

(1997) 09 AHC CK 0029

In the Allahabad High Court

Case No : Criminal Miscellaneous Writ Petition No. 2398 of 1996

Krishna Kumar and Another

APPELLANT

Vs

Sr. Supdt. of Police and Others

RESPONDENT

Date of Decision : 29-09-1997

Acts Referred:

Bureau of Indian Standards Act, 1986 — Section 10(1)
Constitution of India, 1950 — Article 13(3), 21, 226, 31B, 366(10)
Criminal Procedure Code, 1973 (CrPC) — Section 321, 482
Essential Commodities Act, 1955 — Section 3, 3(5), 3(6), 6, 7
General Clauses Act, 1897 — Section 3(29)
Penal Code, 1860 (IPC) — Section 406, 409, 417, 419, 420

Citation : (1998) CriLJ 3806

Hon'ble Judges : I.M. Quddusi, J;G.P. Mathur, J

Bench : Division Bench

Advocate : N.C. Rajvanshi, for the Appellant; S.P. Tiwari, R.G. Padia and U.N. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

G.P. Mathur, J.—Large number of Writ Petitions have been filed for quashing the First Information Reports which have been lodged under Sections 3 7 Essential Commodities Act (hereinafter referred to as the Act). Two such petitions in which leading arguments have been advanced are being disposed of by this order.

2. The Petrol Pump of M/s. Bhagwandin Gayaprasad situate at Ghatampur district Kanpur Dehat was inspected on 2-4-96 and sample of petrol and diesel was taken which was sent to Forensic Science Laboratory, Lucknow. The report of analysis showed that the sample of diesel was adulterated with Kerosene. Thereafter, a first information report was lodged by Dinesh Kumar Misra, Supply Inspector, Ghatampur against the proprietor of M/s. Bhagwandin Gaya Prasad and the Manager Sardar Husain under Sections 3 7 E. C. Act and Sections 406 409 417 419 and 420 IPC at P.S. Ghatampur on the basis of which a case was registered as Crime No. 623/96. Writ Petition No. 127 of 1997 has been filed by

M/s. Bhagwandin Gaya Prasad through its Partner Devi Prasad for quashing the F. I. R. The retail outlet of M/s. Khurja Highway Service Station G. T. Road, Khurja was inspected on 10-1 -96 and sample of petrol and diesel was taken which was sent for analysis to Forensic Science Laboratory, Agra. The report of analysis showed that diesel was adulterated with kerosene. Shri Kunwar Pal Singh, Supply Inspector lodged a first information report against Khurja Highway Service Station under Sections 3/7 E. C. Act at P.S. Khurja Nagar on the basis of which a case was registered as Crime No. 290/96. Krishna Kumar and Manoj Kumar Partners of M/s. Khurja Highway Service Station have filed writ petition No. 2398 of 1996 for quashing the F. I. R. lodged against them.

3. Shri Ramendra Asthana learned counsel for the petitioner has submitted that the F. I. R. contains only an allegation that High Speed Diesel, the sample of which was taken from the petitioner's Petrol Pump was found to be adulterated but the extent or the exact quantity of adulteration is not mentioned and the allegation being vague the prosecution of the petitioners and the proceedings taken in pursuance thereof are liable to be quashed. In order to examine the contention raised, it will be useful first to refer to the statutory provisions.

4. The Central Government in exercise of power conferred by Section 3 of the E.C. Act has made the Motor Spirit and High Speed Diesel (Prevention of Malpractices in Supply and Distribution) Order, 1990 on 22-9-1990 (hereinafter referred to as the Control Order) which by virtue of Clause I (3) came into force on 1st October, 1990 in respect of High Speed Diesel (for short H.S.D.) and on 1st January, 1991 in respect of Motor Spirit (M.S.). The Control Order was amended on 5-8-1993. It is this Control Order which makes adulteration in petrol and diesel a criminal offence and will govern the controversy in hand. For convenience some of the relevant provisions of the Control Order are being reproduced below;

CLAUSE-2 In this Order, unless the context otherwise requires

(g) "adulteration" means the introduction of any foreign substance into motor spirit/high speed diesel illegally/unauthorisedly with the result that the product does not conform to the requirements indicated in Schedule 1,

(c) "dealer" means a person appointed by an Oil Company to purchase, receive, store and sell motor spirit and high speed diesel oil whether or not in conjunction with any other business and shall include his representatives, employees or agents;

(d) "high speed diesel" means any hydrocarbon oil (excluding mineral oils and turpentine substitute) which has its flashpoint at or above 25 degree Celsius and is suitable for use as fuel in compression ignition engines;

(e) "malpractices" shall include the following acts of omission and commission in respect of motor spirit and high speed diesel;

(i) adulteration,

- (ii) pilferage,
- (iii) stock variation,
- (iv) unauthorised exchange,
- (v) unauthorised sale.

(f) "motor spiriti". means any hydrocarbon oil (excluding crude mineral oil) which has its flash point 25 degree Celsius and which, either by itself or in admixture with any other substance, is suitable for use as fuel in spark ignition engines;

(g) "Oil Company" means of the following Oil Companies means any of the following Oil Companies and such other Oil Companies as. may be specified by the Central Government, from time to time :

- (i) Indian Oil Corporation Limited (including Assam Oil Division);
- (ii) Bharal Petroleum Corporation Limited,
- (iii) Hindustan Petroleum Corporation Limited,
- (iv) IBP Company Limited,

(i) product" means motor spirit and high speed diesel oil;

(j) "stock variation" means the variation between the actual sales as per dips and sales as per meter (totaliser) readings beyond the forms) for permissible variation in stocks as given in Schedule II.

CLAUSE (5) The dealer, transporter, consumer or any other person shall not in any manner indulge in any of the malpractices listed in Clause 2(e) above.

SCHEDULE-I

Product Quality :

1. The density at 15 degree Celsius of motor spirit or high speed diesel at tried receiving end (received by dealer) shall be within +/-0.00 30 of the density at 15 degree Celsius at the despatch of the Oil Company as indicated in the delivery document.

2. The density at 15 degree Celsius of Motor spirit or high speed diesel in the dealer's tank. RO pumps/retail point receptacle or any other point in RO premises from were sample is taken and tested shall be within+/- 0.0030 of the recorded morning density of the product in the storage tank or the density recorded after the last receipt whichever is later. The dealer shall maintain a record of densities as mentioned hereinbefore on a daily basis, in a separate register which shall be made available, as and when required, to the Authorised inspecting Personnel.

Clause 8(5) provides that the sample of the product shall be sent for analysis to the laboratories specified in Schedule Jail. Schedule III gives a long list of

laboratories and the five laboratories which are situate in the State of U. P. are as follows :

Sl. No. (13) Indian Oil Corporation Ltd. Allahabad Laboratory, Allahabad.

Sl. No. (39) Indian Oil Corporation, Ltd. Mathura Refinery. Laboratory, Mathura.

Sl. No. (56) Mobile Laboratories of Oil Companies. (IOC, BF.-C, IBP Co. & HPC).

Sl. No. (67). Indian Institute of Petroleum, Dehradun,

Sl No. (72) Forensic Laboratories (which are situate in Lucknow and Agra in this State).

5. Clause 5 of the Control Order lays down that a dealer, transporter, consumer or any other person shall not in any manner indulge in any of the malpractices listed in Clause 2 (e) will show that the adulteration of M.S. or H.S.D. comes within its ambit. A conjoint reading of Clause 2(e) and Schedule-1 shows that if the variation in density of M.S. or H.S.D. at the dealer's tank or pumps from where sample is taken is more than the prescribed limit from the density of the product in the storage tank as recorded in the morning or the density recorded after the last receipt, whichever is later, it will be adulterated and it will amount to breach or violation of the Control Order which will be punishable under Sections 3 & 7 E.C. Act.

6. It has been contended from the side of the petitioners that¹ the only allegation in the FIR is that the analysis of the sample of H.S.D. taken from the petitioners' pumps showed that it was mixed with kerosene but the extent or percentage of the Kerosene has not been mentioned. It is urged that the Depots of Indian Oil Corporation and other Oil Companies receive supplies of petrol, diesel and Kerosene from the same pipe line from Barauni Refinery and there is every chance of small quantity of kerosene getting mixed with petrol and diesel and in these circumstances mere presence of kerosene should not be enough to fasten criminal liability upon the dealers. In view of the contention raised at the bar, we directed the learned counsel appearing for the State of U. P. and Indian Oil Corporation to submit a brief report regarding the procedure and test which are carried on in their laboratories for analysis of samples of M.S. and H.S.D. The Officers of the Forensic Science Laboratory, Lucknow and Allahabad Laboratory of Indian Oil Corporation, Allahabad have submitted reports giving details of the various tests which are performed for analysing the sample We will refer to them hereafter.

7. The Parliament enacted Bureau of Indian Standards Act 1986 (Act No. 63 of 1986) to provide for the establishment of a Bureau for the harmonious development of the activities of standardisation making and quality certification of goods and for matters connected therewith or incidental thereto. The Central Government established the Bureau of Indian Standards Institution in exercise of power conferred by Section 3 of this Act. Under Sub-section (a) of Section 10(1), the Bureau has been conferred the power to establish, publish and promote in

such manner as may be prescribed by the Indian Standard in relation to any Article or process and tender Sub-section (b) power has been conferred to recognise as an Indian Standard in such manner as may be prescribed, any standard established by any other Institution in India or else where, in relation to any Article or process. The specifications for Diesel Fuels as laid down by Bureau of Indian Standards in July, 1995 (known as IS-1460 : 1995) is given below;

Characteristics	Requirements	HSD	LDS	(1)	(2)	(3)	(4)	(i)	No.
Acidity, inorganic.	Nil	Nil	ii)	Acidity, total, mg of KOH/g, Max	0.30	--	iii)	Ash, percent by mass. Max	0.01
iv)	Carbon residue (Ramsbottom) on 10 percent residue, 0.035	1.5	percent by mass, Max. (on whole sample)	(v)		(vi)		vii)	
--	viii)	Distillation, 90 percent volume recovery at OC, Max.	366	--	ix)	Flash point a) Abel. ?C, Min.	32	--	b)
Pensky-Martens, ?C. Min, --	x)	Kinematic viscosity, cS," at 400?C.	1.8 to 5.0	2.5 to 15.7	(xi)	Sediments, percent by mass, Max.	0.05	0.10	xii)
Density at 15?C, kg/mg.	0.82 to 880	to be reported	xiii)	Total (sulphur) percent by mass. max.	1.0	1,8	xiv)	Water content, percent by volume, Max.	0.05
0.25	xv)	Cold Filter Plugging Point (CFPP), Max.	9.0	for --	winter and 21 -C	for summer			

xvi)	Total	sediments,	mg	per	100	ml.,	max.	1.6
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procedure which is being adopted by the laboratory of the Indian Oil Corporation for testing samples of H.S.D. has been given by G. Mitra, Manager, Indian Oil Corporation in Writ Petition No. 2398/96 alongwith the counter affidavit and it is being reported below;

Petroleum products are produced at refineries as per BIS specifications which are further tested in Marketing labs as per Bureau of Indian Standards Specifications.

We are following. BIS Specification No. IS 1460:1995 in testing of HSD Samples received in labs. The details of tests conducted on HSD Samples are as under:

1) Appearance : HSD sample should be free from undissolved water, suspended matter and others visible impurities. It is a visual test.

(2) Density : Test procedure : IS 1448 (P : 16 Density is the mass of the liquid per unit volume. The density of HSD is taken at room temp, with the help of a hydrometer and a thermometer. Then it is converted into Density at 15?.C by ASTM Density conversion table. For HSD Density at 15?.C, as per specification, is 0.820 to 0.880 g/ ml.

3) Distillation : Test procedure : IS 1448 (P:18). In Distillation test 100 ml. of HSD sample is taken in a standard distillation flask fitted with a thermometer. HSD sample is heated and it is observed that 90% volume of distilled HSD should be recovered upto max. 366?C. This is only point prescribed in BIS specification and no other recovery is to-be recorded during testing. If the 90% volume of the distilled HSD is not recovered upto 366?C then HSD sample is not meeting the

specification of Distillation test.

4) Flash Point (Abel): Test Procedure : IS 1448 (P: 18). Flash point is the lowest temperature at which vapour emitted by the product ignites momentarily in the presence of specified test flame when test is conducted under standard conditions. The flash point of HSD is determined with the help of Abel Flash Point Apparatus.

The Flash point test is important from the point of view of safety since product having low flash point is prone to fire hazards. The flash point requirement of HSD as per IS 1460 : 1995 is min. 32°C.

5) Kinematic Viscosity : Test Procedure : IS 1448 (P:25). It is a measure of the resistance to flow. It is expressed in centistokes. In Kinematic Viscosity Test time is measured for a fixed volume of liquid to flow through a capillary viscometer at a controlled temperature, i.e. 40°C. The KV is then calculated from the flow time and the calibration constant of the Viscometer. The KV is a very important characteristic of a fuel &, it is used for pump design. Pump clearances are adjusted accordingly to the viscosity and if it is out of range it will result in pump seizure. The range of KV in HSD is 1.8 to 5.0 Cst. at 40°C.

6) Furfural Test : Furfural Test is to determine adulteration of SKO in HSD samples. This test is covered under MDG (Marketing Discipline Guidelines). In this test 5 ml. of HSD sample is shaken with 1 ml. of Aniline Acetate soln. (prepared by mixing for every 1 ml. of Aniline 9 ml. of Glacial Acetic Acid). If HSD sample is contaminated with Furfural doped SKO then a pink colour will be observed at the bottom of the test tube. However note that the pink colour fades out after some time.

1) Reporting : All the test results are reported in Lab form. If the sample of HSD is not meeting the parameter of any test (Sr. Nos. 1 to 6) then we specify in our test report form under "Remarks" Column that the sample does not meet the specification of HSD in respect of test Sr. No. so and so.

The report of the analysis of sample of HSD is given in a pro forma which contains data regarding appearance, density at 15°C, distillation 90% recovery by volume, Flash point, Kinematic viscosity and furfural test.

8. The specification for Motor Gasolines have been laid down by Bureau of Indian Standards in August 1995 (known as IS-2796 : 1995) which is given below :

Characteristic	Requirements.	Octane	Unleaded	Octane	No.
		1. 2 3 4	(i) Colour Visual	Colourless	Orange
ii)	iii) Density at 15°C. Not limited but to be reported		(iv) Distillation" (a)		
Initial boiling point	Not limited but to be reported		(b) Recovery upto 70°C.		
present by volume.	10-45	10-45	(c) Recovery upto 100°C	40-70	40-70
Recovery upto 180°C	90	90	(e) Final boiling point 215°C.	215°C.	V) Octane
Requirements (a)	Research octane no. 87	87	(b) Anti-knock index.	82	82

vi) vii) viii) Sulphur percent by mass max. 0.20 0.20 ix) Lead content.
(xi) xii) xiii) Vapur lock index. (a) Summer 750 750

----- The procedure adopted by the laboratories of Indian Oil Corporation for testing samples of Motor Spirits is given in the same counter affidavit of G. Mitra and it is being reproduced below :

Petroleum products are produced at refineries as per BIS specifications which are further tested in Marketing labs as per Bureau of Indian Standards Specifications. We are following BIS No. IS. 27796 : 1995, in testing of MS samples received in our labs. The details of test procedures/methods are as follows :

1) Appearance : MS sample should be free from undissolved water foreign matter and others visible impurities. It is purely a Visual Test.

2) Colour (Visual): MS (87 Octane) should be "Orange" in colour.

3) Density ; Test procedure : IS 1448 (P: 16).

Density is the mass of the liquid per unit volume. The density of MS is taken at room temp, with the help of thermometer and hydrometer Then it is converted into Density at 15°C ASTM density conversion table. For MS (87 Octane)" density at 15°C range is not specified but it is to be reported.

4) Distillation : Test Procedure : IS 1448 (P:18)

100 ml. of MS sample is distilled in a distillation flask under prescribed conditions. Systematic observations of temperatures against volume of recovery are made and from this data results are calculated and reported. In MS samples we are observing initial Boiling Point in C. Recovery upto 70 (% volume), Recovery upto 100 (%. volume). Recovery upto 180°C (% volume), Final Boiling point in C and Residue % volume.

Initial Boiling Point: The thermometer reading observed at the instant the first drop of condensate falls from the lower end of the condenser tube. In MS. sample it is to be reported.

Final Boiling Point (FBP) : The maximum thermometer reading attained during the test which usually occurs after the evaporation of all liquid from the bottom of the flask.

In MS FBP should be Max. 215°C.

Recovery upto 70°C (% Vol): should be 10-45

Recovery upto 100°C(% Vol): should be 40-70

Recovery upto 180°C(% Vol) : should be minimum 90

Residue % vol. : max. 2.0

5) Existent Gum : Test Procedure : IS 1448 (P:29)

Existent Gum is the residue obtained by evaporation of Heptane insoluble portion of the evaporation residue of MS. A measured quantity of MS fuel is evaporated under controlled condition of temp and flow of air. The residue is extracted for MS Existent Gum limit is 40 g/m.

6) Furfural Test: This test is covered under MDG (Marketing Discipline Guidelines). In this test 5 ml. of MS sample is shaken with 1 ml. of Aniline Acetate Soln. (Prepared by mixing for every 1 ml of Aniline 9 ml of Glacial Acetic Acid). If MS sample is contaminated with Furfural doped SKD then a pink colour will be observed at the bottom of the test tube. However please note that the pink colour fades out after some time.

Reporting : All the test results are reported in lab form. If the sample of MS is not meeting the parameter of any test (Sr. Nos. 1 to 6) then we specify in our test report form under "Remarks" column that the sample does not meet the specification of MS in respect of test Sr. No. so and so.

9. The report of Scientific Officer of Forensic Science Laboratory, U. P. Government, Lucknow dated 18-3-97 has been filed as Annexure SCA-IV to the supplementary counter affidavit in writ petition No. 127 of 1997 and this shows that the procedure adopted is almost similar to that adopted by the laboratory of Indian Oil Corporation. Here also the sample is analysed with reference to the specifications laid down by Bureau of Indian Standards. It is, therefore, not necessary to reproduce the same.

10. The laboratories of Indian Oil Corporation perform an additional test which is known as Furfural Test which is not being done by the Forensic Science Laboratory. This test is covered in the Marketing Discipline Guidelines issued by the Indian Oil Corporation. A chemical known as Furfural is mixed with kerosene oil supplied by Indian Oil Corporation and if this kerosene oil is used for adulteration of HSD, the Furfural Test which is very simple to carry out will immediately reveal adulteration of diesel with kerosene.

11. Shri Ramendra Asthana has submitted that for determining whether the product is adulterated or not the only relevant factor is its density in view of the definition of the word "adulteration" as given in Clause 2(a) and Schedule 1 of the Control Order and other factors like Flash Point, Recovery at different temperatures, viscosity and flow etc. cannot be taken into consideration. According to the learned counsel the Control Order being a penal provision it has to be strictly construed and consequently the analysis report which is also based on factors other than density cannot be taken into consideration. Shri Yatindra Singh learned Addl. Advocate General has submitted that the Control Order has been enacted to prevent any kind of malpractice in distribution of MS. and HSD. and this object cannot be achieved if the standards fixed by Indian Standards Institution ignored and test of density alone is applied. Learned counsel has elaborated his submission by referring to the density standards fixed for some of the petroleum products by Indian Standards Institution which is as under:

 Product Temperature in Celsius at which Flash Point Density available
 (minimum) gram/cc

Gas'es 20 -0 0.695-0.760 Petrol 30-190 -20 0.695-0.760 Naphtha 120-180 -15
 0.675-0.725 Kerosene 180-260 35 0.75-0.81 Diesel 260-340 32 0.82-0.88
 Lubricating Oil/Wax. 340 200 0.885-0.91 Fuel Oil 500°C 66 0.965-0.995
 Asphalt higher 260 Bitumen Charcoal The data mentioned in the chart would
 show that the density of diesel is higher than that of Kerosene and density of
 kerosene is higher than that of petrol and therefore, if kerosene is mixed with
 diesel the density of such adulterated product would be less than the density of
 pure diesel. However, by mixing some other Article it is possible to again raise
 the density of this adulterated product to the level of diesel. Therefore, by mixing
 more than one item to diesel its density can be brought back to the prescribed
 standard. Similarly, density of petrol will become higher by mixing kerosene but
 it can be brought back to the prescribed standard by mixing another item having
 lower density. It can never be the intention of legislature that even though two or
 more foreign substances have been mixed with diesel but if the product so made
 conforms to the density standard it should not be treated as a malpractice or
 that it does not amount to violation of the provisions of Control Order. If the
 criteria of density alone is taken into consideration it will lead to an absurd result
 that where only one item is mixed it will amount to a malpractice but if more
 than one item is mixed in such a manner which brings the density to the
 prescribed standard, it will not amount to a malpractice. To our mind the correct
 and logical way to interpret Clause 2(a) will be to divide it into two parts. The
 introduction of any foreign substance in petrol or diesel illegally/unauthorisedly
 simpliciter would amount to adulteration even though the product may conform
 to density standard as mentioned in Schedule I of the Control Order. If the
 product does not conform to the density requirement indicated in Schedule I it
 will also amount to adulteration. In order to find out whether any foreign
 substance has been mixed with petrol or diesel it is absolutely necessary to
 perform other tests like determination of flash point, recovery at different
 temperatures, viscosity and flow etc. In fact, this point has been specifically
 mentioned in the reports submitted by the Forensic Science Laboratory, Lucknow,
 which has been filed as Annexure-SCA. IV to the supplementary counter affidavit
 in writ petition No. 127 of 1997. It has been indicated in the report that the
 analysis conducted by laboratory showed that by mixing two or more items
 having different specific gravity (density) the product can be brought within the
 prescribed range of density. It has been further mentioned that many such
 samples have been analysed in the laboratory which had exactly similar density
 but their distillation range (recovery at different temperatures) and time of flow
 was different which showed that the sample of petrol and diesel had been mixed
 with different items in different quantities. In the report it has been specifically
 stated that it will not be proper to rely upon the criteria of density alone for
 finding whether the product is adulterated or not. Therefore, the petitioners"

contention that the tests other than that of density cannot be taken into consideration and analysis report based on other tests as well is not in accordance with law, has no substance and must be rejected.

12. Petrol diesel and kerosene are all hydrocarbons having different carbon contents. The carbon contents of petrol is C 4-10, of Kerosene C 10-14 and that of diesel C 14-20. In the process of refining crude oil they are produced at different stages and therefore their basic ingredient is more or less similar. They do not have absolutely fixed standards like the food items. There is variation in their flash point, recovery at different temperatures, viscosity and density etc. The analysis can only show that one item is mixed with another like the presence of kerosene in diesel can be found out with certainty. However it is not possible to find out the precise content or extent of adulteration if one is mixed with another.

13. Shri Asthana has next submitted that the State Government had issued a G.O. No. 6703/ 29-7-M-118-85 dated 17-12-1985 laying down guidelines for conducting inspection and taking of samples of petrol and diesel. This G. O. provides that the inspection should be done by a team which should consist of the District Coordinator of the Oil Company and representatives of other Oil Companies and it should be headed by an Officer not below the rank of an Executive Magistrate or the District Supply Officer. The G. O. further provides that it will be better if an officer of Excise Department and Weights and Measurements Department is also included in the team. Copy of this G. O. has been filed as Annexure-4 to writ petition No. 127 of 1997. Learned counsel has submitted that as a team of officers and representatives of oil Companies had not conducted the inspection and had not taken sample from the petitioner's pumps the provisions of the Government Order had been violated and proper procedure having not been followed, no action can be taken against the petitioners. The contention raised cannot be accepted in view of the specific provision of the Control Order. The power of search and seizure has been given in Clause 7 and sub-clause (thereof reads as follows:

CLAUSE-7 (1): The State Government may, by notification in the official Gazette, authorise an Officer or the licensing authority, not below the rank of an Inspector, in the Department of Food and Civil Supplies or an Officer of the Oil Company, not below the rank of Sales Officer, for the purpose of implementing the provisions of this Order.

The State Government has issued Notification No. 1932/29-7-91-73 (P)/91 dated 27-3-(991 authorising Officers holding 14 different category of posts to implement the provisions of the Control Order and they are (1) Commissioner Food and Civil Supplies (2) Addl. Commissioner, Food and Civil Supplies (3) Dy. Commissioner Food & Civil Supplies (4) Asstt. Commissioner, Food and Civil Supplies (5) Regional Food Controller (6) Deputy Regional Food Controller (7) Deputy Regional Marketing Officer (8) Collector (9) Addl. Collector (10) Sub-Divisional Officer (11) District Supply Officer (12) Tehsildar(13) Town Rationing

Officer and (14) Supply Inspector. A copy of this notification has been filed as Annexure(1) to the supplementary counter affidavit (sworn on 4-4-97). Clause 10 of the Control Order reads as under :

CLAUSE-10 The provisions of this Order shall have effect notwithstanding anything to the contrary contained in any order made by a State Government or by an officer of such State Government before the commencement of this Order except as respects anything done, or omitted to be done thereunder before such commencement.

14. In view of Clause 10 of the Control Order, the G. O. dated 17-12-1985 referred to by learned counsel for the petitioners stands superseded and cannot be given effect to. By virtue of Sub-clause (2) of Clause 7 and the notification dated 27-3-1991 any one of the 14 category of officers mentioned therein is entitled to enter and search any place being made use of or suspected to be made use of in the business of dealer with respect to which there is reason to believe that the provisions of the Control Order have been/are being or about to be contravened and is also entitled to take sample of the product or seize any stock. The First Information Reports lodged against the petitioners shows that the sample was taken in the presence of Sub-Divisional Officer and also supply Inspector both of whom are Officers authorised by the notification and consequently no illegality has been committed in taking of the sample.

15. Shri N. C. Rajvanshi appearing in Writ Petition No. 2398 of 1996 has submitted that Indian Oil Corporation had issued some Circulars regarding taking of sample, its despatch for analysis and action to be taken against the dealer in case the same was found adulterated. Annexure-4 to the writ petition is a copy of letter dated 28-10-1994 sent by Chief Divisional Manager, Indian Oil Corporation to District Supply Officer, Bulandshahr wherein it is mentioned that the sample should be sent to the laboratory within three days and the report of the analysis should be obtained within one month. Annexure-5 is copy of a circular issued by the Indian Oil Corporation which provides that if the sample is found to be adulterated a show cause notice should be issued to the dealer and if his explanation is not satisfactory following actions should be taken. Fine of Rs. 10,000/- alongwith suspension of sale and supplies for thirty days in first instance, fine of Rs. 15,000/- alongwith suspension of sale and supply to the dealer in the event he was found to have committed any malpractice or done any irregularity in the sale or distribution of the product. The oil companies referred to in Clause 2(g) have issued Marketing Discipline Guidelines in September, 1995 and a copy of the same has been filed alongwith the first counter affidavit filed by Indian Oil Corporation (sworn on 24-1-97). This only provides for the various steps which have to be taken at the time of inspection of retail outlets by the Field Officers of the Oil Companies. We are clearly of the opinion that the executive orders issued by the Government of U. P. or its officers or any circular issued by the Oil Companies are non-est and have to be completely ignored in view of Clause 10 of the Control Order and it is the provisions of the Control

Order which will govern the manner of inspection or taking of sample and the analysis thereof.

16. Learned counsel for the petitioners in both the writ petitions have urged that the Secretary to The Government of U. P. had sent a letter dated 15-12-93 to all the District Magistrate (Annexure-2 to writ petition No. 2398 of 1996) wherein it is mentioned that the Government had taken a decision that a criminal case under the Essential Commodities Act should not be registered against a businessman or trader and action like forfeiture of licence fee, suspension or cancellation of licence may be taken for breach of condition thereof. The Special Secretary (Law) of U. P. Government had also sent a letter dated 11-4-1994 stating that the State Government had taken a decision supplies for sixty days in second instance and termination of dealership in the third instance. Annexure SA-I to the supplementary affidavit is a letter dated 4-1-1988 of the Secretary to the Government of U. P. which provides that the sample should be sent to the laboratory within three days and the report of analysis of sample of petrol should be obtained within fifteen days and that of diesel within one month. Learned counsel has also referred to some other circulars and Government Orders in support of his contention that taking of sample and its analysis has not been done in accordance with the procedure laid down thereunder and therefore the F.I.R. is liable to be quashed.

17. The Executive Orders issued by the State Government or its Officers or the circulars issued by the Oil Companies either prior to the commencement of the Control Order or subsequent thereto can have no application in view of Clause 10 of the Control Order and they have to be ignored. The procedure for taking sample is given in Clause 8 and Sub-clause (5) thereof lays down that the authorised officer shall send sample of the product immediately or in any case within a period of ten days to any of the laboratories specified in Schedule III for the purpose of Analysis. The scheme of the Control Order shows that even the State Government by itself cannot issue a general or special order to any dealer, transporter or consumer. Some limited kind of directions regarding storage, sale, transportation and disposal of Motor Spirits and High Speed Diesel may be issued by the State Government but that too after taking prior approval of the Central Government in view of Clause 9 of the Control Order. The entire procedure for search, seizure and taking of sample has been provided in the Control Order itself and in view of Clause 10 the same shall prevail and has to be given effect to. It is not the case of the petitioners that provisions of Clauses 7 and 8 of the Control Order have been violated in taking of samples or their analysis and therefore the contention raised cannot be accepted.

18. At the time when the writ petition was entertained on 14-8-1996 A Division Bench of which one of us (G. P. Mathur 1.) was a member, a detail order was passed directing the State Government and the Indian Oil Corporation of file copies of all the circulars and Government Orders issued with regard to inspection and taking of sample from petrol and diesel pumps, the manner of

analysis of the samples and also to show the authority under which the aforesaid orders and circulars had been issued. Dr. R. G. Padia learned counsel for Indian Oil Corporation (respondent No. 6) has frankly conceded that the Corporation has no authority to issue any circulars which may have any statutory force. It was also conceded that the action to be taken against a dealer has to be determined with reference to the relevant Control Orders, the conditions of the licence and the Essential Commodities Act and the Corporation had no authority to make any provision for the same. It could only suspend or refuse to make that all prosecutions u/s 37 E.C. Act which were pending in Courts should be withdrawn in public interest. The letter further mentioned that the Governor of U.P. had granted permission to Public Prosecutors to move applications in Courts for withdrawal of the prosecutions. It was followed by a Government Order dated 5-8-1996 (Ann. 1 to Supp. Affi. in WP. No. 2825/96) wherein it is mentioned that earlier Government Order dated 15-12-1996 is still in force. It is urged by learned counsel that as the State Govt. had issued direction for not lodging a FIR u/s 37 E.C. Act against a business man or trader and had further issued directions for moving applications for withdrawal of the pending prosecutions, there is no justification for registering a case against the petitioners and the proceedings initiated against them are liable to be quashed.

19. In order to judge the contention raised it is necessary to first examine the nature of the various Government Orders reference of which has been made above. Law generally means Act of Parliament or of a State Legislature or a Rule or a Statutory Order having the force of law, that is positive or State made law. There is difference between (1) Law (2) Orders having the force of law (3) Administrative or executive instructions. The definition of "Law" in Article 13(3) (a) of the Constitution, of "existing law" in Article 366(10) of the Constitution and "Indian Law" in Section 3(29) of the General Clauses Act would help to determine essential characteristics of law or order having the force of law. Whatever is not included in them would have to be relegated to the category of administrative or Executive instructions. One of the essential feature which goes to make "Law" is that the maker of law should be authorised not merely to do something but specifically to make law in the sense of legislation as distinguished from merely taking administrative action. The Control Orders are delegated legislation and have been made by the Government in exercise of power conferred by Section 3 of the E.C. Act.

20. A statutory Rule is also a delegated legislation and its position was explained in a Constitution Bench decision in *The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya*, by Subba Rao, J. by quoting the following passage from *Interpretation of Statutes* by Maxwell :

Rule made under a statute must be treated for all purposes of construction or obligation exactly as if they were in the Act and are to be of the same effect as if contained in the Act and are to be judicially noticed for all purposes of construction or obligation.

The same view was taken in *State of Tamil Nadu Vs. Hind Stone and Others*, . The statutory Rules cannot, therefore, be described as or equated with administrative directions.

21. Sub-section (6) of Section 3 of the E.C. Act provides that a Control Order made by Central Govt. or by any Officer or authority of the Central Govt. shall be laid before both the Houses of Parliament, as soon as may be after it is made. The Parliament gets an opportunity to examine the Control Orders and can suggest amendments which the Government is bound to any out. Once the Control Orders are laid before the Parliament for the requisite period it gets a seal or approval therefrom. Section 6 of E.C. Act is a very special provision and it reads as under :-

SECTION 6 : "Any order made u/s 3 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or any instrument having effect by virtue of any enactment other than this Act.

Normally a delegated legislation like a Rule or regulation cannot have over riding effect vis-a-vis an Act of Parliament or State Legislature and is always subservient to them. However on account of the special provisions of Section 6 of the E.C. Act in the event of any inconsistency the Control Orders will prevail over other Acts whether made by the Parliament or by the State Legislature: In *Chint Ram and Another Vs. State of Punjab*, a Full Bench has held that a Control Order issued u/s 3 of E.C. Act will prevail over Prevention of Food Adulteration Act. Thus there can be no doubt that the Motor Spirit and High Speed Diesel (Prevention of Malpractices in Supply and Distribution) Order, 1990 will prevail over all other statutory enactments.

22. The various Government Orders or Circulars, reference to which has been made above and which are relied upon by the petitioners are not Control Orders as they have not been issued in exercise of powers conferred by Section 3 of E.C. Act. They were not published in the Official Gazette as required by Section 3(5) (a) of the Act. They are merely in the nature of executive instructions or administrative orders. The Control Orders being law, its provisions cannot be altered or amended or varied by means of administrative orders or executive instructions, A law made by the Parliament or State Legislature or by their delegate can be altered or amended by Parliament. Legislature or its delegate as the case may be. Therefore, any government order or circular cannot add anything or subtract from or amend the provisions of the Control Order. For interpreting the provisions of Control Order the government orders or circulars have to be completely ignored and they cannot be taken notice of.

23. Learned counsel for the petitioners have submitted that as the State Government had issued directions for not lodging of the FIR u/s 37 E.C. Act against traders and business men and had further issued direction for moving applications for withdrawal of prosecution, there is no justification for registering a case against the petitioners and the proceedings initiated against them in

pursuance of the impugned first information reports are liable to be quashed. As mentioned earlier when the writ petition was entertained on 14-8-96 the Court had expressed an opinion that prima facie the Government Orders and the Circulars appeared to be contrary to the provisions of EC Act and the respondents were directed to show their authority to issue such orders or circulars. Learned State counsel took time on several occasions to file counter-affidavit and finally a short counter-affidavit was filed on 15-1-97 wherein it is averred that a Government Order has been issued on 10-12-96 by which the earlier Government Order dated 15-12-93 has been rescinded with immediate effect and a copy of the same has been filed as Annexure SCA I. It also provides that earlier Government Order dated 20-2-95 by which a direction had been issued to submit final reports in pending cases u/s 37 EC Act had become inoperative. In view of this Government Order there is no impediment now in either registering a case or prosecuting those who are alleged to have committed offences u/s 37 EC Act and such cases pending in the Courts of law are not to be withdrawn. It is indeed shocking (that an Administrative Order was issued by the U.P. Government on 15-12-93 directing (that criminal cases u/s 37 E.C. Act should not be registered against a trader or business man which was followed by another Administrative Order dated 11-4-94 directing withdrawal of prosecution of all such cases which were pending in Court of law. The Essential Commodities Act has been enacted by the Parliament and not by the State legislature. The Central Government has enacted nearly eighty Control Orders which have force of law and have to be applied equally to all the persons in the country. The State Government is under a constitutional duty to apply and enforce all the laws which have been made by Parliament or by a delegated of the Parliament. The Legislature of State is not competent to amend any law made by the Parliament or by its delegated unless such a power is specifically conferred upon it by the constitution or statute. The effect of the Government orders dated 15-12-1993 and 11-4-1994 was that the Essential Commodities Act. and all Control Orders made thereunder stood completely repealed in their application in the State of U.P. and this had been done not by the State Legislature but by an Administrative Order. If the State Government wanted to withdraw the prosecution of a particular accused it could do so by moving an application to that effect u/s 321, Cr. P.C. but no general order for withdrawal of all prosecutions u/s 37 E.C. Act could be passed in the manner it was sought to be done by the Government Order. It is common knowledge that there is widespread adulteration in petrol and diesel and shortage of, liquified petroleum gas which has given rise to a black market in this commodity. The preamble of the Act says : An act to provide in the interests of general public for the control of production, supply and distribution of and trade and commerce in certain commodities. The power conferred under the Act is for maintaining or increasing supplies of essential commodities and for securing their equitable distribution and availability at fair prices. The Act is of prime importance to the entire country and it is for this reason that it has been placed in the Ninth Schedule making it immune from challenge by virtue of Article 31-B of the Constitution. However,

the U.P. Government by simply issuing an administrative order granted a licence to business men and traders to indulge in black marketing thereby making illegal money at the expense of public at large. It is really unfortunate that instead of watching the interest of masses the Government acted in a manner in which traders and business men could commit breach of law with impunity. Fortunately wisdom has dawned upon the U.P. Government and it has withdrawn the earlier Government Orders after this Court had passed an order on 14-8-96 directing it to show its authority to issue such kind of orders.

24. Shri R. Asthana has lastly urged that the Control Order does not contain any provision which may enable a dealer to get the sample tested again and as he is deprived of an opportunity to show that the sample was not adulterated, the provisions of Article 21 of the Constitution are violated. Learned counsel has supported his argument by making reference to Prevention of Food Adulteration Act, Insecticides Act and some other enactments where accused is given a right to have the sample tested again. Reliance has also been placed upon a decision of a learned single Judge of Punjab & Haryana High Court in Tarsem Singh v. Union of India 1997 (1) EFR 127 wherein provisions of Clause 19(i) of Fertilizer Control Order were struck down on this ground. In our opinion the scheme of the Control Order and its provisions are of such a nature that giving of second opportunity to an accused to have the sample analysed again may not arise at all. In view of Clause 2(a) the product has to conform to the requirement of Schedule-1 which requires that the density at 15 degree Celsius of Motor Spirit or High Speed Diesel in the dealer's tank, RO Pumps/retail point receptacle or any other point in RO premises from where sample is taken and tested shall be within ± 0.0030 of the recorded morning density of the product in the storage tank or the density recorded after the last receipt whichever is later. The dealer shall maintain a record of densities as mentioned hereinbefore on a daily basis in a separate register which shall be made available, as and when required, to the Authorised Inspecting Personnel. Every dealer of petrol and diesel pumps is provided with an instrument to measure the density, a thermometer and calibration chart by which the density at 15 degree Celsius can be found out. The delivery documents of petrol or diesel despatched from the Depot of oil company mention its density. The dealer is required to measure the density of the petrol or diesel which has been received by him before transferring it to his storage tank. If the variation in density is more than ± 0.0030 from the density mentioned in the delivery document, he can easily refuse to take its delivery. There is no compulsion on the dealer to accept delivery of petrol or diesel if the variation in its density is more than ± 0.0030 from the density mentioned in the delivery document. Once the dealer accepts a consignment which he would do only if variation in its density is within the prescribed limit and transfer it to his storage tank, there is no way in which its density may vary beyond the permissible limit unless a foreign substance is mixed with it. Under para 2 of Schedule-I the dealer is required to maintain a record of density every day in the morning before commencement of business. The density on any subsequent day also

cannot vary beyond permissible limit if no foreign item is mixed. A dealer is not required to give any fixed standard of the product but is only required to maintain the consignment of petrol and diesel in the same shape in which he has received it so that its density does not vary beyond the permissible limit.

25. It will be inappropriate to compare the provisions of Control Order with that of Prevention of Food Adulteration Act. Food items are manufactured and sold by millions and their number is also very large. A restaurant: owner or sweet meat seller keeps on manufacturing food items almost continuously. Petrol or diesel is not manufactured or produced by dealers nor it is supplied by private manufactures. There are only four oil companies which are all government corporations which supply the product to the dealers. The Government Corporations are not expected and will not supply sub-standard or adulterated material and it can be presumed that the product supplied by them would be pure and would conform to the standards laid down by Indian Standards Institution. The dealer is only required to maintain the product in the same condition in which he had received it. There is no compulsion on any one to get a dealership of petrol or diesel. Any one who wants to be appointed as a dealer of an oil company does so by his own choice and after becoming a dealer he cannot be heard to complain that the Control Order by which he is governed does not give him a second opportunity to get the sample analysed again. We think that in view of the nature of the commodity involved, its source of supply being oil companies as defined in Clause 2(g) and the requirement being confined to variation of density within permissible limits as required by Schedule-I, a dealer cannot complain violation of Article 21 of the Constitution merely on the ground that a second opportunity to get the sample analysed is not provided to him.

26. As a result of discussion made above our conclusions are as follows :

(I) it is not possible to give the precise quantity or extent of adulteration in any petroleum produce. The report of the laboratory to the effect that the product is adulterated is sufficient to hold that the dealer has indulged in malpractice as defined in Clause 2(e).

(II) The report of analysis submitted by any of the laboratory enumerated in Schedule III of the Control Order is conclusive and is admissible without any formal proof.

(III) The inspection and taking of sample of petrol or diesel has to be done in accordance with Clauses 7 and 8 of the Control Order and any officer specifically authorised for this purpose under Sub-clause (I) of Clause 7 is empowered to inspect and take sample.

(IV) Administrative or executive orders issued by the State Govt. or circulars issued by the Oil Companies regarding manner of inspection, taking of sample and their analysis etc. are without any authority of law and consequently cannot be taken notice of.

(V) A petition under Article 226 of the Constitution for quashing the FIR or the investigation of the case or in a petition u/s 482 Cr. P.C. for quashing the proceedings of the case cannot be entertained if the FIR contains an allegation that the report of analysis showed that the sample was adulterated.

(VI) The State Government has no authority or power to direct either by executive order or by legislation that cases under E.C. Act involving breach or violation of a Control Order made by the Central Govt. shall not be registered or the person responsible for the same will not be proceeded with.

(VII) The operation of a Control Order issued by the State Government cannot be stayed or suspended by simply issuing an administrative or executive order.

27. It may be mentioned here that if Kerosene is mixed with diesel it may amount to breach of the provisions of Kerosene (Restriction of Use and Fixation of Ceiling Price) Order, 1993. That apart selling diesel mixed with Kerosene also amounts to cheating which is punishable u/s 420, IPC. In both the writ petitions, report of the analysis shows that diesel has been mixed with Kerosene. The petitioners have therefore committed breach of the Control Order as well as offence u/s 420, IPC. The question of quashing the FIR or investigation of the case, therefore, does not arise.

28. Before parting with the case, we would like to observe that a large number of Control Orders have been made by U.P. Government and Government of other States. The Central Government has also made nearly eighty Control Orders. They cover a whole range of commodities like Cotton cloth, Coal, Sugarcane and Textiles of which there is no shortage. The role of Government in production and supply of some of even essential items like Food-grains, Sugar and Cement, except in the larger sense of providing electricity or irrigation facility, is very small. Wheat paddy and pulses are produced by farmers who sell their produce to dealers of foodgrains and they sell it to public at large without the intervention of any Government agency at any stage. Some of the Control Orders and the licences issued there under contain very stringent provisions like maintenance of an accurate account of entire stock on daily basis or an account of every transaction entered during the course of the day. The duty cast upon the dealers in some cases becomes difficult to follow. A dealer may have no intention to indulge in malpractice or to make illegal money yet he may commit breach of the provisions of the Control Orders which gives power to law enforcement agencies to arrest and prosecute him and also to seize and confiscate the entire stock. It is for this reason that quite frequently a demand is made by the trader community to repeal the Essential Commodities Act. Petroleum however stands on an entirely different footing. It is the most precious commodity and its price affects the world economy. The production of crude oil in 1996-97 in the country was about 32 million tonnes while the consumption was about 58 million tonnes. The Government imported more than 26 million tonnes of oil by spending nearly Rupees twenty thousand crores in scarce foreign exchange. The consumption of petroleum products is rising fast with no prospect of increase in its production in

the country. Oil imports are projected at nine billion dollars (Rs. thirty one thousand crores) in 1997-98 (Times of India 23-8-97). In terms of MTOE (million tonnes of oil equivalent) the import is likely to grow from the present level of 50 MTOE in 1996-97 to 83 MTOE by the year 2001-02 (Times of India 16-9-97). Kerosene and cooking gas are sold at subsidised rates with Government spending Rs. 6000 crores in a year in subsidising Kerosene. The production as well as import of oil is done by the Government and it is refined in the refineries owned by the Government or by oil companies., A dealer plays no role in getting supplies of petrol or diesel. He operates in a seller's market. Adulteration of diesel with Kerosene, a subsidised commodity is wide spread. There is black market both in Kerosene and liquified gas. To exercise effective control over the sale and distribution of petroleum products it will be better if a comprehensive law is made dealing with every aspect of the matter. The desired result may not be achieved by making Control Orders under the E.C. Act as its clubbing together with so many other Control Orders made under one Act dilutes its efficacy. We think that if the Parliament makes a legislation either by making appropriate amendment in the Petroleum Act or by enacting an independent Statute covering supply and distribution of all the petroleum products like, petrol, diesel, Kerosene, liquefied petroleum gas and etc. the desired result may be more effectively achieved.

29. In the result, the writ petitions are dismissed. The respondents are commanded by a writ of mandamus to strictly enforce all the Control Orders issued with regard to petroleum products like the Kerosene (Restriction on use and Fixation of Ceiling price), Order 1993. The Liquified Petroleum Gas (Regulation and Supply and Distribution) Order, 1993. The Motor Spirit and High Speed Diesel (Prevention of Malpractices in Supply and Distribution) Order, 1990 issued by the Central Government and Kerosene Control Order, 1962 and U.P. High Speed Diesel Oil and Light Diesel Oil (Maintenance of Supply and Distribution) Order, 1981 issued by the U.P. Government.

30. The Office is directed to send a copy of this judgment each to Principal Secretary (Law) and L.R. and Secretary, Department of Civil Supplies to U.P. Government, Lucknow. A copy shall also be sent to Secretary, Ministry of Civil Supplies and Secretary, Ministry of Petroleum, Government of India, New Delhi.

31. A copy of this judgment will also be sent to all the Special Judges (E.C. Act) in the State of U.P.