee if he wanted the part of the sample available with him to be sent to the Director for analysis. If he had

made the application after paying the prescribed fee, the Magistrate would have had no option but to send the part of the sample for analysis by the Director. If in pursuance of the application the part of the sample was sent to the Director and he had reported that the part of the sample was incapable of analysis for the reason that it was decomposed, the appellant could perhaps, have contended that he was deprived of his right to have the sample analysed by the Director on account of the laches of the complaint and that he should be acquitted. But, since the appellant never applied under Section 13(2) of the Act, he cannot complain that he has been deprived of any right.”

35. This view was reiterated by the Apex Court in the case of “**Prabhu Vs. State of Rajasthan**”, 1994 (1) FAC 194.

36. The learned counsel for the petitioners has relied upon the decision of the Hon’ble Supreme Court in “**Girishbhai Dahyabhai Shah Vs. C.C.Jani & Another**”, 2009 (11) Scale 5. In the case before the Hon’ble Supreme Court, the sample of curd was collected on 8th April, 1988. The second sample in order to enable the appellant to have it analysed pursuant to the right given to him under Section 13.(2) of PFA Act was made available to him on 17th July, 1989, i.e., 15 months after the sample had been taken. The sample was sent to Central Food Laboratory on 6th December, 1989 and

the Report was received on 26th December, 1989. The appellant contended that since the Report of Public Analyst was served upon him only on 17th July, 1989 by which time the sample of curd had deteriorated and further examination of the sample had become meaningless, which deprived him of the valuable right conferred on him by Section 13.(2) of the Act. It was in these circumstances that the appellant was acquitted by the Hon'ble Supreme Court on the ground that the sample of curd had deteriorated and had not remained capable of being analysed on account of passage of time. However, curd cannot at all be equated with wheat. A curd is bound to get so much deteriorated so as to become incapable of analyses, after expiry of such a long period. But, the same may not necessarily be true in the case of wheat. Unless the sample is actually sent to the Central Food Laboratory and it is reported that with the passage of time it had deteriorated to such an extent that it has become incapable of being analysed by the Laboratory, it cannot be said that the petitioners have been deprived of the right made available to them by Section 13.(2) of PFA Act to show that the sample, when taken, was free from adulteration. It would be

pertinent to note here that even in the case relied upon by the learned counsel for the petitioners, the sample was actually sent to the Laboratory and was analysed. Therefore, in my view, a person accused of adulteration of an article such as wheat, must necessarily wait till the second sample is actually analysed by Central Food Laboratory and he cannot seek quashing of the criminal prosecution solely on account of delay in making the report of Public Analyst available to him particularly when the adulteration is of the nature as was found in this case.

37. During the course of arguments, it was submitted by the learned Additional Standing Counsel that since chargesheet has already been filed, it may not be open to this Court to interfere in exercise of its writ jurisdiction and the petitioners should agitate their grievances before the trial court, at an appropriate state. The question as to whether filing of chargesheet precludes the High Court quashing criminal proceedings in a writ petition under Article 226 of the Constitution of India or not, came up for consideration before a Full Bench of this Court in “**Neelam Mahajan Vs. Commissioner of Police & Others**”, 53 (1994) DLT 389 (FB).

The Full Bench, after considering the case law on the subject, inter alia, held as under:

“It is evident from the above analysis that the power of the High Court to issue an appropriate writ to undo injustice is not affected or taken away by mere act of filing of the challan in the Court of the Magistrate but the said power is required to be exercised with circumspection and is hedged with self imposed restrictions.

The legal position, therefore, is that there is no restriction or limitation in the exercise of the power of the High Court to issue prerogative writ under Article 226 to quash the First Information Report or criminal proceedings after filing of the challan but the said power is required to be exercised with utmost care and caution. These powers of High Court are not taken away by filing of challan.”

38. As regards certain observations made by the Hon’ble Supreme Court in “**State of Bihar & Another Vs. P.P.Sharma & Another**”, AIR 1991 SC 1260, the Full Bench took the following view:

“These observations do not show that the High Court will have no jurisdiction to grant relief under Article 226 once challan had been filed in Court. The aforesaid observations show that after filing of the challan the High Court has to be very careful and cautious to grant discretionary relief under Article 226 of the Constitution. Thus, the question is not of lack of jurisdiction or

right of petitioner to maintain the petition though the High Court may in appropriate cases refuse to quash the First Information Report and criminal proceedings after the challan had been filed. It would depend on the facts and circumstances of each case whether First Information Report and criminal proceedings after filing of challan deserved to be quashed or not.”

39. In **“Ashok Chaturvedi & Others Vs. Shitul H.Chanchani & Another”**, JT 1998 (5) SC 452, it was contended before the Hon’ble Supreme Court that the Magistrate took cognizance of the offences and directed issue of process against the appellant, who then moved the High Court under Section 482 of the Code of Criminal Procedure for quashing the cognizance on the ground that the allegations made in the complaint even if taken on their face value did not constitute an offence. It was contended before the Hon’ble Supreme Court that since the appellant would have an opportunity to plead their case at the time of framing charge, the Court should not interfere with the order whereby cognizance was taken. Repealing the contention, the Hon’ble Supreme Court, inter alia, held as under:

“The learned counsel for the respondent in this connection had urged that the accused had a right to put this argument at the time

of framing of charges, and therefore, this Court should not interfere with the order of the Magistrate taking cognizance, at this stage. This argument, however, does not appeal to us inasmuch as merely because an accused has a right to plead at the time of framing of charges that there is no sufficient material for such framing of charges as provided in Section 245 of the Criminal Procedure Code, he is debarred from approaching the court even at an earliest (sic earlier) point of time when the Magistrate takes cognizance of the offence and summons the accused to appear to contend that the very issuance of the order of taking cognizance is invalid on the ground that no offence can be said to have been made out on the allegations made in the complaint petition. It has been held in a number of cases that power under Section 482 has to be exercised sparingly and in the interest of justice. But allowing the criminal proceeding to continue even where the allegations in the complaint petition do not make out any offence would be tantamount to an abuse of the process of court, and therefore, there cannot be any dispute that in such case power under Section 482 of the Code can be exercised.”

40. For the reasons given in the preceding paragraphs, since the safeguards provided and the rights conferred upon an accused under PFA Act and Rules made thereunder are necessarily available to a person who is prosecuted under Section 7 of the Essential Commodities for production, distribution or supply of an adulterated essential commodity

and there was contravention of Rule 14 of PFA Rules which is mandatory in nature by not sending the Specimen Seal Impression to the Public Analyst, separately, in a sealed cover for its comparison with the seal impressions put on the samples, the prosecution of the petitioners cannot be allowed to continue. The criminal complaint subject matter of this petition is, hereby, quashed. The petition stands disposed of.

(V.K.JAIN)
JUDGE

FEBRUARY 19, 2010
RS/