

(1997) 09 CAL CK 0036
In the Calcutta High Court
Case No : C.R.R. No. 860 of 1997

Indian Oil Corporation Ltd.

APPELLANT

Vs

S.A. Neyazi

RESPONDENT

Date of Decision : 25-09-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Standards of Weights and Measures (Enforcement) Act, 1985 — Section 33, 33(1), 51, 51(1), 62(1)
Standards of Weights and Measures (Packaged Commodities) Rules, 1977 — Rule 2, 2(1), 24, 24(2), 24(3)
Standards of Weights and Measures Act, 1976 — Section 2, 28, 29, 3, 30

Citation : (1998) CriLJ 2281

Hon'ble Judges : Dibyendu Bhusan Dutta, J

Bench : Single Bench

Advocate : Pradip Kr. Ghose and Jaymallya Bagchi, for the Appellant; P.N. Ghose, for the Respondent

Judgement

Dibyendu Bhusan Dutta, J.—The present application u/s 482 of the Criminal Procedure Code is directed against the proceedings in Case No. C. R. 235 of 1996 pending in the Court of Sub-Divisional Judicial Magistrate, Durgapur.

2. The above case arose out of a written complaint lodged by an Inspector of Legal Metrology, Durgapur subdivision with the Court of Sub-Divisional Judicial Magistrate, Durgapur.

3. The complainant's case may be stated as follows. In course of, a surprise visit of LPG bottling plant of Indian Oil Corporation Limited, the petitioner No. 1 Company at Durgapur on 22-3-96 along with Assistant Controller of Legal Metrology, Burdwan and Inspector of Legal Metrology, Durgapur, the petitioner No. 3 who happened to be the acting plant manager of that bottling plant was asked to produce filled LPG cylinders for checking of their net content. The checking was undertaken in presence of the petitioner No. 3 and the complainant verified and checked the cylinders which were supplied by the packer. A weight

checking data sheet was prepared in 32 filled cylinders as per procedure laid down in Rule 24 of the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 (For short, "Rules"). Out of those 32 LPG filled cylinders an error was detected in one cylinder. According to the second schedule of the aforesaid Rules, the maximum permissible error in deficiency is 150 gms. But as per serial No. 12 of the weight checking data sheet, the net content of that particular LPG cylinder was found to be less than the declared net content by 1200 gms. The error in deficiency was thus more than twice the maximum permissible limit as shown in schedule 2 of the relevant Rules. The LPG cylinder in question was accordingly seized u/s 29 of the Standards of Weights and Measures Act, 1976 (for short, "Act of 1976") and it was kept under the safe custody of the petitioner No. 3. The complainant's predecessor effected a seizure on 13-6-95 from this bottling plant for detection of short weight of the contents of LPG cylinders. The offence in respect of that seizure was compounded by the Controller of Legal Metrology, West Bengal u/s 73 of the Act of 1976 read with Section 65 of the Standards of Weights and Measures (Enforcement) Act, 1985 (for short, "Act of 1985") and the petitioner company paid the compounding fees amounting to Rs. 4,995/- on 7-7-95. Thus the offence in relation to the short weight that was detected on 22-3-96 is a second offence within the meaning of Section 65(2) of the Act of 1985 within a period of three years from the date on which the first offence was compounded. The act of manufacturing, packing, distributing, selling, offering, exposing, processing for sale of any packaged commodity which does not conform to the declared net weight as per the provisions of Rule 24(4)(c) of the Rules amounts to contravention of Section 39 of the Act of 1976 read with Rule 25 of the Rules and is punishable u/s 63 of the said Act. The petitioner No. 3 as acting plant manager packed and possessed for distribution of the concerned filled LPG cylinder and had thereby committed an offence u/s 39 of the Act which is punishable u/s 63 of the Act of 1976. The petitioner No. 1 being the Company and the petitioner No. 2 being its Managing Director have also committed the said offence within the meaning of Section 74 of the Act of 1976.

4. The learned Magistrate by order dated 21st August, 1996 took cognizance upon that complaint and issued process against the petitioners.

5. The petitioners have come up in revision u/s 482 of the Cr.P.C. for quashing the criminal proceeding.

6. The petitioners' case as made out in the revisional application may be stated as follows. The impugned prosecution is illegal and without jurisdiction inasmuch as the allegations in the petition of complaint taken in their entirety and read in the context of the relevant statutory provisions do not make out the basic ingredients of the offences complained of nor disclose the commission of any offence punishable in the eye of law. In relation to the LPG bottling plant at Durgapur, the petitioner company is a wholesale dealer of LPG cylinders in the said plant for bulk sale in distribution who in turn sells, distributes and delivers

them to the respective consumers. This particular LPG bottling plant is wholly a wholesale packaging unit of the company and there is no allegation in the petition of complaint that this plant is either wholly or partly a retail outlet dealing with retail packaging of commodities. Under the scheme of the Rules, a wholesale packaging unit is governed by Chapter 3 and not by Chapter 2 of the Rules containing Rules 24 and 25. This wholesale packaging unit sells commodities in bulk to various distributors of the company and no retail sale to customer takes place from this plant. As per the provisions of the Rules, sample size to be selected in an LPG bottling plant for inspection is 80 in number while the sample size selected in this case was 32. The entire inspection and the weight checking data sheet prepared on the basis of wrong sample size is illegal and the impugned prosecution based on such data sheet is liable to be quashed. Moreover, the petitioner No. 2 was at the material point of time holding the post of Director (Marketing) and was only involving in policy matters relating to LPG cylinders and was not, in any way, responsible to the company for conduct of its day to day business. In the absence of the allegation in the petition of complaint that the petitioner No. 2 was responsible to the company for conduct of its day to day business, the petitioner No. 2, who now happens to be the Chairman of the Company, cannot be prosecuted for the alleged offence, if there be any.

7. During the hearing, Mr. Pradip Kr. Ghosh, appearing with Mr. Jaymalya Bagchi for the petitioners, raised the following points. The instant prosecution is based on a data which is said to have been collected after observance of a procedure laid down in Rule 24 of the Rules. According to Mr. Ghosh, the place where the test was carried out is the wholesale packaging unit of the company in respect of LPG cylinders where the LPG cylinders are packed for the distribution to the dealer and no retail sale to the customer takes place in the plant. Mr. Ghosh contended that Rule 24 cannot have any manner of application to a wholesale packaging unit. The Company, it is urged, is a wholesale dealer and not a retail dealer in respect of the LPG cylinders which are packed in the Durgapur bottling plant. Mr. Ghosh draws my attention to the heading of Chapter II of the Rules which contains Rule 24 and submits that this chapter is applicable only to retail packages and not to wholesale packages. He also draws my attention to the provisions of Rule 3. This rule makes it clear that the provisions of Chapter II are applicable only to packages intended for retail sale and since Rule 24 is contained within this chapter, it cannot be applicable to the wholesale packages and as such, any data that was collected after observance of the procedure laid down in Rule 24 cannot form the basis for a valid prosecution. Mr. Ghosh further submits that the provisions of Chapter III of the Rules are applicable to wholesale packages. The said Chapter contains only one rule namely Rule 29. This rule only requires a declaration to be made on every wholesale package as to the particulars specified in clauses (a), (b) and (c). According to Mr. Ghosh, Chapter III does not contain any rule similar to Rule 24 prescribing the procedure for verifying whether the quantity found in a wholesale package tallies with the net quantity declared under Rule 29. According to Mr. Ghosh, the penal statute is

to be construed strictly and if it admits of two interpretations, one leading in favour of the accused should be preferred. Since the Rules do not specifically provide for any test to be carried out in the manner laid down in Rule 24 in relation to a wholesale package, there is no scope for applying Rule 24 to the concerned package on the supposition that this is what might possibly have been intended by the legislature in respect of wholesale package. Mr. Ghosh relies on a Supreme Court decision reported in *W.H. King Vs. Republic of India and Another*, He also relies on Maxwell on "Interpretation of Statutes", where it is observed that the court must always see that the person to be penalised comes fairly and squarely within the plain words of the enactment and it is not enough that what he has done comes substantially within the mischief aimed at by the Statute.

Mr. Ghosh further contends that according to the complaint, there has been contravention of Section 39 of the Act of 1976 which is punishable u/s 63 of the Act of 1976. Mr. Ghosh draws my attention to the heading of Chapter IV of the Act of 1976 which contains Section 39. The heading reads as "Commodities in packaged form intended to be sold or distributed in the course of inter-State trade or commerce". Mr, Ghosh submits that Section 39 can apply only when the commodity is intended to be sold or distributed in the course of inter-State trade or commerce and not otherwise. It is contended by Mr. Ghosh that there is no specific averment in the petition of complaint suggesting that the concerned LPG cylinders were packages intended to be sold or distributed in the course of" inter-State trade or commerce. If these basic facts are not stated in the complaint, such a complaint could not constitute a valid foundation for a prosecution because unless the concerned commodity is connected with the counsel of inter-State trade or commerce, there could not be any violation of Section 39 for attracting Section 63 of the Act of 1976 and as such, the learned Magistrate was not justified in taking cognizance or issuing process against the accused petitioners. Mr. Ghosh relief in this regard on two decisions of our High Court - one of which is a single bench decision reported in (1977) 4 CHN 1073; *Abdul Rahaman v. J.D. Manchanda* and the other is a Division Bench decision reported in *Khial Asghar Vs. Union of India and others*, Reliance is also placed in a Single Bench decision of Gauhati High Court reported in *Arun Singhvi Vs. State of Assam*,

It is next contended by Mr. Ghosh that even if it be assumed that Rule 24 applies to the impugned package, and even if it be assumed that the correct sample size was 32 and not 80, the number of packages showing error being one, it cannot be said that there has been any violation of the rule or for that matter, that the seized package did not conform to the Rule 24. In this regard, Mr. Ghosh draws my attention to the table in the ninth schedule of the Rules which, according, to Mr. Ghosh, suggests that if the number of cylinders taken as a sample for test is 32, the question of violation of the rule would arise only if the number of packages showing error exceeds two. In the instant case, only one out of 32 packages was found to show error, and as such, there would be no violation of the rule so as to constitute a foundation for prosecution of the accused

petitioners under the Act of 1976 or the Rules.

Lastly, it was urged by Mr. Ghosh that at least the prosecution cannot lie u/s 74 of the Act of 1976 against the petitioner No. 2 only on the basis of the allegation that he was the then Managing Director of the Company, because Section 74 does not ipso facto render a Managing Director of a Company liable to be prosecuted for any offence committed by the company unless and until he was in charge of and responsible to the conduct of the business of the company. In the absence of disclosure of the basic fact in the petition of complaint as to whether the petitioner No. 2 was in charge of and responsible to the conduct of the business at the material point of time, the impugned prosecution is liable to be quashed as against the petitioner No. 2. Mr. Ghosh relies on several decisions reported in *Momtaz Begum Vs. The State*, and *G. Atherton and Co. (Pvt.) Ltd. and Others Vs. Corporation of Calcutta*,

8. Mr. P.N. Ghosh, the learned counsel appearing for the State Opposite Party, sought to refute the contentions of Mr. Pradip Ghosh in the following manner. According to Mr. P. N. Ghosh, Chapter II of the Rules is applicable to the packages in the LPG bottling unit of the Company at Durgapur even if the company is assumed to be exclusively a wholesale dealer and not a retail dealer in relation to the said bottling plant. He draws my attention to the definitions of the terms "retail dealer", "retail package", "retail sale", "wholesale dealer" and "wholesale package" appearing in clauses (o), (p), (q), (w) and (x) respectively of Rule 2 of the Rules and submits that the only difference between a retail dealer and a wholesale dealer lies in the fact that a retail dealer sells directly to the consumer while a wholesale dealer sells not directly to any consumer but through one or two intermediaries. The term "retail package" according to Rule 2(p) means a package which is produced, distributed, displayed, delivered or stored for sale through retail sales agencies or other instrumentalities for consumption by an individual or a group of individuals. The term "retail sale", on the other hand, in relation to a commodity means the sale, distribution or delivery of such commodity through retail sales agencies or other instrumentalities for consumption by an individual or group of individuals or any other consumers. The term "wholesale package" as defined in Rule 2(x) means a package containing (i) a number of retail packages, where such first mentioned package is intended for sale, distribution or delivery to an intermediary and is not intended for sale direct to a single consumer, (ii) a commodity sold to an intermediary in bulk to enable such intermediary to sell-, distribute or deliver such commodity to the consumer in smaller quantities. According to Mr. P. N. Ghosh, the term "retail package" may be a package which is intended for sale through retail sales agencies and as such, Chapter 2 of the Rules does apply to the packages stored in the bottling plant of the petitioner company obviously for distribution to intermediaries. Mr. P. N. Ghosh submits that the heading of this chapter does not use the expression "retail packages". It reads as "packages intended for retail sale" and not packages which are dealt with by a retail dealer. It is urged by Mr. P. N. Ghosh that a package intended for retail sale can very

well be a wholesale package with which a wholesale dealer is to deal with at his premises.

Rule 24 prescribes the procedure for examination of and determination of quantity and error in packages at the premises of the manufacturer or packer. While carrying out examination or tests, samples are required to be drawn from such batch of packages in such numbers as are specified in the ninth schedule. The ninth schedule prescribes the manner of selection of samples of packages. According to paragraph 2 of this schedule, the sample shall be selected at random in accordance with the manner specified in paragraphs 3 and 4. Paragraph 3 provides that where for the determination of the net quantity of any commodity contained in a package it is necessary to take samples of packages stored by the manufacturer or packer in a warehouse, godown or at any other place, the sample shall be selected at random, from every batch of packages, while according to paragraph 4 if it is necessary to take samples from the place where the package is being filled such sample shall be selected from among the packages which have already been filled. Mr. P. N. Ghosh refers to the definitions of the terms "packer" and "batch". The term "packer" has been defined in Rule 2(k) which means a person who, or a firm or a Hindu undivided family, which pre-packs any commodity, whether in any bottle, tin, wrapper or otherwise, in units suitable for sale, whether wholesale or retail. The term "batch" is defined in Rule 2(b). It means, (i) in the case of packages which have been stored where the total number of such packages does not exceed 100, all such packages and (ii) in the case of packages which are on or at the end of packing line, the maximum output of packages. Mr. P. N. Ghosh contends that from the petition of complaint, it would appear that the petitioner No. 3 was asked to produce LPG cylinders which have already been filled for checking of their net content and the net contents of 32 such cylinders were checked. According to the table of the ninth schedule, when the batch size is less than 4000, the sample size is 32 and as such, no exception can be taken to the sample size being taken as 32 in the instant case".

Undisputedly, a weight checking data sheet was prepared in the instant case as contemplated under Sub-rule (2) of Rule 24 of the Rules. A copy of the data sheet was produced by the state counsel. From the said data sheet, it appears that it bears the signature of the petitioner No. 3 and contains the findings cylinder wise with regard to the declarations as to the net quantity actually contained in the sample packages and the extent of error noticed during the test. Mr. P. N. Ghosh contends that this sheet can, for all practical purposes, be construed as report within the meaning of Sub-rule (3) of Rule 24. He then refers to Rule 25. Rule 25 empowers the director or the authorised person to take punitive action in accordance with the provisions of the Act of 1976 against the manufacturer, or the packer on completion of examination of the packages at the premises of the manufacturer or the packer, in case it appears from the report contemplated under Sub-rule (3) of Rule 24 that the number of packages showing an error in deficiency greater than the maximum permissible error is

more than " the number specified in column 3 of the table in the ninth schedule or any such package shows an error in deficiency greater than twice the maximum permissible error. The column 3 of the table in the ninth schedule is evidently meant for insertion of the number of packages showing error only within the range which exceeds the maximum permissible error but does not extend beyond twice the maximum permissible error. The term "maximum permissible error" is defined in Rule 2(i). It means an error in deficiency or excess in relation to the quantity contained in an individual package which does not exceed (i) in relation to the commodities specified in the first schedule, the limits of error specified in that schedule and (ii) in relation to the commodities not specified in the first schedule, the limits of error specified in the second schedule. The commodity with which we are concerned here is not specified in the first schedule. As such, the second schedule will be applicable here and according to the table 1 of the second schedule, the maximum permissible error in deficiency is 150 gms. or milliliter in respect of a commodity whose declared quantity falls with the range of 10,000 to 15,000 gms. or milliliters. The serial No. 12 of the weight checking data sheet relates to the seized LPG cylinders/It shows that the declared quantity was within the range of 10,000 to 15,000 and the error in deficiency was to the extent of 1200 gms. In other words, the error in the instant case was much more than twice the maximum permissible error. As such, it is urged by Mr. P. N. Ghosh that the number of packages specified in column 3 of the table of the ninth schedule does not apply to the present case. It is rather the case of a package showing an error in deficiency greater than twice the maximum permissible error within the meaning of Clause (c) of Sub-rule (1) of Rule 25 of the Rules.

Mr. P.N. Ghosh refers to the provisions of Rule 39(2) of the Rules and Section 39(7) of the Act of 1976 and submits that the petitioners have committed the offence punishable u/s 63 of the Act of 1976 and Rule 39(2) of the Rules. But since Section 39 is applicable only when commodities in packaged form are intended to be sold or distributed in the course of inter-State trade or commerce and since, it is not the case of the complainant that the concerned packages were connected with any inter-State trade or commerce, Mr. P. N. Ghosh banks upon the provisions of Section 33 of the Standards of Weights and Measures (Enforcement) Act, 1985 and submits that the provisions of the Act of 1976 and the Rules relating to the commodities in packaged form shall apply, as far as may be, in every commodity in packaged form which is distributed, sold or kept, offered or exposed for sale, in the State, as if the provisions aforesaid were enacted by, or made under the Act of 1985. In view of provisions of Section 33 of the Act of 1985, Mr. Ghosh submits that the petitioners can be deemed to have committed the offence punishable u/s 63 of the Act of 1976 for contravention of the provisions of Section 39(7) of that Act as also the offence punishable under Sub-rule (2) of Rule 39 of the Rules for contravention of Rules 24 and 25 of the Rules.

On the question of vicarious liability of the petitioner No. 2, Mr. P. N. Ghosh

submits that the very fact that he was the Managing Director of the Company at the material point of time renders him liable by a legal fiction u/s 74 of the Act of 1976.

9. The point for my decision would be as to whether any interference would be justified in the facts and circumstances of this case in exercise of this Court's inherent jurisdiction u/s 482 of the Cr.P.C.

10. At the outset, I will show that the Standards of Weights and Measures Act, 1976 is an Act which is not at all applicable to any goods other than weights and measures which are intended to be sold or distributed by weight within the State. The preamble of this Act reads as "An Act to establish standards of weights and measures, to regulate inter-State trade or commerce in weights, measures and other goods which are sold or distributed by weight, measure or number and to provide for matters connected therewith or incidental thereto. The preamble itself suggests that this Act was enacted for the purposes of (i) establishing standards of weights and measures, (ii) regulating inter-State trade or commerce in weights, measures and other goods which are sold or distributed by weight, measure or number (iii) providing for matters connected therewith or incidental thereto. So far as goods which are sold or distributed by weight are concerned, this Act aims at regulating only the inter-State trade or commerce in relation to such goods. The term "inter-State trade or commerce" is defined in Section 2(m) of this Act. In relation to goods which are brought, sold, supplied or delivered by weight, it means the purchase, sale, supply, distribution or delivery which (i) occasions the movement of such goods from one State to another or (ii) is effected by transfer of documents of title to such goods during its movement from one State to another. There are two Explanations to this definition clause. Explanation I provides that where the goods are delivered to a carrier or other bailee for transmission, the movement of goods shall be deemed to commence at the time of such delivery and terminate at the time when delivery is taken from such carrier or bailee, while Explanation II provides that where the movement of goods commences or terminates in the same State, it shall not be deemed to be a movement of such goods from one State to another merely by reason of the fact that in the course of such movement it passes through the territory of any other State. Part II of this Act deals with establishment of Standards of Weights and Measures. Part III deals with appointment and powers of Director and other staff. Section 29 contained in part III deals with the power of inspection of the authorities who are appointed. u/s 28 to discharge the functions and duties under the Act for carrying out the purposes of the Act. The plain reading of Section 29 will at once make it clear that the power of inspection, entry, search and seizure are all confined to goods in relation to which any inter-State trade or commerce has either taken place or is intended to take place. Section 30 provides for forfeiture of any package used in the course of any inter-State trade or commerce and seized u/s 29. Part IV consists of five chapters containing Sections 31 to 46. The very heading that follows part IV reads as "Inter-State trade or commerce in weight, measure or other goods". Section 31 specifically

provides that the provisions of this part shall apply only to weights, measures and goods in relation to inter-State trade or commerce. The heading that follows Chapter IV of this part also makes it clear that this chapter is meant only for commodities in packaged form which are intended to be sold or distributed in the course of inter-State trade or commerce. Chapter V of this Part deals with verification and stamping of weights and measures sent from one State to another. Section 40(e) and (f) define "transferee State" and "transferor State" respectively. Section 41 prescribes the procedure of verification and stamping of weights and measures sent from one State to another. Each of the Sections 55, 56 and 57 of Part VI specifically uses the expression "in the course of any inter-State trade or commerce". Sections 60, 62 and 63 similarly use the expressions "in the course of inter-State trade or commerce". Section 68 creates a statutory presumption and that too in the course of inter-State trade or commerce. Thus, surveying the provisions of the Act of 1976, I have no hesitation to hold that so far as goods sold or distributed by weight are concerned, this Act is exclusively meant for regulating the inter-State trade or commerce in such goods.

11. The Standards of Weights and Measures (Packaged Commodities) Rules, 1977 are the rules which are made by the Central Government in exercise of its powers conferred by Section 83 of the Act of 1976. Delegation of this power in favour of the Central Government for making rules was evidently meant only for carrying out the provisions of the Act of 1976. When the very object of the Act itself is to regulate inter-State trade or commerce in goods intended to be sold or distributed by weight, Section 83 of the Act could not confer upon the Central Government to make any rule for accomplishing anything which is not in the contemplation" of the Act itself. In other words, the Rules owe their origin to the Act itself and must, accordingly"; be subservient to the Act. The Central Government would be acting without jurisdiction if they made the rules in exercise of the delegated powers u/s 83 of the Act for carrying out any of the purposes for achieving which the Act was not enacted by Parliament. As such, I can safely hold that the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 Well made only for the purpose of carrying out the provisions of the Act of 1976. That being so, none of the provisions of these rules can have any manner of application by itself to any goods intended to be sold or distributed within the State. In short, both the Act of 1976 and the Rules of 1977 made thereunder are meant for regulating the inter-State trade or commerce, and not intra-State trade or commerce, in goods which are intended to be sold by weight.

12. If we now look to the Standards of Weights and Measures (Enforcement) Act, 1985, we will find that its preamble suggests as if that it is an Act only to provide for the enforcement of the Standards of Weights and Measures established by or under the Standards of Weights and Measures Act, 1976 and for matters connected therewith or incidental thereto. But, if we analyse the provisions of this Act of 1985, we will at once discover that its preamble does not fully reflect all the objectives of the Act. I have already held that the Act of 1976 was not

meant for regulating intra-State trade or commerce in relation to goods which are intended to be sold by weight. I shall presently show that the Act of 1985 was enacted not only for the enforcement of the Standards of Weights and Measures established by or under the Act of 1976 but also for regulating the intra-State trade or commerce in relation to goods intended to be sold by weight. Patently, one of the basic features of the Act of 1985 is regulation of packaged commodities sold or distributed in course of intra-State trade or commerce. Section 2 is categorical in laying down that nothing in this Act shall apply to any inter-State trade or commerce either in any weight or measure or any other goods which are sold, delivered or distributed by weights, measures or number. Section 3(k) of this Act provides that "Standards Act" means the Standards of Weights and Measures Act, 1976. Section 3(o) provides that the words and expressions used in this Act and not defined but defined in the Standards Act shall have the meaning respectively assigned to them in that Act. According to Section 4, provisions of this Act override the provisions of any other law except the Standards Act. Section 5 empowers the State Government to appoint controller, inspector and other officers and staff for exercising powers and discharging duties" imposed by this Act for carrying but the purposes of this Act. Section 29 empowers the inspector to enter any premises whenever he has any reason to believe that an offence punishable under this Act has been or is likely to be committed in relation to not only any weights and measures, but also goods which are sold, delivered or distributed by weight. The premises to be inspected is one where such goods are manufactured, packed or distributed or kept or offered for sale in packaged form. There-is also power to verify the net content by weight of any package. Chapter 9 has a caption entitled "provisions with regard to the sale and distribution of commodities in packaged form within the State". Sub-section (1) of Section 33 provides that the provisions of the Standards Act as well as the rules made thereunder relating to commodities in packaged form shall, as far as may be, apply to every commodity in packaged form which is distributed, sold, or kept, offered or exposed for sale in the State as if the provisions aforesaid were enacted by or made under this Act, subject only to the modification that any reference therein to the "Central Government", "Standards Act" and the "Director" shall be construed as references respectively to the "State Government", "this Act" and the "Controller". Sub-section (2) of Section 33 empowers the State Government to make rules, not inconsistent with the Standards Act or any rule made thereunder, to regulate the packaging of any commodity intended to be sold or distributed, within the State, in packaged form, or to regulate the sale or distribution, within the State, of any commodity in packaged form. According to the Explanation to Sub-section (2), the expression "commodity in packaged form" shall have the meaning assigned to it in the Standards Act and shall include a pre-packed commodity. It has not been brought to my knowledge if the State Government has at all made any rules under Sub-rule (2) of Section 33 of this Act up till now. The expression "commodity in packaged form" is defined in the Standards Act in Section 2(b). It means commodity packaged, whether in any bottle, tin, wrapper or otherwise, in

units suitable for sale, whether wholesale or retail. Thus, it is clear that regulation of packaged commodities sold or distributed in the course of intra-State trade or commerce is one of the main features of the Act of 1985.

13. The petitioner company is an All India company but the petition of complaint does not, however, categorically disclose whether the premises inspected in the instant case was connected with inter-State or intra-State trade or commerce in the LPG cylinders. If it was connected with inter-State trade or commerce, the Standards Act of 1976 and the Rules made thereunder would by themselves be applicable. If the trade or commerce involved was intra-State and not inter-State, even then by virtue of Section 33 of the Act of 1985, the provisions of the Act of 1976 and the Rules made thereunder would be applicable, as far as may be. The word "premises" is defined in Section 2(r) of the Act of 1976. It includes, amongst others, a place where any business, industry, production, or trade is carried on by a person, whether by himself or through agent, by whatever name called and a warehouse, godown or other place where any goods are stored or exhibited.

14. An attempt was sought to be made by Mr. Pradip Kr. Ghosh appearing for the petitioners to suggest that the provisions of Rule 24 or 25 of the Rules of 1977 cannot have any manner of application to the instant case inasmuch as, according to the petitioner company, it does not make any retail sale from the concerned premises and that it is exclusively a wholesale dealer and not a retail dealer and that the concerned premises is exclusively a wholesale packaging unit wherefrom the company sells LPG cylinders in bulk to its distributors. The petition of complaint does not, however, give us any precise idea as to whether the petitioner company functions as a wholesale dealer or partly as a wholesale dealer and partly as a retail dealer from the premises. But, this much is clear from the complaint that the concerned premises is an LPG bottling plant of the company. If we look to the definition of "packer" and "pre-packed commodity" as per Rules 2(K) and 2(1) respectively of the Rules, it would be apparent on the face of the complaint that the petitioner company is a "packer" and the commodities selected as sample for test were all pre-packed commodities. It goes without saying that every LPG cylinder is LPG in packaged form and is a unit suitable for sale, whether wholesale or retail. The term "wholesale package", according to the Rule 2(x) of the Rules means (i) a package containing a number of retail packages, where such first-mentioned package is intended for sale, distribution or delivery to an intermediary and is not intended for sale direct to a single consumer and (ii) a commodity sold to an intermediary in bulk to enable such intermediary to sell, distribute or deliver such commodity to the consumer in smaller quantities. The term "retail package", according to Rule 2(p), means a package containing any commodity which is produced, distributed, displayed, delivered or stored for sale through retail sales agencies or other instrumentalities for consumption by an individual or group of individuals. The petitioner company may not be a retail dealer dealing in the LPG cylinders

directly with the consumers and may be a wholesale dealer who distributes or sells such commodity through one or more intermediary. But then, the expressions used in Chapter II of the Rules of 1977 are "packages intended for retail sale". The number of retail packages which were produced by the petitioner No. 3 to the inspecting authority at the time of verification were individually retail packages which are also ultimately meant for retail sale to the consumers through the intermediaries. Having regard to the scheme of the Rules of 1977, feel inclined to accept the contention of Mr. P. N. Ghosh in preference to that of Mr. Pradip Ghosh that Rules 24 and 25 of the Rules of 1977 are very much applicable to the filled LPG cylinders produced for inspection at the bottling plant of the petitioner company, no matter, whether the petitioner company functions from the said plant as a wholesale dealer or a retail dealer.

15. At the final stage of hearing, however, no exception was taken on behalf of the petitioners to the sample being selected for test with 32 filled LPG cylinders. It was also not disputed on behalf of the petitioners that the entries in column 3 of the table of the ninth schedule of the Rules are not meant for a case where the error in deficiency is more than twice the maximum permissible error, and in the instant case, as per serial No. 12 of the weight checking data sheet, copy of which was furnished to the petitioners, the error was 1.2 kgs, which is six times the maximum permissible error in deficiency as per serial No. (viii) of table 1 of the Second Schedule. The package concerned cannot, therefore, be said to be a package that conforms to the provisions of the Act of 1976 or the Rules of 1977 in relation to such package. In the circumstances, the provisions of Clause (c) of Sub-rule (1) of Rule 25 is attracted here by reason of Section 33 of the Act of 1985.

16. Section 51 of the Act of 1985 provides for the penalty for contravention of Section 33. According to Sub-section (1) of Section 51, whoever manufactures, distributes, packs, sells or keeps for sale or offers or exposes for sale or has in possession for sale, any commodity in packaged form, commits an offence, unless each such package conforms to the provisions of the Standards Act and the Rules made thereunder, read with Section 33. Sub-section (2) makes such a person liable in case he packs, amongst other acts, any commodity in packaged form knowing or having reason to believe that the commodity contained in such package is lesser in weight than the weight stated on the package. According to the Explanation to Sub-section (2), in determining, for the purpose of this sub-section, whether the quantity contained in a package is lesser than the quantity declared on the package or label thereon, the maximum permissible error specified under the Standards Act in relation to the commodity contained in such package, shall be taken into account. Sub-section (1) of Section 65 of the Act of 1985 provides for compounding of an offence punishable u/s 51. But, Sub-section (2) makes the provisions contained in Sub-section (1) inapplicable to a person who commits the same or similar offence within a period of three years from the date on which the first offence, committed by him, was compounded. The petition of complaint contains annexures suggesting that there was

commission of a similar offence on 13-6-95 by the petitioners in relation to the same premises and that the said offence was compounded by payment of composition fee within a period of three years next prior to the date of commission of the offence for which the impugned prosecution has been launched.

Incidentally, it may be pointed out that the petition of complaint discloses the factum of composition as per Section 65 of the Act of 1985.

17. The offences complained of, according to the petition of complaint, may be stated to be those which are punishable u/s 63 of the Act of 1976 for the alleged contravention of Section 39 of the Act of 1976 by reason of the fact that the concerned packaged commodity which was packed for sale did not conform to the net weight as per the provisions of the Rule 24(4)(c) and Rule 25 of the Rules.

18. I have already observed that the petition of complaint does disclose materials sufficient to make out a prima facie case that the commodity in packaged form seized from the Durgapur LPG bottling plant of the petitioner company did not conform to the provisions of Rules 24 and 25 of the Rules which are very much applicable here by reason of the provisions of Section 33 of the Act of 1985. From what I have already observed above, the materials on record can also be said to be sufficient to make out the prima facie case that there has been contravention of Section 33 of the Act of 1985 and a contravention of Section 33 is an offence punishable u/s 51 of the Act of 1985.

19. While determining the question as to whether a prosecution is to be quashed in exercise of the inherent jurisdiction of this Court u/s 482 of the Cr.P.C., my concern would be to find out if the continuance of the impugned prosecution would be a mere abuse of the process of the Court. On a thorough analysis of the materials on record with reference to the statutory provisions in the light of the rival contentions of the parties, I have shown that they are at least sufficient to disclose a prima facie case of commission of an offence punishable u/s 51 of the Act of 1985 for the alleged contravention of Section 33 of the Act of 1985 read with the provisions of Rules 24 and 25 of the Rules of 1977. It is true that the complainant has quoted Section 63 of the Act of 1976 as the section under which the offence the petitioners are said to have committed is punishable, but then quotation of a wrong section or provision of law can be of no consequence at all if the facts alleged in the complaint do disclose the basic ingredients of an offence. Accordingly, the entire prosecution is not liable to be quashed on that score.

20. What remains to be considered is as to whether the prosecution is maintainable as against the petitioner No. 2. The only allegation against him is that he was the managing director of the company at the material point of time. Now, in the instant case, the offence involved is such that it can be said to have been committed by the petitioner company. The petitioner No. 3 was the acting

plant manager of the company in relation to the concerned premises at the material point of time and no argument has been advanced on his behalf in support of quashing of the prosecution as against him. Under Sub-section (1) of Section 62 of the Act of 1985 which corresponds to Sub-section (1) of Section 74 of the Standards Act, whenever a company commits an offence under either of these two Acts, every person who, at the time when the offence was committed, was incharge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and is liable to be proceeded against and punished accordingly. The complaint does not disclose any Other fact so as to implicate the petitioner No. 2 with the offence concerned besides disclosing the fact that he happened to be the managing director of the company. Sub-section (1) of Section 62 of the Act of 1985 does not make the managing director of the company guilty of the offence merely by reason of the fact that he is the managing director of the company. The legal fiction created under the aforesaid provisions is applicable against any person who was incharge of and was responsible to the company for conduct of the business at the time when the offence was committed. A managing director ipso facto cannot be presumed to be a person incharge of and responsible to the company for the conduct of the business of the company. Whether a person was in charge of and was responsible to the company for the conduct of the business of the company at a particular point of time, is undoubtedly a question of fact to be decided in each particular case. In the absence of any specific averment in the petition of complaint in effect that the petitioner No. 2 as managing director of the company was incharge of and was responsible to the company for the conduct of the business of the company at the time when the offence was committed, the legal friction cannot be pressed into service and this view of mine is fully supported by the series of decisions that were cited on behalf of the petitioners and have already been referred to above, while reciting the contentions of Mr. Pradip Kr. Ghosh on the point of vicarious liability of the petitioner No. 2.

21. In this view of the matter, there would be no escape from the conclusion that the impugned prosecution is liable to be quashed so far as it is directed against the petitioner No. 2.

22. In the result, the revisional application succeeds in part. Let the impugned prosecution be quashed as against the accused petitioner No. 2. Let a copy of this order be communicated forthwith to the Ld. Magistrate.