



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPLICATION (APL) NO.555 OF 2022

APPLICANT : Abhay s/o Anup Rathi,
Aged about 36 years, Ocu. Business,
R/o Near Dental College, Ghateman
Gaurakshan Roak, Akola, Tah. & Dist.
Akola.

..VERSUS..

NON-APPLICANTS : 1 State of Maharashtra,
through Police Station Officer, Police
Station, Khadan, Akola, Tq. & Dist,
Akola.
2 The Police Inspector, Local Crime
Branch, Khadan Akola, Dist. Akola.

WITH

CRIMINAL APPLICATION (APL) NO.695 OF 2022

APPLICANTS : 1 Rohan Nandu Bitani,
Aged about 20 years, Occu. Service,
R/o Yeota Road, Akola, Tq. & Dist.
Akola
2 Sheikh Sameer Skeikh Hasan,
Aged of 22 years, Occu. Service, R/o
Rahul Nagar, Akola, Tq. & Dist. Akola
3 Javed Hussain Safdar Hussain,
Aged about 25 years, Occu. Service,
R/o Old City, Akola, Tq. & Dist.
Akola.

..VERSUS..

NON-APPLICANT : State of Maharashtra,
through Police Station Officer, Police
Station, Khadan, Akola, Tq. & Dist.
Akola.

Shri J. T. Gilda, Senior Advocate a/b Shri A. J. Gilda, Advocate for Applicant(s).
Shri S. S. Doifode, APP for Non-Applicants in both applications.

CORAM : **VINAY JOSHI AND**
VALMIKI SA MENEZES, JJ.

RESERVED ON : **3rd AUGUST, 2023.**

PRONOUNCED ON : **8th SEPTEMBER, 2023.**

JUDGMENT : (PER : VALMIKI SA MENEZES, J.)

. By these two criminal applications, the applicants seek to invoke this Court's inherent power under Section 482 of the Code of Criminal Procedure, 1973, seeking to quash the First Information Report (FIR) No.1203 of 2021 dated 23.12.2021, registered with Khadan Police Station, District Akola and connected Final Report dated 04.10.2022 in RCC No.1242 of 2022.

The Final Report alleges offences against the applicants under Sections 188, 285 read with Section 34 of the Indian Penal Code, 1860, under Sections 3 and 7 of the

Essential Commodities Act, 1955, under Sections 3 and 4 read with Section 23 of the Petroleum Act, 1934 and under the Motor Spirit and High Diesel (Regulation of Supply, Distribution and Prevention of Malpractice) Order 2005 and Amendment Order 2017. The sole applicant in Criminal Application (APL) No.555 of 2022 is alleged to be the owner of the seized product purporting to be bio-diesel or a petroleum product and is alleged to have illegally sold this product, which is subject matter of the seizure conducted pursuant to lodging of the FIR. The three applicants in Criminal Application (APL) No.695 of 2022 are daily wagers and driver of a tanker in which the said product was stored. For the purpose of decision in this matter, we refer to the record in Criminal Application (APL) No.555 of 2022, which is filed at the behest of applicant Abhay Anup Rathi, since the record is common to the other criminal application bearing No.695 of 2022.

2. The facts, as stated in the application and as culled out from the record of the FIR and from the Final

Report, that have led to the filing of these two applications under Section 482 of the Code of Criminal Procedure, are as under :

a) It is the applicant's case that he is in the business of supply of Hydrocarbon Oil for Industrial use, for which purpose he owned two tankers and would operate his business from a land belonging to one Prasanna Tapadia, where the raid/seizure was carried out by the complainant. It is further the applicant's case that the concerned hydrocarbon oil was imported into India from U.A.E., through Jawaharlal Nehru Port Trust Airport (JNPT) at Nava Sewa along with its invoice, and after obtaining requisite test report and clearing customs, the imported hydrocarbon oil was moved to K. M. Enterprises, Raigad in Konkan area, which has in turn supplied the same to the applicant after payment of all the necessary taxes under an invoice and E-way bills. The applicant claims that the seized

product is neither bio-diesel nor a petroleum product, which is prohibited for retail sale and is meant only for Industrial use.

b) The FIR dated 23.12.2021, was registered against the applicants Rohan, Sheikh and Javed at 02:31 hours under Sections 3 and 7 of the Essential Commodities Act (hereinafter referred to as “the EC Act”) and under Sections 188, 285 read with 34 of the IPC at the behest of one Nitin Bhimrao Chawhan, the Assistant Police Inspector posted at Local Crime Branch Office, Akola; the allegations in the FIR are that on receiving secret information on 22.12.2021, that the applicant Abhay Rathi was storing bio diesel, a prohibited product, in two tankers, at a Paddy field along the Malkapur - Yevta Road at Akola, the complainant proceeded to the spot with Panchas and other Police personal for conducting a raid and found the said Rohan, Sheikh and Javed unloading the said product from the

trucks. That, since these persons nor the applicants were in possession of any licence of sale of bio diesel or petroleum products, he seized the three tankers bearing Nos.MH-30-L-1751, MH-30-L-2087 and MH-46-BM-2331 loaded with this product in the presence of the Panchas. Thereafter, nine samples of the product i.e. three samples each of 750 ml from each truck were drawn, sealed under Panchanama and sent by the complainant for chemical analysis. Since the acts allegedly committed by the accused persons were offences under Sections 3 and 7 of the EC Act and under Sections 188, 285 and 34 of the IPC, and these were cognizable, the impugned FIR was lodged.

c) Thereafter, the nine samples, which were drawn in glass bottles, were sent for testing on 02.02.2022 to the Small Can Filling Plant (S.C.F.P.) Khapri Laboratory of the Indian Oil Corporation Limited for determination as to whether the

samples contained bio-diesel.

d) The test report dated 12.02.2022 stated that it was rejected since specifications were not met for 107111-Bio Diesel.

After having received this report, it appears that an additional charges were added alleging offences under Sections 3, 4 and 23 of the Petroleum Act, 1934.

e) Thereafter, another set of samples was seized from the tankers by a different Assistant Police Inspector in the presence of Panchas on 07.07.2022, which was then sent to the Regional Forensic Science Laboratory, Amravati. However, reliance was placed on another report of the Department of Explosives dated 17.02.2023 which gives its opinion on the earlier opinion rendered by the Indian Oil Corporation Limited stating that the product was not confirmed to standards of bio-

diesel.

f) The charge-sheet came to be lodged before the concerned Court on 04.10.2022 alleging offences against the applicants under Sections 188, 285 read with Section 34 of the IPC, under Sections 3 and 7 of the EC Act, under Sections 3 and 4 read with Section 23 of the Petroleum Act, 1934 and under the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order 2005 (hereinafter referred to as “the 2005 Order”) and Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Amendment Order 2017 (hereinafter referred to as “the 2017 Order”).

The application had initially only laid challenges to the FIR, however, after submitting the Final Report, the applicants have sought its quashment on the basis that the FIR did not disclose any cognizable offence made out against

the them and the entire investigation being without jurisdiction and contrary to the provisions of the EC Act and orders framed thereunder was liable to be quashed.

3. The main grounds on the basis of which the two sets of applications seek to quash the FIR and the connected Final Report are the following :

a) That, the search and seizure, conducted by an Assistant Police Inspector on 22.12.2021 and the FIR lodged on the basis of the said Assistant Police Inspector's complaint, was by a person not authorized in terms of Section 3 of the EC Act, and in terms of Clause 7 of the 2005 Order issued under Section 3 of the EC Act, inasmuch as Clause 7 empowers a Police Officer not below the rank of Deputy Superintendent of Police duly authorized by general or special order to enter, conduct, search and seizure of such products.

b) That, the entire search and seizure and the act of collection of samples of the product is in violation of Clause 8 of the 2005 Order; and further that the laboratory test reports were neither notified laboratories in terms of Schedule III nor in consonance with Clause 8(4) of the 2005 Order. The prosecution on the basis of search, seizure and samples taken in violation of the 2005 Order is bound to fail.

c) That, the drawing of samples taken on 07.07.2022 was by a person not authorized in terms of Section 14 of the Petroleum Act, 1934 and in violation of Rule 198 (1) (c) of the Petroleum Rules, 2002; the samples having been tested by Regional Forensic Science Laboratory, Amravati on 15.02.2023 (Report released on 17.02.2023) were by a laboratory not authorized in terms of Sections 17 to 19 of the Petroleum Act and the results were in total contravention of Rule 195 and Rule 186(2)

of the Petroleum Rules, 2002 (Petroleum Rules) and Clause 8(5) of the 2005 Order.

4. With the consent of the learned Senior Counsel Shri J. T. Gilda for applicant and learned Additional Public Prosecutor Shri S. S. Doifode for the State, we have heard these two applications under Section 482 of the Cr.P.C. finally at the stage of admission. We have also heard extensive oral arguments on behalf of the rival parties. Written notes of arguments also came to be filed on record. After hearing of the parties, we have reserved the judgment on 03.03.2023, however, thereafter the learned Senior Counsel for applicant has circulated the matter requesting further hearing therein to enable him to cite a judgment of the Hon'ble Supreme Court decided on 23.03.2023 (*Avtar Singh and another v. State of Punjab*), which according to him would support his submissions. Accordingly, we heard further arguments from both the sides in the matter on 03.08.2023 and the matter was finally concluded and reserved for judgment.

5. Learned Senior Counsel Shri Gilda for applicant in Criminal Application (APL) No.555 of 2022 has submitted that the raid was conducted by one Shri Nitin Chawhan, who was a Police Officer of the State of Maharashtra of the rank of Assistant Police Inspector on the basis of secret information and was not a random search. The raid was conducted on 22.12.2021 in a field occupied by applicant Abhay Rathi on the premise that he had illegally stored bio-diesel in three tankers, which were seized by the Police Officer, and during this raid, nine samples of 750 ml each were drawn from these tankers in glass bottles, which were seized under the signature of the said Assistant Police Inspector in the presence of Panchas and the three accused in Criminal Application (APL) No.695 of 2022 (Rohan, Sheikh and Javed). The learned Senior Counsel further submits that the samples seized on 22.12.2021 were sent for analysis/testing only on 02.02.2022, almost 40 days after they have collected, to the S.C.F.P. Khapri Laboratory, Nagpur of the Indian Oil

Corporation Limited for determination as to whether the samples contained bio-diesel. An FIR came to be lodged on 23.12.2021 on a written complaint filed by the said Assistant Police Inspector at Khadan Police Station, District Akola.

6. The learned Senior Counsel for applicant further submits that another set of samples was drawn from the seized oil tankers on 07.07.2022, almost six months after the first seizure, this time by one Yogesh Waghmare, also of the rank of Assistant Police Inspector. Nine samples of one litre each were drawn on 07.07.2022, which were sent for testing/analysis to the Regional Forensic Science Laboratory (R.F.S.L.), Amravati only on 27.09.2022, twenty days after they were drawn and these samples were tested by the R.F.S.L. on 15.02.2023 more than seven months after they were drawn, and the test report was released by this Laboratory on 17.02.2023.

7. It is the submission of the learned Senior Counsel for applicant that the Officer of the rank of Assistant Police

Inspector was neither authorized in terms of Section 3 of the EC Act or the 2005 Order issued thereunder and that the entire investigation which followed on the basis of the initial search and seizure conducted by unauthorized person and in violation of the above provisions of the EC Act necessarily must result in the failure of the prosecution.

It is further the submission of the learned Senior Counsel that initially the FIR was filed under Sections 3 and 7 of the EC Act and under Sections 188, 285 read with Section 34 of the IPC, however, thereafter, on receipt of the second test report, it appears from the record that further charges were added under Sections 3 and 4 read with Section 23 of the Petroleum Act, 1934 and under the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order 2005 and Amendment Order 2017.

8. It is further the submission of the applicant that not only are the samples at both points of time taken by a person not authorized to draw the same, but that both, the

procedure for drawing of the samples and the test reports themselves are in violation of Clauses 8(1), 8(4) and 8(5) of the 2005 Order and of Rules 186(2), 195 and 198(1)(c) of the Petroleum Rules and Sections 17, 18 and 19 of the Petroleum Act, 1934. For that purpose, the learned Senior Counsel has taken us through the entire record of the charge-sheet, the FIR, the complaint, the two reports analysing the product at different points of time and the seizure panchanamas.

9. In support of his arguments, the learned Senior Counsel for applicant has cited before us the following judgments :

a) *Medipol Pharmaceutical India Private Limited v. Post Graduate Institute of Medical Education and Research and Anr.* reported in (2021) 11 SCC 339.

b) *Jeewan Kumar Raut and Anr v. Central Bureau of Investigation.* reported in (2009) 7 SCC 526.

c) *State of Punjab v. Balbir Singh.* reported in (1994) 3

SCC 299,

d) Indian Oil Corporation Limited and Ors. v. R. M. Service Centre and Anr., reported in (2019) 19 SCC 662,

e) Roy V. D. v State of Kerala, reported in (2000) 8 SCC 590,

f) Nasimkhan Sikandarkhan v. State of Maharashtra and Anr., reported in 2005 (Supp.) Bom.C.R. (Cri.) 461

g) M/s. Ch. Yegnaiah and Sons and Ors. v. The State of AP, reported in 2002 (3) A.P.L.J. 395 (HC) (AP).

h) Avtar Singh and Anr. v. State of Punjab, reported in (2023) SCC OnLine SC 319.

10. In reply, it is the primary submission of Shri S. S. Doifode, learned Additional Public Prosecutor appearing for the non-applicants that since the FIR was registered both, under the provisions of Sections 3 and 7 of the EC Act and under Sections 188 and 285 of the IPC, an Officer, of any rank would be empowered under the provisions of Section 4(2) of the Cr.P.C. (hereinafter referred to as “the

Code”) as offences under any law are to be investigated, enquired into and dealt with in accordance with the provisions of the Code. It was argued by the prosecution that the provisions of Clauses 8(1), 8(4) and 8(5) of the 2005 Order and of Rules 186(2), 195 and 198(1)(c) of the Petroleum Rules and Sections 17, 18 and 19 of the Petroleum Act, 1934, could not act as a bar to any Officer empowered under the Code to conduct the search or a seizure or an investigation whether the matter pertains to an offence under the EC Act, the Petroleum Act or any Orders or Rules made under these laws.

11. It is the further submission of the non-applicant that the two reports of the Chemical Analysis of the product drawn from the tankers clearly hold that the product contains hydrocarbon and is a petroleum product covered by the Petroleum Act and the 2005 Order issued under Section 3 of the EC Act, and therefore, an offence in terms of Sections 3, 4 and 23 of the Petroleum Act and under Sections 3 and 7 of the EC Act have been made out;

that the petroleum product has neither been stored in conformity with the requirements of these Acts, and therefore, an offence, *prima facie*, has also been committed in terms of Section 188 of the IPC, since the possession and storage of the product is contrary to the order duly promulgated by the Collector. It is his further submission that the storage of the petroleum product in the manner done by the applicant is *prima facie* an offence under Section 285 of the IPC, since the product is combustible and its storage in the manner done, may endanger the human life.

In support of his arguments, learned APP has pressed into service the following case law :

- a) *Comandant, Gokul Nagar v. Arjun Das, reported in reported in (2006) 12 SCC 129,*
- b) *G. S. Oils Limited v. State of Maharashtra, dated 11.10.2012 passed in Criminal Writ Petition No.396 of 2012 (Bombay High Court),*

c) *Sarvesh Kumar Shahi v. State of Maharashtra, reported in 2019 ALL MR (Criminal) 3114 (Bom.)*

12. In order to determine whether the material collected during the course of investigation would make out a case for prosecution of the applicants under Sections 3 and 7 of the EC Act, Sections 3, 4 and 23 of the Petroleum Act, the 2005 Order and Sections 188 and 285 of the IPC, and for the proper appreciation of the submissions made by the learned Counsel, we deem it appropriate to make a reference to certain provisions of law.

Section 3 of the EC Act empowers the Central Government, by order, to provide for regulating or prohibiting the production, supply and distribution of an essential commodity. For that purpose, orders issued by the Central Government may provide for regulation or prohibition of production, supply and distribution of essential commodities, in terms of the manner stated in sub-section (2) of Section 3 of the EC Act.

Section 7 of the EC Act sets out the punishment for the contravention of any order made under Section 3. Thus, it would be incumbent upon the prosecution to demonstrate through the investigation, the violation or contravention of a particular order issued under Section 3 of the EC Act, in this case, on the initial claim of the product being Bio-Diesel and later on the claim that the product was covered under the Petroleum Act.

13. Whilst adverting to the provisions of the EC Act, we would make a reference to the order dated 19.12.2005 issued by the Central Government under Section 3 of the EC Act, in G.S.R. 729(E) known as the “Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 2005”. This order seeks to regulate and control the supply, transportation, marketing, blending and sale of “High Speed Diesel”, which in terms of the definition under Clause 2(e) is defined as :

“2(e) “High Speed Diesel” means any Hydrocarbon Oil, excluding mineral Colza Oil and Turpentine substitute, which meets the requirements of Bureau of Indian Standards specification number IS-1460.”

The 2005 Order also defines who is the “Authorized Officer” under Clause 2(b) which reads as under:

2(b) “Authorized Officer” means an officer authorized under the provisions of Clause 7.

“Malpractices” are defined in the 2005 Order in Clause 2(f) which are :

2(f) “Malpractices” shall include the following acts of omission and commission in respect a Motor Spirit and High Speed Diesel :

- (i) Adulteration,*
- (ii) Pilferage,*
- (iii) Stock variation,*
- (iv) Unauthorized Exchange,*
- (v) Unauthorized Purchase,*
- (vi) Unauthorized sale,*
- (vii) Unauthorized possession,*
- (viii) Over-charging,*
- (ix) Sale off-specification product, and*
- (x) Short delivery.*

Though, the charge-sheet does not specify which of the above acts of Malpractices have been resorted to by the applicants, the material on record would have to establish that there was a contravention of the 2005 Order, either in terms of the malpractices specify therein or there has been a breach of Clauses 3, 4 or 5 of the 2005 Order.

14. Clause 7 of the 2005 Order, specifies who is the authorized officer and the manner in which search and seizure of the product is to be done and samples taken thereof. Clause 7 of the order reads as under :

“7. Power of search and seizure -

(1) Any Gazetted officer of the Central Government or a State Government or any police officer not below the rank of Deputy Superintendent of Police duly authorized, by general or special order of the Central Government or a State Government, as the case may be, or any officer of the oil company, not below the rank of sales officer, may, with a view to securing compliance with the provisions of this Order, or for the purpose of satisfying himself that this Order or any order made there under has been complied with or there is reason to believe that all or any of the provisions of this Order have been and are being or are about to be contravened.-

(a) enter and search any place or premises of a dealer, transporter, consumer or any other person who is an employee or agent of such dealer or transporter or consumer,

(b) stop and search any person or vehicle or receptacle used or intended to be used for movement of the product;

(c) take samples of the product and seize any of the stocks of the product and the vehicle or receptacle or any other conveyance used or suspected to be used for carrying such stocks and thereafter take or authorize the taking of all measures necessary for securing the production of stocks or items so seized before the Collector or District Magistrate having jurisdiction under the provisions of the Essential Commodities Act, 1955 and for their safe custody pending such production;

(d) inspect, seize and remove with, such aid or assistance as may be necessary, books, registers, any other records or documents of the dealer, transporter,

consumer or any other person suspected to be an employee or agent of the dealer, transporter or consumer;

(2) While exercising the power of seizure provided under sub-clauses (c) and (d) above, the authorized officer shall record in writing the reasons for doing so and a copy of such recording shall be provided to the dealer, transporter, consumer or any other concerned person, as the case may be.

(3) The provisions of Section 100 of the Code of Criminal Procedure, 1973 (2 of 1974), relating to search and seizure shall, as far as may be, apply to searches and seizures under this Order.”

Thus, Clause 7 specifies that the authorized officer to conduct a search and seizure under the 2005 Order or for an essential commodity being Bio-Diesel as first set out in investigation papers or any hydrocarbon oil, shall be a Police Officer not below the rank of Deputy Superintendent of Police, duly authorized by general or special order of the State Government. Clause 7 further authorizes such officer not below the rank of Deputy Superintendent of Police to take samples of the product and to produce the stocks and any vehicle used, before the Collector or District Magistrate having jurisdiction under the EC Act. In addition, the authorized officer shall record in writing the reasons for seizure of the products, providing a copy of such writing to the dealer or transporter.

Clause 7 also provides that the provisions of Section 100 of the Code, as far as may be, shall apply to such search and seizures.

We take note of the fact that in the present case, the search and seizure was in an open field, thus not necessitating the procedure to be followed under Section 100 of the Code.

15. The manner in which the Sampling of Product taken during the search/seizure is to be done is specified in Clause 8 of the 2005 Order, which reads as under :

“8. Sampling of Product :-

(1) The authorized under clause 7 shall draw the sample from the tank, nozzle, vehicle or receptacle, as the case may be, in clean aluminum containers, to check whether density and other parameters of the product conform to the requirements of Bureau of Indian Standard specifications number IS 2796 and IS 1460 for motor spirit and high speed diesel respectively. Where samples are drawn from retail outlet, the relevant tank-truck sample retained by the dealer as per clause 3(b) would also be collected for laboratory analysis.

(2) The authorized officer shall take and seal six samples of 1 litre each of the motor spirit or three samples of 1 litre each of the high-speed diesel. Two samples of motor spirit or one of high speed diesel would be given to the dealer or transporter or concerned person under acknowledgment with instruction to preserve the sample in his safe custody till the testing or investigations are completed. Two samples of Motor Spirit or one of High Speed Diesel shall be kept by the concerned oil company or department and the remaining two samples of Motor Spirit or one of High Speed Diesel would be used for laboratory analysis;

(3) The sample label shall be jointly signed by the authorized

officer who has drawn the sample, and the dealer or transporter or concerned person or his representative and the sample label shall contain information as regards the product, name of retail outlet, quantity of sample, date, name of the authorized officer, name of the dealer or transporter or concerned person or his representative;

(4) The authorised officer shall forward the sample of the product taken within ten days to any of the laboratories mentioned in Schedule III or to any other such as laboratory when it may be notified by the Government in the Official Gazette for this purpose, for analysing with a view to checking whether the density and other parameters of the product conform to the requirements of Bureau of Indian Standard specifications No. IS 2796 and IS 1460 for motor spirit and high speed diesel respectively.

(5) The laboratory mentioned in sub-clause (4) shall furnish the test report to the authorised officer within twenty days of receipt of sample at the laboratory.

(6) The authorised officer shall communicate the test result to the dealer or transporter or concerned person and the oil company, as the case may be, within five days of receipt of test result from the laboratory for appropriate action.”

Thus, Clause 8 specifies that when samples have to be taken, three samples of one litre each of the product are required to be taken, if the same is of high speed diesel, of which one would be given to the dealer/transporter under acknowledgment and two samples on which samples' labels to be jointly signed by the authorized officer and dealer are to be sent within ten days to an accredited laboratory specified in Schedule III of the 2005 Order. We note that all Forensic

Laboratories in the States/Unitaritories are authorized for the purpose of Clause 8 of the 2005 Order. The laboratory is required to furnish the test report to the authorized officer within twenty days from the receipt of the samples.

Clause 10 specifies that the provisions of the 2005 Order shall have overriding effect, notwithstanding anything contained to the contrary, any order made by a State Government before the commencement of the Order.

16. The 2017 Order amends the 2005 Order by inserting Clause 6A therein, which reads as under :

“6A(1) The Central Government may permit the direct sale of bio-diesel (B-100) for blending with high speed diesel to all consumers, in accordance with the specified blending limits and the standards specified by the Bureau of Indian Standards.

(2) The owner of every outlet selling bio-diesel (B-100) shall prominently display at the place of business the permissible limits specified by the manufacturers of vehicles and the standards specified by the Bureau of Indian Standards for blending of bio-diesel (B-100) for use of consumers in their vehicles.

Explanation.- *For the purposes of this clause, “oil company” means the Indian Oil Corporation Limited, the Hindustan Petroleum Corporation Limited, the Bharat Petroleum Corporation Limited, any private bio-diesel manufacturers, the authorized dealer of such oil companies and joint ventures of public sector oil marketing companies authorized by the Central Government.”*

17. From the record, it appears that a second set of samples was drawn on 07.07.2022, from the concerned oil tankers by Shri Yogesh Waghmare, Assistant Police Inspector, in the presence of panchas and with the help of a contract personnel of Indian Oil Corporation Limited. On this occasion, nine samples, each of one litre were drawn. To consider the submissions on behalf of the applicant, that the second set of samples was drawn by a Police Officer below the rank designated under the Petroleum Act or that the seizure was in violation of the Petroleum Rules, 2002, we make reference to certain provisions of the Petroleum Act, 1934 and the Rules made thereunder.

18. Under the Petroleum Act, “Petroleum” has been defined under Section 2(a) to mean any liquid hydrocarbon or mixture of hydrocarbons and any inflammable mixture containing a liquid hydrocarbon.

Under sub-section 2(d), the act of transport of petroleum has been defined while sub-section 2(f) defines what the words “to store petroleum” means, and it states that the

words mean to keep the same in any place, but does not include any detention happening during the ordinary course of transport.

19. Under Chapter II of the Petroleum Act, the mode of taking inspection, sampling of petroleum, Use of Standard Test Apparatus and its certification, the authorization of officers for carrying of testing and the power of the Central Government to make rules in this behalf have been set out.

Section 14 of the Petroleum Act requires the Central Government by a notification to authorize a specific officer by name or by virtue of office to carry out inspections, take samples for testing of any petroleum and in that behalf, the Central Government may make rules to regulate the taking of samples of petroleum for testing. In terms of these provisions, the Central Government, in exercise of power conferred by Sections 4, 5, 14, 21, 22 and 29 of the Petroleum Act has made the Petroleum Rules, 2002.

20. Under Section 17 of the Petroleum Act, the Central Government may authorize any officer by name or by virtue of office to test petroleum of which samples have been taken under that Act. In terms of Section 18 of the Petroleum Act read with Rule 193 of the Petroleum Rules, 2002, the method of conducting test has been prescribed, while Rule 195(2) specifies the form in which the test certificate is to be issued.

21. Rules 186 and 198 of the Petroleum Rules, 2002 are of particular importance for the decision in this matter and the same are quoted below :

“186. Drawing of Sample. – (1) In all cases, the sampling officer shall personally superintend the drawing of the sample and the sample shall be drawn in the presence of at least one witness. Where the sample is drawn from an original unopened receptacle containing petroleum otherwise than in bulk the opening shall be sufficient to admit of the sample being rapidly transferred from the receptacle.

(2) Two bottles, each of a capacity of 1 litre, shall be filled to nine-tenths of their capacity with the sample and corked. The corks shall be driven home and cut-off level with the neck, and melted sealing wax shall be worked into the corks and the bottles shall be efficiently sealed.

(3) In the case of petroleum imported into India the bottles containing the samples shall, after being sealed, be labelled with the name of the consignee, particulars of the ship or vehicle by which it is imported and such other distinguishing marks as may be necessary.

198. Power to enter, inspect, search and seize. – (1) Any, officer, specified in column (1) of the table below, may within the jurisdiction specified in the corresponding entry in column 2 of the said table:

(a) enter, inspect and search any place where he has reason to believe that any petroleum is being imported, transported, stored, produced, refined or blended or is under transport and inspect all receptacles, plants and appliances used in connection therewith in order to ascertain if they are in accordance with provisions of the Act and of these rules:

(b) search for petroleum therein;

(c) take samples for testing of any petroleum found therein and make payments by cash for value of samples taken; and

(d) seize, detain and remove any petroleum or any material suspected to be petroleum or any equipment or appliances used therein together with connected documents thereof in respect of which he has reasons to believe that any of the provisions of the Act or of these rules have been contravened.

<i>Designation of the Officer</i>			<i>Limit of Jurisdiction</i>
<i>1</i>			<i>2</i>
Chief Controller	Controller	&	Whole of India
All District Magistrates			Their respective Districts
All Magistrates subordinate to District Magistrate			Their respective Jurisdiction
Police Officer not below the rank of an Inspector			The area over which their authority extends

(2) Whenever any officer other than the Chief Controller, seizes, detains or removes any petroleum or any material connected therewith or any connected documents thereof under this rule, he shall forthwith report the fact by telegram to the Chief Controller and the Controller having jurisdiction over the place where seizure etc., has taken place and whenever any officer not being the District Authority seizes, detains or

removes any petroleum or any material connected therewith or any connected documents thereof under this rule, he shall intimate the facts of the case to the Chief Controller and the Controller having jurisdiction.

(3) Whenever any samples are taken in accordance with this rule, they shall be tested in accordance with the relevant provisions of Chapter X of these rules.

(4) Whenever any petroleum is seized under this rule, it shall be stored, under adequate guard until examination by Chief Controller or the Controller and receipt of instructions from him as to its disposal.

(5) Whenever searches are made under this rule the same shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974). All officers of the police and district authorities shall assist the Chief Controller in the execution under the Act and rules.

(6) Whenever any person by himself or any person in his employment voluntarily obstructs or offers any resistance to or otherwise interferes with or refuses or fails to give or willfully gives false or misleading information to the officer duly appointed under this rule who is acting in accordance with his duty thereunder such person shall be deemed to have committed an offence under the Act.”

22. Thus, a combine reading of these Rules require that the officer effecting entry, conducting inspection and search and seizure of any petroleum, shall be not below the rank of a Police Inspector for the area over which his authority extends.

23. Having quoted the relevant provisions under which the inspection, search and seizure was carried out in the present case by an officer, who was below the rank of a Police Inspector

i.e. Assistant Police Inspector, we now make reference to some of the case law cited by the learned Counsels for the parties, who were relied upon the same in support of their arguments.

24. In Balbir Singh (supra), the Hon'ble Supreme Court was considering a situation where Police Officers conducting search and seizure under the NDPS Act, did not proceed under the provisions of that Act and proceeded with the search and seizure under the Code of Criminal Procedure, in terms of the provisions incorporated in Sections 41 to 60, 70 to 81, 93 to 105 and Section 165 thereof. The principle question dealt with by the Hon'ble Supreme Court was whether the Police Officers were acting in compliance with the provisions of the NDPS Act and if the same were not in consonance with that Act, whether such non conformity/compliance vitiates the trial. In dealing with this argument, at paragraphs 10 and 11 of the judgment, the Hon'ble Supreme Court held that where there is an embargo under Sections 41 and 42 of the NDPS Act empowering only a Gazetted Officer to authorize such search, then notwithstanding the fact that the officer may have

proceeded under the Code of Criminal Procedure, he was not competent to conduct the search, not being designated with a rank specified under the NDPS Act. To quote from the judgment :

“15..... The object of NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, to avoid harm to the innocent persons and to avoid abuse of the provisions by the officers, certain safeguards are provided which in the context have to be observed strictly. Therefore these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to Section 42(1). To that extent they are mandatory. Consequently the failure to comply with these requirements thus affects the prosecution case and therefore vitiates the trial.

25. The questions considered above arise frequently before the trial courts. Therefore we find it necessary to set out our conclusions which are as follows :

(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act.

(2-A) Under Section 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chapter IV of the Act etc. when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place. When such warrant for arrest or for search is issued by a Magistrate who is not empowered, then such search or arrest if carried out would be illegal. Likewise only empowered officers or duly authorized officers as enumerated in Section 41(2) and 42(1) can act under the provisions of the NDPS Act. If such arrest or search is made under the provisions of the NDPS Act by anyone other than such officers, the same would be illegal.

(2-B) Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention, that would affect the prosecution case and vitiate the conviction.

(2-C) Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extent these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial.

(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this

provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.

(4-A) If a police officer, even if he happens to be an "empowered" officer while effecting an arrest or search during normal investigation into offences purely under the provisions of CrPC fails to strictly comply with the provisions of Sections 100 and 165 CrPC including the requirement to record reasons, such failure would only amount to an irregularity.

(4-B) If an empowered officer or an authorised officer under Section 41(2) of the Act carries out a search, he would be doing so under the provisions of CrPC namely Sections 100 and 165 CrPC and if there is no strict compliance with the provisions of CrPC then such search would not per se be illegal and would not vitiate the trial.

The effect of such failure has to be borne in mind by the courts while appreciating the evidence in the facts and circumstances of each case.

(5) On prior information the empowered officer or authorised officer while acting under Sections 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact.

(6) The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory. If there is non-compliance or

if there are lapses like delay etc. then the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case.”

25. In Roy V. D. (Supra), the Hon’ble Supreme Court considered the legality of an arrest and search which was done by an officer not empowered or authorized under Sections 41 and 43 of the NDPS Act, but who had conducted the entire search and arrest purportedly under the Code of Criminal Procedure. Whilst, considering the legality of the seizure, the Hon’ble Supreme Court has also considered whether the High Court could act in exercise of its inherent jurisdiction under Section 482 of the Cr.P.C. to quash criminal proceedings which are founded on investigations and seizures conducted not in accordance with the procedure in special statute. After quoting from Balbir Singh (supra), it held thus :

“16. Now, it is plain that no officer other than an empowered officer can resort to Section 41(2) or exercise powers under Section 42(1) of the NDPS Act or make a complaint under clause (d) of sub-section (1) of Section 36-A of the NDPS Act. It follows that any collection of materials, detention or arrest of a person or search of a building or conveyance or seizure effected by an officer not being an empowered officer or an authorised officer under Section 41(2) of the NDPS Act, lacks sanction of law and is inherently illegal and as such the same cannot form the basis of a proceeding in respect of offences under Chapter IV

of the NDPS Act and use of such a material by the prosecution vitiates the trial.

17. To the same effect is the view expressed by this Court in State of Punjab v. Balbir Singh [1994 (3) SCC 299]. In para 13 Jayachandra Reddy, J. speaking for the Court observed thus :

“13. Therefore, if an arrest or search contemplated under Sections 41 and 42 is made under a warrant issued by any other Magistrate or is made by any officer not empowered or authorised, it would per se be illegal and would affect the prosecution case and consequently vitiate the trial.”

18. It is well settled that the power under Section 482 of the Cr.P.C. has to be exercised by the High Court, inter alia, to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Where criminal proceedings are initiated based on illicit material collected on search and arrest which are per se illegal and vitiate not only a conviction and sentence based on such material but also the trial itself, the proceedings cannot be allowed to go on as it cannot but amount to abuse of the process of the court; in such a case not quashing the proceedings would perpetuate abuse of the process of the court resulting in great hardship and injustice to the accused. In our opinion, exercise of power under Section 482 of the Cr.P.C. to quash proceedings in a case like the one on hand, would indeed secure the ends of justice.”

26. In Jeewan Kumar Raut (supra), the Hon’ble Supreme Court was considering the applicability of the provisions of the Code in cases where a special statute such as the Transplantation of Human Organs Act, 1994, had provided for a procedure for investigation of an offence and designation of an authority/officer to conduct such investigation. Whilst,

considering and applying the principle of law in cases, where procedures under statute conflict with those set out in a general statute such as the code of criminal procedure, it has held thus :

“19. TOHO is a special Act. It deals with the subjects mentioned therein, viz. offences relating to removal of human organs, etc. Having regard to the importance of the subject only, enactment of the said regulatory statute was imperative.

20. TOHO provides for appointment of an appropriate authority to deal with the matters specified in Sub-section (3) of Section 13 thereof. By reason of the aforementioned provision, an appropriate authority has specifically been authorized inter alia to investigate any complaint of the breach of any of the provisions of TOHO or any of the rules made thereunder and take appropriate action. The Appropriate Authority, subject to exceptions provided for in TOHO, thus, is only authorized to investigate cases of breach of any of the provisions thereof, whether penal or otherwise.

26. It is a well-settled principle of law that if a special statute lays down procedures, the ones laid down under the general statutes shall not be followed. In a situation of this nature, the respondent could carry out investigations in exercise of its authorization under Section 13(3)(iv) of TOHO. While doing so, it could exercise such powers which are otherwise vested in it. But, as it could not file a police report but a complaint petition only; Sub-section (2) of Section 167 of the Code may not be applicable.

27. The provisions of the Code, thus, for all intent and purport, would apply only to an extent till conflict arises between the provisions of the Code and TOHO and as soon as the area of conflict reaches, TOHO shall prevail over the Code. Ordinarily, thus, although in terms of the Code, the respondent upon completion of investigation and upon obtaining remand of the accused from time to time, was required to file a police report, it was precluded from doing so by reason of the provisions contained in Section 22 of TOHO.

28. To put it differently, upon completion of the investigation, an authorized officer could only file a complaint and not a police report, as a specific bar has been created by the Parliament. In that view of the matter, the police report being not a complaint and vice versa, it was obligatory on the part of the respondent to choose the said method invoking the jurisdiction of the Magistrate concerned for taking cognizance of the offence only in the manner laid down therein and not by any other mode. The procedure laid down in TOHO, thus, would permit the respondent to file a complaint and not a report which course of action could have been taken recourse to but for the special provisions contained in Section 22 of TOHO.”

27. Thus, in the above judgments, the Hon’ble Supreme Court has reiterated the legal positions that where a special statute specifically authorizes a particular officers, whether by designation or by a rank to conduct investigation, search and seizure, such investigation not done by designated officer would vitiate the entire proceeding, including the filing of a final report.

28. Whilst on the subject, we may also advert to a judgment of this Court rendered in Sarvesh Kumar Shahi (supra) cited by the prosecution to contend whether a search and seizure or investigation conducted under the EC Act, 1955, by Police Sub-Inspector under the Cr.P.C. was competent and maintainable. In that case, we may note that the FIR was

registered for the offences punishable under Sections 3, 7, 8 and 10 of the EC Act, Sections 2 and 3 of the 2005 Order and under Sections 109, 114, 212, 407, 411, 420, 467, 468, 471 and Section 120B of the IPC. The investigation in that case was carried out by an Assistant Commissioner of Police and not by a Deputy Superintendent of Police as was required under the EC Rules. There is no doubt that in that judgment whilst referring to the judgment in Roy V. D. (supra), this Court has held that the search, arrest and investigation were not *per-se* illegal and the same were not vitiated by the fact that the officer conducting investigation proceeded under Section 100 and under Section 165 of the Cr.P.C. We, however, note that in that case, there was no independent challenge to the FIR or to the scheme of the EC Act and the only effort sought to be made was that the initiation of action against that applicant was illegal. We also note that the judgment was rendered in the face of specific Sections of the Indian Penal Code, quoted by us above which were also been investigated, whilst in the present case, the only provisions of the IPC which have been applied are Sections 188

and 285 of the IPC. Section 188 deals with disobedient of an order promulgated by public servant, in this case purporting to be the 2005 Order while the provisions of Section 285 appeared to have been applied to claim an act done rashly or negligently to endanger the human life by the applicant by merely storing the petroleum product, for which the other while had requisite permission, in oil tankers. We also note that in Sarvesh Kumar Shahi (supra) that the FIR was registered prior to commencement of investigation and the challenge was thrown from the panchanama of seizure pursuant to the register of the FIR without challenging the drawing of samples has been contrary or in breach of any provision of law. In contrast, in the present case, the entire initial investigation, search and seizure took place under the authority and supervision of the Assistant Police Inspector and the FIR/complaint came to be lodged at the behest of this officer later on, when the seized samples were forwarded for analysis.

We are, therefore, of the opinion that on facts, what has been held in Sarvesh Kumar Shahi (supra) is not applicable

to the present case.

29. In Indian Oil Corporation Limited (supra), the Hon'ble Supreme Court was considering whether non compliance with the procedure laid down in the 2005 Order read with Section 100 of the Code, was mandatory and whether Clause 7 thereof dealing search and seizure, if not complied with, it would render the investigation a nullity. It has been held:

“14. The first issue required to be examined is whether the appellants were required to follow the procedure under the Control Order read with Section 100 of the Code. The Control Order has been issued under Section 3 of the Act. Such Act has been enacted for control of the production, supply and distribution and trade and commerce, of certain commodities. In respect of High Speed Diesel and Motor Spirit, the Control Order is issued for regulation of supply and distribution and prevention of the malpractices. Section 6A of the Act provides for confiscation of the essential commodity whereas, Section 7 of the Act makes any person who contravenes any order made under Section 3 liable for criminal prosecution. Therefore, we find that the effect of issuance of the Control Order is that in the event of violation of such Control Order, any person who contravenes any order made under Section 3 of the Act i.e. the Control Order, he is liable to be punished by a Court. Therefore, the violation of the Control Order has penal consequences leading to conviction. The provisions of search and seizure contained in Clause 7 read with Section 100 of the Code will come into play only in the event a person is sought to be prosecuted for violation of the provisions of the Control Order. Admittedly, in the present case, the dealer is not sought to be prosecuted for the violation of the Guidelines, therefore, the procedure for drawing of samples which is a necessary precondition under the Control Order for prosecuting an offender does not arise for consideration.

16. The Guidelines as mentioned in sub-clause (I) of Clause 2.5 of the Guidelines is to streamline the functioning i.e. the oil companies should not arbitrarily or without any justification send the sample for testing at their sweet will. The sample in this case was drawn on 06.05.2013 and was sent for testing on 22.05.2013 i.e. there was a delay of 5 days. Since the Guidelines use the timeline as a preferred time line, it cannot be said that the timeline mentioned has to be strictly adhered to and is mandatory. The language, the purport and the effect of testing do not warrant to read the word 'preferably' as mandatory timeline. It is not the case of the dealer that the sample sent after five days will lose its efficacy as the umpire sample would be sent only after the first report is confronted to the dealer. Still further, the dealer has not raised any objections regarding delay in sending the sample in the two replies submitted by him on 17.07.2013 and 02.01.2014. The argument that the umpire sample in the hands of the dealer could not be tested because of sludge and to doubt the other two samples is totally untenable. Such argument is based upon conjectures as the other two samples collected and sealed cannot be permitted to be disputed only because one sample was found with sludge. There is no material to doubt the correctness of the samples taken."

Thus, as held, issuance of the 2005 Control Order and its violation by contravene Section 3 of the EC Act would make the applicant liable to punishment with penal consequence, and accordingly Clause 7 read with Section 100 of the Code would come into play, if prosecution for such violation was launched. Further, samples, if drawn ought to be sent for testing within the timelines set out in the order, though the same may not be mandatory, it is preferable that the same be adhered to.

30. A Single Judge of this Court, whilst considering whether investigation conducted under the EC Act, by an officer of the rank below a Police Inspector was authorized has held thus :

“9. The learned counsel for the applicants further pointed out that the seizure was carried out by the A.P.I. Sawale, who was not authorised to make seizure. In this respect, the learned counsel for the applicants pointed out that Notification dated 7-7-1994 has been issued by the Government of India, Ministry of Petroleum and Natural Gas, New Delhi in pursuance of sub-clause (c) of Clause 7 of the Kerosene (Restriction on Use and Fixation of Ceiling Price) Order, 1993 whereunder all the police officers not below the rank of Inspectors have been authorised to take necessary action under the provisions of the said order within their respective jurisdiction. It may be noted that Rule 9 of the said Order provides that the Central Government may by Notification authorize any officer to take action under the said order. As pointed out above, the Notification dated 7-7-1994 authorizes the Police Officers not below the rank of Inspectors. The investigating officer in the present case Mr. Sawale is Assistant Police Officer and as such he was not authorised to take action under the Order. Thus, the seizure was carried out by an unauthorized officer on the basis of which FIR was registered and charge-sheet was filed. The same is inherently illegal and cannot form the basis of prosecution. In this respect, the learned counsel for the applicants relied on (Roy V.D. v. State of Kerala, 2000(4) Crimes 196 (SC), wherein it is held as under :

"Where criminal proceedings are initiated based on illicit material collected on search and arrest which are per se illegal and vitiate not only a conviction and sentence based on such material but also the trial itself, the proceedings cannot be allowed to go on as it cannot but amount to abuse of the process of the court; in such a case not quashing the proceedings would perpetuate abuse of the process of the court resulting in great hardship and injustice to the accused."

10. The learned Counsel for the applicants also relied on (Laxmikant Shankarlal Sarda v. State of Maharashtra and another), 2002(2) Mh.L.J. 471, in which it was held that the seizure and investigation by PSI was not legal, he being an officer below the rank of Police Inspector.

11. The learned Counsel for the applicants lastly pointed out that the charge-sheet discloses that an offence under Section 3 read with Section 7 of the Essential Commodities Act has been committed by applicant Nos. 2 and 3. However, neither the charge-sheet nor any documents filed with it disclose as to which order was violated by the applicants so as to attract the provisions of Section 7 of the Essential Commodities Act. In such situation, the charge-sheet is liable to be quashed. In support of the submission, the learned Counsel for the applicants relied on (Kallol Kumar Mukherjee and others v. State of West Bengal), 1995 Cri.L.J. 654 (Cal).”

Thus, it has been held that wherein investigation, search or seizure was conducted by officer below the rank of a Police Inspector, the entire prosecution on the basis of such investigation which was not authorized, cannot be sustained and requires to be set aside.

31. In M/s. Ch. Yegnaiah and Sons (supra), the Andhra Pradesh High Court had occasion to deal with a petition invoking its power under Section 482 of Cr.P.C. for quashment of a criminal complaint before a Magistrate for offence under Section 7 of the EC Act and contravention of Clause 5 of the 1998 Motor Spirit and High Speed Diesel Order under that

Act, on the ground that the search and seizure was conducted by an officer below the rank of Deputy Superintendent of Police. After referring to the specific procedures of the order passed under Section 3 of the EC Act, the Andhra Pradesh High Court has held thus :

“6. The learned Public Prosecutor has contended that the Inspector of Police, Vigilance Cell, is a Gazetted Officer authorized by the State to conduct check and seizure under the provisions of the Essential Commodities Act. What is mentioned is, the Police Officer who is a Gazetted Officer not below the rank of Dy. Superintendent of Police can be authorized to make search and seizure of petrol bunks. No doubt, an interpretation has to be made drawn from the rule position extracted above. If the “every police officer” is taken into consideration as Gazetted Officer, there is no need to mention in the clause that a police officer not below the rank of DSP shall investigate the case. If a police officer has to be entrusted with search and seizure, the rule contemplates that he should not be below the rank of DSP. It is not the case of the respondent that the said Inspector is working as a Gazetted Officer in the capacity of Police Officer not below the rank of DSP. It is to be seen that he is acting as police officer for a particular purpose. Obviously, the Vigilance Inspector only performed the duties of police officer and not that of gazetted officer. He is not authorized by the Government to conduct seizure and check. Therefore authorization given by general or special order to the Inspector of Vigilance in question does not arise and he only performed the duties of police official. Moreover he is designated as a police officer, not as a Gazetted Officer. He has acted only in the capacity as police official. In that view of the matter, search and seizure conducted by the Inspector of Police, Vigilance Cell is bad, as he is not authorized to do so in terms of the Clause-4 of the MS & HSD Order.”

32. In Medipol Pharmaceutical India Private Limited (supra), the Hon’ble Supreme Court was considering the

provisions of the Drugs and Cosmetics Act, 1940 and the valuable right of person sought to be penalized under such statute to have the seized sample tested through an accredited laboratory, and further whether considerable and unexplained delay on the part of the authority to obtain test reports within the time frame stipulated by the Rules would vitiate the entire process of penalizing. We quote certain passages from this judgment, where its principle has been considered :

“13. Though the aforesaid judgments pertain to criminal prosecutions under the Drugs and Cosmetics Act, Prevention of Food Adulteration Act and Insecticides Act, yet, they lay down that a valuable right is granted to a person who is sought to be penalized under these Acts to have a sample tested by the Government Analyst that is found against such person, to be tested by a superior or appellate authority, namely, the Central Drugs Laboratory. These judgments lay down that if owing to delay which is predominantly attributable to the State or any of its entities, owing to which an article which deteriorates with time is tested as not containing the requisite standard, any prosecution or penalty inflictible by virtue of such sample being tested, cannot then be sustained. We have seen that on the facts of this case, the sample drawn and analyzed by the Government Analyst was delayed for a considerable period resulting in the sample being drawn towards the end of its shelf life. Even insofar as the samples sent to the Central Drugs Laboratory, there was a considerable delay which resulted in the sample being sent and tested 8 months beyond the shelf life of the product in this case. It is thus clear that the valuable right granted by Section 25 of the Drugs and Cosmetics Act kicks in on the facts of this case, which would necessarily render any penalty based upon the said analysis of the sample as void.

17. We have seen in the present case that the post-decisional hearing proved to be an eyewash as the seven-member Committee did not even refer to the findings of the appellate report, which showed that the Government Analyst's report was wholly incorrect, 61.96% being widely off the mark. Given the fact that there is considerable unexplained delay on the part of the Drug authorities and the Respondent resulting in the first and second samples being tested late - the second sample being tested 8 months after its shelf life had expired - it is clear that the order of blacklisting dated 21.02.2019, as confirmed by the order dated 18.09.2019, is infirm and is therefore, set aside. Concomitantly, the impugned High Court judgment is also set aside."

Thus, where samples are required to be sent for testing within a time frame, even though the same is not mandatory but is directory, that such time frame are required to be followed in spirit and if there is inordinate unexplained delay on the part of the authorities sending the same for testing the process itself of analysis may stand vitiated.

33. Recently, the Hon'ble Supreme Court in Avtar Singh (supra) was considering whether investigation and a prosecution launched by an officer below the rank specified under Central Government Notification issued under Section 3 of the EC Act could be sustained. The Hon'ble Supreme Court has held that since the entire action was taken by an officer of the rank of Sub-Inspector, who was not authorized under the

Government order, the entire search, seizure and investigation must fail. We quote from that judgment as under :

“13. The facts in the case as noticed above as such, are not in dispute. The only argument raised is about the power of the person who had seized cylinder on the basis of which the appellants were prosecuted. Clause 7 of the Order, which is reproduced hereunder, prescribes officers who have the power.

‘7. Power of entry, search and seizure:-

(1) an officer or the Department of Food and Civil Supplies of the Government, not below the rank of an Inspector authorised by such Government and notified by Central Government or any officer not below the rank of a Sales Officer of an Oil Company, or a person authorized by the Central Government or a State Government and notified by the Central Government may, with a view to ensuring compliance with the provisions of this Order, for the purpose of satisfying herself that this order or any order made thereunder has been complied with:

(a) Stop and search any vessel or vehicle which the Officer has reason to believe has been, or is being or is about to be, used in the contravention of this Order;

(b) Enter or search any place with such aid or assistance as may be necessary;

(c) Seize and remove with such aid or assistance as may be necessary, the entire quantity of any stock of liquefied petroleum gas in cylinders, cylinder valves and pressure regulators, alongwith the vehicles, vessels or any other conveyances used in carrying such stock if he has reason to suspect that any provision of this Order has been or is being or is about to be, contravened in respect of such stock and thereafter take or authorise the taking of all measures necessary for securing the production of the stock of liquefied petroleum gas in cylinder, cylinders, gas cylinder valves, pressure regulators, vehicles, vessels or other conveyances so seized before the Collector having

jurisdiction under the provisions of section of the Essential Commodities Act, 1955 (10 of 1955) and for their safe custody pending such production.....’

14. It nowhere prescribes that a Sub-Inspector of the Police can take action. No doubt, the aforesaid Clause provides that in addition to the specified officers, the persons authorised by the Central or State Government may take action under the Order. However, nothing has been placed on record to support the argument that the Sub Inspector of the Police was authorised to take action under the aforesaid Order.

15. It is a settled law that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods are necessarily forbidden. Reference can be made to Dharani Sugars and Chemicals Ltd. Vs. Union of India and Ors. reported in (2019) 5 SCC 480.

16. In the absence of the authority and power with the Sub-Inspector to take action as per the Order, the proceedings initiated by him will be totally unauthorised and have to be struck down.”

34. A reading of the above case law would lead us to the conclusion that when the EC Act and the Petroleum Act being special statutes, similar to the case as in the NDPS Act, it is only an officer specifically empowered under that statute that has the authority to carry out investigation which includes the power to search and seize. Further, it would be only the authorized officer under these Acts, who would be required to carry out the seizure of the material in accordance with the manner prescribed under these two statutes i.e. in terms of the 2005 Order read with 2017 Order under the EC Act and in terms of

the Petroleum Rules, under the Petroleum Act.

35. The offences alleged to have been committed by the applicants in the Final Report are under Sections 3 and 7 of the EC Act read with the 2005 and 2017 Orders issued by the Central Government under the EC Act. It appears from the record that initially, the Assistant Police Inspector conducted a raid on secret information received by him on 22.12.2021 under Sections 3 and 7 of the EC Act, on the premise that the applicants had stored Bio-Diesel in the tankers. After obtaining the nine samples, he registered an FIR on 23.12.2021, in terms of the above Sections.

Under the 2005 Order an authorized officer being one authorized under the provision Clause 7 thereof would require to have a rank not below Deputy Superintendent of Police duly authorized by general or special order of the State Government. Thus, to proceed with a search or seizure under the EC Act in relation to any product specified in the 2005 Order or in relation to a malpractice concerning the adulteration, supply, distribution or prevention of such acts in

relation to these products, only an officer of the rank of Deputy Superintendent of Police or above specifically authorized in that behalf by the State Government could enter, conduct the search and take samples under Clause 7 of the 2005 Order.

In the present case, the officer who proceeded on the basis of secret information received by him to commence the investigation by conducting a search and seizure and obtaining samples of the product, was of a rank of Assistant Police Inspector, which was two ranks below the rank of Deputy Superintendent of Police, apart from the fact that from the record, he had no authorization from the State Government, in terms of the provisions of the EC Act to act in the matter.

36. The 2017 Order includes a new Clause 6A into the 2005 Order including Bio-Diesel for blending high speed diesel amongst the product covered in the 2005 Order.

Even when the search and seizure is carried out by an officer not below the rank of Deputy Superintendent of Police, the procedure for sampling of the product is set out in Clause 8

of the 2005 Order, which requires the officer to take six samples of one litre each in case of motor spirit or three samples of one litre each in case of high speed diesel of which one of the samples shall be given to the dealer or transporter and one sample is to be sent for testing within ten days to any of the laboratories specified in Schedule III of the 2005 Order. In the present case, even assuming the officer who conducted the raid was authorized, the samples seized are not in accordance with the mandate of Clause 8 of the 2005 Order, since he has collected samples of only 750 ml each, that to for testing them as bio-diesel. We are of the opinion that where a provision of law mandates a representative sample to be of one litre, any sample taken of a lesser quantity, not in accordance with what the provision sets out as a representative sample, could not be relied upon in evidence at a trial.

37. We further find, that in the case of collection of samples, both, on 22.12.2021, and on 07.07.2022, apart from the fact that the samples collected were not in accordance with the quantity specified to be a representative sample, the timeline

specified under the 2005 Order and under the Petroleum Act have not been adhered to or delays in sending the samples for analysis to a laboratory being explained.

The first set of samples which was of 750 ml each, being below the required representative quantity of one litre was collected on 22.12.2021, but was sent to the laboratory about 40 days, thereafter on 02.02.2022, in contravention of the requirement of Clause 8 of the 2005 Order under which 10 days are specified for the samples to be sent for analysis. The second set of samples was drawn on 07.07.2022 and sent for testing on 27.09.2022 to the Forensic Science Laboratory at Amravati about 80 days after they were drawn in complete violation of Clause 8 of the 2005 Order. The charge-sheet was filed on 04.10.2022 while the second set of samples was tested by the Laboratory only on 05.02.2023 more than six months after their collection and report to that effect was released on 17.02.2023. Even considering that the timeline specified in the Clause 8 of the 2005 Order are directory in nature, on the face of it, there is inordinate delay in submitting both the samples

for chemical analysis. Such samples, having been retained before analysis for considerable period of time would be unreliable in their composition for proof of their chemical content for considering them to be in contravention of the provisions of both EC Act and the Petroleum Act. Though, this by itself may not be the sole factor to be considered for a decision whether an offence made out, it is certainly a factor that would lead us to believe that a trial would end in a failure to prove the content of the samples, merely on the period that they were not sent for analysis.

38. We note, that though the FIR has been registered under Sections 3 and 7 of the EC Act, the Final Report has been filed also invoking the provisions of Sections 3, 4 and 23 of the Petroleum Act.

Section 3 prohibits the transport or storing of any petroleum, same in accordance with the rules made under Section 4 of the Act. Section 23 of the Act provides for penalties for contravention of any of the rules made under

Section 4 or Section 5 of the Act. Thus, the charge-sheet must proceed on the basis of specific allegations contained in the FIR or investigation that sets out facts constituting infraction of a particular rule framed under Section 4 of the Petroleum Act and such investigation is required to be carried out by an officer authorized under the Petroleum Act, 1934. In terms of the powers of the Central Government under Section 4 of the Petroleum Act, the Petroleum Rules of 2002, more specifically Rule 186 requires the officer taking the samples in two bottles each of capacity of one litre and forward the same to the testing officer. At the time the initial search and seizure was done on 22.12.2021, where representative samples of 750 ml each were drawn by the Assistant Police Inspector, no investigation was conducted in terms of the provisions of the Petroleum Act. However, at a later stage i.e. on 12.06.2022, additional charges were framed under Sections 3, 4 and 23 of the Petroleum Act and thereafter another Assistant Police Inspector visited the site, where the three tankers were stationed and on 07.07.2022, took samples of the very same product, under a panchanama of the

same date, this time of one litre each numbering three in all and sent the same to the RFSL at Amravati.

Under the provisions of Rule 186 of the Petroleum Rules, two bottles, each of a capacity of one litre shall be taken as samples, to be considered representative samples of the product.

39. In terms of Rule 198(1)(c) of the Petroleum Rules, the officers authorized to enter, inspect and search any place, where they have reason to believe that any petroleum product has been transported or stored in contravention of the Petroleum Acts or Rules are specified. Under Rule 198, it is only a police officer not below the rank of a Police Inspector who would have the jurisdiction and authority to conduct a search for petroleum or to take samples for testing of petroleum or to seize or detain such petroleum. In the present case, we note that it was an officer of the rank of an Assistant Police Officer, who was not obviously authorized in terms of Rule 198 conducted the search, seizure and taking of samples for testing

of petroleum product on 07.07.2022. Even assuming the first set of samples taken on 22.12.2021 were to be considered, the same were taken by an Assistant Police officer who was obviously not authorized to act in the matter.

40. Thus, the power to conduct a search and seizure is vested, both under the EC Act and the 2005/2017 Orders made thereunder or under the Petroleum Act and Rules made thereunder is vested either in a officer not below the rank of the Deputy Superintendent of Police or Police Inspector, as the case may be, while the officer who undertook the search and seizure at both points of time i.e. on 22.12.2021 (before FIR was lodged) and on 07.07.2022 (when Sections 3, 4 and 23 of the Petroleum Act were applied) were of the rank of Assistant Police Inspector. Applying the ratio laid down in Avtar Singh (supra), where it is held that it is a settled law that where power is given to do a certain thing in a certain way, other methods are necessarily forbidden, and in the absence of authority and power with an Assistant Police Inspector to take action as per the 2005 Order or as per the Petroleum Rules, the proceedings

initiated on that basis are unauthorized and have to be stuck down. Consequently, all proceedings consequent to the search and seizure carried out on 22.12.2021 leading to the lodging of FIR on 23.12.2021 and filing of the final report, for the offences under Sections 3 and 7 of the EC Act, under Sections 3 and 4 read with Section 23 of the Petroleum Act, 1934 and under the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order 2005 and Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Amendment Order 2017, a liable to be quashed and set aside in exercise of our inherent jurisdiction under Section 482 of the Cr.P.C.

41. With regard to the launching of the prosecution on the basis of the seizures which were unauthorized and charging the applicants for offences under Sections 188, 285 read with Section 34 of the IPC, these offences have been added to the charge-sheet purportedly for disobedient of orders promulgated by public servant or for offences, claim to arise under Section 285 of a negligent conduct with fire a combustible material

such as to endanger human life. The FIR and charge-sheet appeared to be silent as to which order promulgated by a public servant has been breached by the applicants to attract the provisions. Assuming the same refers to the 2005/2017 Orders under the EC Act, the same would relate back to the question of authorization of the officer who was conducted a seizure on the basis of offence has been alleged. Thus, the provisions of Section 188 of the IPC would not arise in this Case.

42. We also take note of the fact that after the first sample was drawn and seizure was conducted by unauthorized officer on 22.12.2021, proceedings were taken before the Collector of Akola under the EC Act by a report of the seizure sent to that authority; an order dated 14.07.2022, was passed by the Collector, Akola in terms of Section 6A of the EC Act, wherein the Authority (Collector) has arrived at a finding that the concerned tankers contained mixed hydrocarbon oil and not bio-diesel, as was initially claimed by the prosecution and consequently all three confiscated vehicles along with the product contained therein were released. Reference is made to

the collection of the very same material by the Assistant Police Inspector in that order. The second set of samples was taken by an Assistant Police Inspector on 07.07.2022, this time proceeding on the basis that the product was covered under the Petroleum Act. Surprisingly, after the Collector having released the vehicles on 14.07.2022 concluding that the product, based on the first report of chemical analysis was a mixed hydrocarbon oil and not bio-diesel as claimed, instead of desisting from proceeding further in their investigation, the prosecution proceeded to file a charge-sheet including therein allegations under Sections 3, 4 and 23 of the Petroleum Act. This was done in the face of the second report dated 17.02.2023 wherein an opinion is recorded that the sample does not meet the specifications/standards for Bio-Diesel and hence rejected.

There being no specific allegation that the product was stored in any manner contrary to the provisions of the Petroleum Act, the facts stated in the complaint do not allege any case made out under the provisions of Section 285 of the IPC.

43. For all the above reasons, this is a fit case for interference in our inherent jurisdiction under Section 482 of the Cr.P.C., and to allow both criminal applications bearing APL No.555 of 2022 and APL No.695 of 2022. We hereby quash and set aside the FIR in Crime No.1203 of 2021 dated 23.12.2021, registered with Khadan Police Station, District Akola and connected Final Report dated 04.10.2022 in RCC No.1242 of 2022.

(VALMIKI SA MENEZES, J.)

(VINAY JOSHI, J.)