

(1974) 04 BOM CK 0010

In the Bombay High Court

Case No : Criminal R. A. No. 1184 of 1973

Laxmandas Sarvottamdas Doshi and Co.

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 16-04-1974

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 439

Evidence Act, 1872 — Section 114, 114(g)

Prevention of Food Adulteration Act, 1954 — Section 10, 10(5), 11, 11(1)(c)(i), 11(1)(c)(iii)

Citation : (1975) MhLj 622

Hon'ble Judges : J. M. Gandhi, J

Bench : Single Bench

Advocate : M.V. Paranjpe with S. B. Patil, for the Appellant; Raja S. Bhonsale, Asstt. Govt. Pleader, for the Respondent

Judgement

J. M. Gandhi, J.—This is a revision application filed against the judgment and order of conviction passed by the learned Sessions Judge, Satara, u/s 16 (1) (a) (i) of the Prevention of Food Adulteration Act sentencing the petitioners to suffer rigorous imprisonment for six months and to pay a fine of Rs. 1,000 in default rigorous imprisonment for two months, on December 20, 1973. Ordinarily, in a revision application, I would not have allowed the party to go into evidence and I would have been reluctant to alter any finding of facts held by the trial Court and confirmed by the appellate Court. In this revision application, some important questions of law arise with regard to the interpretation of sections 7 and 16 of the Prevention of Food Adulteration Act of 1954 (Act No. XXXVII of 1954) (hereinafter referred to as "the said Act" and the rules made thereunder, viz., the Prevention of Food Adulteration Rules 1955 (hereinafter referred to as "the said Rules"). Before I go to the various provisions of law, I would like very briefly to state the facts of the case.

2. In Criminal Case No. 85 of 1972 in the Court of the Judicial Magistrate, First Class, Satara, at Satara, the prosecution case was against six accused persons,

1. Messrs. Laxmandas Sarvottamdas Doshi & Co., which is a partnership firm, of which accused Nos. 2 to 6, viz., 2. Haridas Laxmandas Doshi, 3. Narayan das Laxmandas Doshi, 4. Kisandas Laxmandas Doshi, 5. Jivandas Laxmandas Doshi and 6. Madhavdas Laxmandas Doshi are the partners. The learned Magistrate convicted accused Nos. 1 and 2 u/s 16 (1)(a) (i) of the said Act. As accused No. 1 was a corporate body, he passed the sentence against accused No. 2 to suffer rigorous imprisonment for six months and to pay a fine of Rs. 1,000 or in default to suffer rigorous imprisonment for two months. Accused Nos. 3 to 6 were acquitted. On appeal, the learned Sessions Judge, Satara, dismissed the appeal and confirmed the conviction and-sentence passed against both the accused.

3. The prosecution case is that accused No. I, Messrs. Laxmandas Sarvottamdas Doshi, is a registered partnership firm, which carried on business in foodgrains in Somyar Petri, Satara. Accused Nos. 2 to 6 were its partners on November 4, 1971. S. G. Jadhav, Food Inspector Kolhapur Circle, visited the shop of the accused on November 4, 1971 at about 9-15 a. m. He was accompanied by the panch Kondiram Shinde. One Khanolkar, Municipal Food Inspector, Satara had accompanied Jadhav when he visited the said shop of the accused. When they visited the said shop, accused No. 2 was attending to the business. Food Inspector Jadhav and panch Kondiram Shinde found that pulses and other foodgrains were kept in the shop for sale and the sale was going on. Jadhav asked accused No. 2 to sell him 600 grams of Bajri and 600 grams of Tur Dal. Accordingly the accused sold Bajri and Tur Dal to Jadhav. We are concerned in this revision application only with regard to the Tur Dal Thereafter Jadhav divided the Tur Dal and kept it in three clean bottles. All the three bottles were labelled with prescribed label and they were also sealed. Thereafter, each bottle was wrapped in the brown paper and the bundle was tied horizontally and also vertically with strings and four lac seals were affixed on each bottles at four different places. Jadhav thereafter gave a notice in the prescribed form to accused No. 2, which is at Exh. 25. Accused No. 2 signed it in acknowledgment of the copy having been received. The said receipt is at Exh. 26. It appears that the receipt has been signed by one Kulkarni, who is the Munim of the said shop. One bottle was handed over to accused No. 2 and receipt Exh. 27 was obtained. Jadhav then prepared a memo of these facts which is at Exh. 28 and it was signed by panch Kondiram Ramchandra Shinde. Out of the two bottles taken by Jadhav, one was sent to the Public Analyst. The Public Analyst sent his report at Exh. 30. According to him, the Tur Dal contained extraneous coal tar dye tartrazine and the sample did not conform to Rule 29 of the said Rules. There was some correspondence between Jadhav and the accused and in reply to an enquiry on January 3, 1972, accused No. 3 Narayandas saw Jadhav in his office at Kolhapur on January 17, 1972 and showed him the original bill of purchase of the Tur Dal. A copy of that bill was handed over to Jadhav, which is at Exh. 32. Narayandas was instructed by Jadhav to send a reply. In April 1972, Jadhav applied for sanction from the Commissioner and obtained his sanction in June 1972 from him vide Exh. 34. As Jadhav was transferred, further investigation

was carried on by one Shrikhande, the other Drug Inspector, Kolhapur. Ultimately, the papers were received by one Umakant Gokhindikar, Drug Inspector of Satara. He made further inquiries and it is Gokhindikar who lodged the complaint in the Court of the Judicial Magistrate, First Class, Satara on September 4, 1972.

Before lodging the complaint, Gokhindikar had again approached the Commissioner for sanction and accordingly the sanction was given on February 22, 1973 vide Exh. 39.

4. The defence of the accused mainly was that the Tur Dal sold to Jadhav was not meant for human consumption; that it was kept in a sealed bag which was not in their godown and it was meant for Bharade i. e. cattle feed ; that the sample was sold by his Munim Kulkarni and accused No 2 arrived at the shop a little later when Jadhav had already filled up the bottles with Tur Dal. It was contended that at the same time the original bill of purchase was shown to Jadhav by accused No. 2. It was also contended by the accused that the Tur Dal was kept in the same condition as it was purchased from the manufacturer. It was contended on behalf of the accused that they had not committed any offence with regard to the food sold to Jadhav. It was contended by the accused that the Tur Dal was neither adulterated nor misbranded as required under the provisions of the said Act.

5. Mr. Paranjpe, appearing on behalf of the appellants, submitted before me that in order to appreciate various points which he has raised, it is very important to note various dates of events that have happened in this case:

4-11-1970 : Jadhav took samples of the Tur Dal.

10-11-1971 : Jadhav is alleged to have sent the sample to the Public Analyst.

18-12-1971 : Report of the Public Analyst.

4-9-1972 : Charge-sheet was put up before the Judicial Magistrate, F. C, Satara.

13-3-1973 : Jadhav was examined as a witness.

28-5-1973 : Jadhav was cross-examined.

7-6-1973 : Statements of the accused were recorded.

22-6-1973 : Defence witnesses were examined. In the course of the examination of the defence witnesses, while cross-examination of D. W. 2 Vishnudas was going on, the Prosecutor opened the sample bottle which was produced by the Food Inspector in the Court, in order to cross examine the defence witness No. 2. When the sample bottle was opened in the Court, it was found by the learned Magistrate that the contents thereof were decayed and decomposed.

Mr. Paranjpe contended that the rules framed under the said Act were mandatory and he submitted that Rules 17 and 18 read with Rule 7 were not observed by Jadhav and, therefore, this is a case of violation of mandatory rules. He further

submitted that the Food Inspector Jadhav had committed a breach of Rule 14 (2) viz., he has not put the samples as required under Rule 14 in a clean and dry bottle. He submitted that there is no evidence on record to show that the requirements of Rule 14 were observed. He further contended that the accused are entitled to have benefit under Rule 19 (2) as they had purchased the Tur Dal from a licenced manufacturer and that they had sold the Tur Dal after storing it properly in the same condition in which it was purchased. He contended that u/s 10 (5) of the Act, search procedure to be followed by the Food Inspector is as provided in the Code of Criminal Procedure. He submitted that the presence of the panch is absolutely necessary and the drawing up of the panchnama is also necessary. He submitted that in this particular case no panchnama is produced and therefore, the provisions of section 10(5) and (7) have not been observed.

6. He next submitted that on the evidence which had been led, both the Courts have erred in holding that the Tur Dal purchased from the shop of the accused was either an adulterated or misbranded one. He submitted that when definition of adulterated foodstuff as described in section 2 (i) (j) is read with Rules 28, 29 and 30, it cannot be said that the Tur Dal was adulterated. He submitted that on proper interpretation of section 2 (ix) (d), it cannot be said that the Tur Dal which was sold by the accused was misbranded.

7. The last point urged by Mr. Paranjpe was that the conviction u/s 16 (1) (a) (i) is not proper. He submitted that this is a case, where section 16 (1) (a) (ii) applies and the proviso to that section empowers the Court to pass sentence less than even six months, if sufficient grounds are shown. Mr. Paranjpe, for these various propositions which he advanced, relied upon authorities including those of the Supreme Court, and Patna, Mysore and our High Court. I will deal with these authorities dealing separately on each point. Mr. Paranjpe also contended that this was the first offence committed by the accused and, if the rule of minimum sentence does not apply, the Court should show mercy and the provisions of the Probation of Offenders Act should also be applied.

8. Mr. Bhonsale, the learned Assistant Government Pleader, appearing on behalf of the State submitted that, as far as the last point raised by Mr. Paranjpe is concerned, there was the latest authority, viz., Pyarali K. Tejani Vs. Mahadeo Ramchandra Dange and Others, where it has been held that the benefit under the Probation of Offenders Act cannot be given to the offenders under the Prevention of Food Adulteration Act. He also submitted that the proviso to section 16 does not arise as the conviction u/s 16 (1) (a) (i) is correct. He submitted that not only the article of food which was seized was adulterated but it was also misbranded and there was no question of section 16 (1) (a) (ii) coming into operation at all. With regard to the contentions as to the mandatory nature of the provisions of the said Act and the said Rules, Mr. Bhonsale submitted that according to some of the decisions, the rules are not mandatory. He further submitted that the Court should raise a presumption u/s 114 of the Evidence Act that official acts were done in a proper manner and mere want of evidence to

have observed all the rules or that some technical breach has been committed, cannot vitiate the conviction. With regard to the provisions of Rule 18 being mandatory and the interpretation of the said rule, Mr. Bhonsale submitted that the contention raised by Mr. Paranjpe is not tenable. He submitted that under Rules 17 and 18, the Food Inspector is called upon to send the sample with form No. 7 and the fascimile with the sample and the copy of the form used, separately and that the report Exh. 30 having stated that they were received separately is conclusive evidence of compliance with Rule 18 and the Court cannot go into the question at all. He submitted that the word "separately" in Rule 18 of the said rules does not mean at separate point of time or by two different despatches. As regards the contentions raised by Mr. Paranjpe, u/s 13 (2) viz., that the accused were deprived of their right to call upon the Court to send the sample to the Director of Central Food Laboratory, Calcutta, for the purpose of his report on analysis, he submitted that merely because the prosecutor while cross examining the defence witness has opened the sample produced by the Food Inspector in the Court and merely because the Court found that the sample was decayed and/or decomposed is not sufficient to come to the conclusion that the accused were deprived of their right given to them u/s 13(2). He further submitted that the Court cannot consider the question of deprivation of section 13(2) unless an application has been made by the accused to send one of the samples to the Director of Food Laboratory, Calcutta and the Report of the Director of Food Laboratory has been received. He submitted that no application was made by the accused in this case and therefore, in the light of the observations in the judgment of the Supreme Court, the Court cannot come to the conclusion that the accused were deprived of their right u/s 13 (2). With regard to the contentions u/s 19 (2) raised by Mr. Paranjpe, Mr. Bhonsale submitted that this is a matter of actual evidence and finding of facts. Both the lower Courts have held that it has not been established that the sample given to the Food Inspector was from the Tur Dal purchased from the licensed manufacturer and under a bill which contained a clause of warrantee. He further submitted that both the lower Courts have come to the conclusion that the burden of proving the ingredients required u/s 19 (2) of the Act is on the accused and the accused have not established that the goods were stored and were in the same condition as they were purchased. He submitted that on these findings of facts by the two lower Courts, it is not open to the accused to raise the question of getting any benefit u/s 19 (2). He relies upon certain observations by the learned Magistrate as well as the Sessions Judge in this behalf. With regard to the contention of Mr. Paranjpe, that this was a case merely of breach of Rule 29 and, in this particular case, this was not adulterated or misbranded food article, he submitted that if the provisions of Rules 28, 29 and 30 are read together, the effect would be that the accused were responsible for selling food articles, which were prohibited for sale having been mixed with coal tar dye tartrazine. According to Mr. Bhonsale, Rule 29 cannot be read separately from Rules 28 and 30 but, according to his submission, if all the three rules are read together, the Court should hold that if a food article is prohibited from being/

coloured or mixed with colour, not only it is breach of Rule 29 but it amounts to an adulteration u/s 2 (i) (j). He submitted that on the evidence on record, conviction u/s 16 (1) (a) (i) is proper. He also submitted that on correct interpretation of section 2 (ix) (d) what is required to be seen is the intention of the party who colours a particular article and as it is established that the Tur Dal was mixed with tartrazine, it must be held that it was so done to appear better or to get more price. He submitted that it has been established that the Tur Dal was misbranded as required u/s 2 (ix) (d). In this connection he also relies upon certain findings of both the lower Courts and he submits that the High Court sitting in revision should not interfere with the finding of facts and more so when a concurrent finding has been recorded by the two lower Courts. These are the various contentions raised by Mr. Bhonsale at the Bar. As this revision application involves an important question of interpretation, I would like to deal with each of the contentions separately and deal with the various authorities cited at the Bar before me.

9. The first contention raised before me is that rules 17 and 18 read with rule 7 of the said Rules are mandatory. In order to deal with this contention, it is necessary to look at the rules in little detail.

10. Rule 7 of the said Rules reads as follows;

"Duties of public analyst-(1) On receipt of a package containing a sample for analysis from a Food Inspector or any other person, the Public Analyst or an Officer authorised by him shall compare the seals on the container and the outer cover with specimen impression received separately and shall note the condition of the seals thereon.

(2) The public analyst shall cause to be analysed such samples of articles of food as may be sent to him by Food Inspector or by any other person under the Act.

(3) After the analysis has been completed, he shall send to the person concerned two copies of the report of the result of such analysis in Form III within a period of sixty days of the receipt of the sample."

"17. Containers of samples how to be sent to the public analyst.-The container of sample for analysis shall be sent to the public analyst by registered post or railway parcel or air freight, or by hand (or by any other suitable means of transport available) in a sealed packet, enclosed together with a memorandum in Form VII in an outer cover addressed to the public analyst."

"18. Memorandum and impression of seal to be sent separately by post.-A copy of the memorandum and a specimen impression of the seal used to seal the packet shall be sent to the public analyst separately by registered post or delivered to him to or any person authorised by him."

11. The first and the important contention raised by Mr. Paranjpe is that there has been a violation of rule 18 He submitted that in this connection, one has to bear in mind that the Prevention of Food Adulteration Act creates an absolute

offence and, therefore it is necessary that before a conviction can be made under the provisions of the said Act, the prosecution must establish that the authorities concerned had observed all the formalities and the rules as required under the provisions of the said Act and the said Rules made there under. He submits that merely because the report of an analyst is properly sent under form No. 3, as required, it cannot necessarily raise a presumption that all the Rules were observed. He submits that the prosecution by leading cogent and clear evidence should establish that the Rules were observed and all precautions which are provided by the Rules and which are available to the accused are not rendered nugatory by non-observation of the Rules, which are mandatory. In this particular case, though this is a revision petition, he has drawn my attention to the evidence of Food Inspector Jadhav P. W. 1 and he submitted that the Food Inspector has not deposed to that the Rules were observed as required. Neither the prosecution has led evidence to show that as required under rule 18, the sample with Form No. VII and the facsimile of the seal with the copy of Form No. VII were sent separately. They have not examined the person who had taken these two things which are required under rule to be sent separately. He further submitted that not only the Inspector has not stated in so many words what were the precautions taken but, in cross examination on page 90, he has categorically admitted that:

"At one and the same time the sample bottle of Tur Dal along with the memorandum copy and another copy of the Memorandum with the impression of seal were sent through a peon of my office."

Mr. Paranjpe submits that on this specific admission, by the Food Inspector it cannot be said that the two things were sent separately. He further submits that the prosecution has not even produced two separate receipts for having sent two different parcels and, in view of this admission on the part of the Food Inspector, he submits that it is clear that rule 18 was not observed and therefore it is a violation of mandatory rule 18 and once a mandatory Rule has not been observed, the benefit should automatically go to the accused. In support of his argument that by the word "separately" what is meant by the legislation is that the two things must not be sent at one and the same point of time-there must be two definite disposals by the Food Inspector-he submits that merely because the Public Analyst has made his report in Form No. III, which is prescribed by the Act, and which is in a printed form, which states:

"I hereby certify that I Shri A. G. Lakhani, Public Analyst for Food and Drug Administration, Kolhapur, duly appointed under the provisions of the Prevention of Food Adulteration Act, 1954, received on the 11th day of November 1971, from S.G. Jadhav, Food and Drug Inspector, F. and D. Administration, Kolhapur, a sample of Tur Dal for analysis, properly sealed and fastened, and that I found the seal intact and unbroken. The seal fixed on the container of the sample tallied with the specimen impression of the seal separately sent by the Food Inspector and the sample was in a condition fit for analysis,"

it cannot be inferred that the two things were sent separately. Mr. Paranjpe submitted that it was incumbent upon the prosecution to lead positive evidence and having examined the Food Inspector it was for the Food Inspector to have stated on oath that the two things were sent separately. He not having done so in his examination-in-chief nor having stated that all the Rules were observed and further when questioned in cross-examination, he having admitted, as stated above, that both the things were sent at one and the same time, with one and the same peon, the Court should not hold that the statement made in exh. 30-the Analyst's Report-that they were sent separately is correct. In support of his submission that the Rules are mandatory, Mr. Paranjpe has relied upon the four judgments, two of Mysore High Court, one of Patna High Court and one of Calcutta High Court.

12. In *Mary Lazrado v. The State* A I R 1966 Mys. 244, Tukul J. has held that rules -7 and 18- of the Prevention of Food Adulteration Rules are mandatory and hence non-compliance with them affects the evidentiary value of the report of the Public Analyst and the conviction solely based upon it cannot be sustained. This judgment has dissented from what was held in *Kamal Singh v. State* (1957) ALJ 89 and has followed what has been held in *State of Gujarat Vs. Shantaben*, . Dealing with the proposition of what is stated in the Analyst's Report, it is held that the mere fact that the Report of the Public Analyst contained a statement that the sample sent for analysis had been properly sealed and fastened, and that he found the seal intact and unbroken is not sufficient. The presumption in regard to the regularity of procedure followed by the Public Analyst may be raised when there is proof that the Food Inspector had discharged his functions according to the Rules. To raise a presumption both in favour of the Food Inspector and the Public Analyst is to render the Rules superfluous and meaningless. Dealing with the contention raised in that case, viz., that an accused person is given the right u/s 13 (2) to submit one of the samples either given to him or the prosecution by the Food Inspector to the Director of Food Laboratory, Calcutta, is sufficient guarantee and non-observance of manner on all points in the Rules should not be held to be violation of the provisions of the Act and the provisions in the Rule be considered as directory rather than mandatory, the learned Judge observed as follows:

"The method of checking and verification provided for by the Rule is the only guarantee against tampering and is a definite source of confidence both to the accused and to the Court that the sample analysed was the very sample which had been submitted by the Food Inspector. In fact, it is the report or the Certificate issued after such analysis that virtually concludes the accused against himself. The procedure prescribed by the Rules serves a great public purpose by guaranteeing impartial and honest handling of the sample despatched to, and received for analysis by, the Public Analyst.

To argue that the Rules could be regarded as directory because the accused is given the liberty of submitting the sample in his possession for analysis is to

render the guarantee afforded by the Rules meaningless. The burden of proving the guilt of the accused is on the prosecution and if the report or the certificate is to be used as evidence without calling the Public Analyst or the Director of the Central Food Laboratory for evidence as the law now permits, then it is imperative that all the rules prescribing the procedure commencing from the stage of purchasing the sample of food leading up to its analysis are strictly observed. To argue that the accused has got the liberty of getting his sample analysed to counteract the effect of the report of the Public Analyst is to require the accused in every case to prove his innocence."

Tukol J. has referred to the decisions in *Rattan Anmol Singh and Another Vs. Atma Ram and Others*, and *Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others*, and House of Lord's decision in *Julius v. Lord Bishop of Oxford* 1880 A C 214 and he further observed:

"The test for determining whether a particular provision of law is mandatory or only directory has been discussed by the Supreme Court in *Hari Vishnu v. Ahmad Ishaque*, It is to be determined from the true intention of the Legislature, which ultimately depended on the context and that a provision which is mandatory must be strictly observed while substantial compliance was sufficient in the case of a directory provision."

Tukol J. further observed that bearing these principles in mind of investigation to find out the intention of Legislature, he comes to the conclusion that the method of check and verification provided for by the Rules is the only guarantee against tampering and was a definite source of confidence both to the accused and to the Court that the sample analysed was the very sample which had been submitted by the Food Inspector and looking to the scheme of the various sections and the Rules made under the Act it is manifest that the Magistrate can accept the report as evidence only if the report is prepared after full and thorough compliance with the Rules. Having thus come to the conclusion that the rules were mandatory and the rules having not been observed the report relied upon in the case could not be accorded the requisite evidentiary value and the conviction solely based upon it could not be sustained, Tukol J. allowed the petition and set aside the order of conviction and sentence and acquitted the accused.

13. In *Belgaum Borough Municipality v. S. Shankar* A I R 1968 Mys. 196 the Division Bench consisting of H. Hombe Gowda C. J. and C. Honniah J. confirmed the decision in *Mary Lazrado v. The State* and held as follows:

"Prevention of Food Adulteration Rules (1955), rules 7 and 18-Rules requiring Food Inspector to send copy of memorandum and specimen impression of seal used to seal packet, to Public Analyst separately by post-Rules are mandatory-Non-compliance with Rules affects evidentiary value of Certificate and of Public Analyst and in the absence of extraneous evidence conviction based on such report is vitiated."

Dealing directly with the provisions of Rule 18, Chief Justice Hombe Gowda has

observed (p. 197):

"...The above Rules make it abundantly clear that it is obligatory on the part of the Food Inspector to send a copy of the memorandum and a specimen impression of the seal used to seal the packet to the Public Analyst separately by post. P.W.I Mendosa, who is the Food Inspector and who purchased the oil from the first respondent had not stated anywhere in his evidence that he sent a copy of the memorandum and a specimen impression of the seal used to seal the packet to the Public Analyst separately. The question for consideration, therefore, is as to whether the said Rule is mandatory and the non-observance of the same vitiates the entire trial and the order of acquittal in the circumstances is, therefore, justified. The question as to whether these rules are mandatory or directory came up for consideration in *Mary Lazrado v. State of Mysore*"

After discussing *Mary Lairado's* case and another decision in *Laxman Sitaram v. The State* AIR 1967 Mys. 33, Chief Justice Hombe Gowda observed (p. 197):

". . . We entirely agree with the observations of His Lordship and hold that Rules 7 and 18 of the Rules framed under the Prevention of Food Adulteration Act are mandatory in nature and any non-compliance of the Rules affects the evidentiary value of the report of the Public Analyst. As already stated, the learned Magistrate has come to the conclusion that the certificate issued by the Public Analyst has no evidentiary value."

Dealing with the contention raised by the other side that the rules were directory and the evidence led was sufficient coupled with the Analyst's Report, Chief Justice Hombe Gowda has observed: That the position in *Laxman Sitaram v. The State* and the observations of Kalagate J. that the certificate issued by the Public Analyst was valid and could be acted upon, Hombe Gowda C. J. held (p. 198):

"... We are clearly of the opinion that Kalagate J. did not lay down any such proposition of law in the case referred to above. If it is construed to lay down any such proposition of law, we have no hesitation to say that it is wrong. The interpretation of Rules 7-and 18 by Tukol J. referred to above, in our opinion, sets out the law in clear terms. Therefore, we have no hesitation in holding that Rules 7 and 18 of the Rules framed under the Prevention of Food Adulteration Act are mandatory and the non-compliance of those Rules affects the evidentiary value of the certificate and in the absence of extraneous evidence the conviction is sure to be vitiated."

14. The third decision relied upon by Mr. Paranjpe was of the Patna High Court reported in *Daitari Mahto Vs. State*, . This decision lays down:

"Prevention of Food Adulteration Rules (1955), Rule 7-Comparison of seal on container with specimen impression by Public Analyst and to note condition of seal-Rule is mandatory in nature-Non-compliance with the same renders conviction illegal."

This decision followed the decision in *Belgaum Borough Municipality v. S.*

Shankar to which I have already referred to. After quoting the relevant provisions, Anwar Ahmad J. observed as follows (p. 130):

"...The submission of the learned counsel has to be accepted. Under rule 18a, specimen impression of the seal had to be sent to the Public Analyst separately by registered post or delivered to him or to any person authorised by him and, under Rule 7 (1), the Public Analyst was required to compare the seal on the bottle and the outer cover with the specimen impression received by him separately and to note the condition of the seal thereon. The evidence of P. W. 2 quoted above makes it clear that specimen impression of the seal was not sent separately and by registered post. The registration receipt granted by the postal Department has not been filed nor has the acknowledgment receipt been brought on record. In absence of any evidence on record, it is not possible to hold that the specimen impression of the seal was sent separately and by registered post and, thus, the provisions of rule 18 have been violated. Further, there is no evidence on record that the facsimile impression of the seal was actually received by the Public Analyst and, thus rule 7 (1) must also be deemed to have been violated. It was not the case of the prosecution that the impression of the seal was delivered to the Public Analyst personally or to any person authorised by him."

Anwar Ahmad J. further observed (p. 130):

"It is by now well-nigh settled that rules 18 and 7 are mandatory and non-compliance with either of them vitiates the trial."

Quoted with approval State of M.P. Vs. Abbasbhai Tyab Ali Bohra, .

15. Dealing with the case of Kamal Singh v. State wherein Rules 7, 15, 17 and 18 have been held to be directory, Anwar Ahmad J. held (p. 131):

"... but I would prefer to follow ? recent Bench decision of the Mysore High Court in Belgaum Borough Municipality v. S. Shankar."

The learned Judge observed (p 131):

"... I entirely agree with the observations made in the above case and hold that Rules 7 and 18 are mandatory in nature and any non-compliance with the same makes the conviction illegal."

16. The Calcutta decision cited by Mr. Paranjpe is a decision of the Division Bench consisting of Chief Justice Mitra and A. K. De J. in The Administrator Silliguri Municipality Vs. Hiralal Goala, . A.K. De J. delivering the judgment for the Bench, has held:

"Prevention of Food Adulteration Rules (1955), Rule 18-Provision regarding sending of specimen impression of the seal separately is mandatory and its non-observance makes conviction illegal."

This was a Criminal Revision Application filed by the Administrator of the

Municipality for enhancement of sentence when the accused was convicted by the Magistrate, and while hearing the rule, the opposite party had challenged the conviction as illegal under sub-section (6) of section 439 of the Code of Criminal Procedure. Dealing with the provisions of Rules 7 and 18 it was urged before the Division Bench that under the provisions of the Act, the Food Inspector shall send a sample of it in accordance with the Rules prescribed for sampling to the Public Analyst for the local area concerned. Sub-section (3) of section 11 of the Act provides that when a sample of any article of food is taken under sub-section (1) of section 10 the Food Inspector shall send a sample of it in accordance with the rules prescribed for sampling. Rule 14 of the Prevention of Food Adulteration Rules, 1955, prescribes the "manner of sending samples for analysis". Rule 15 provides the manner of labelling and addressing the containers. Rule 16 deals with the manner of packing and sealing the samples, Rule 17 prescribes that the container of sample of analysis shall be sent to the public analyst enclosed together with a memorandum in Form VII in an outer cover addressed to the public analyst. Rule 18 provides that a copy of the memorandum and a specimen impression of the seal used to seal the packet shall be sent to the public analyst separately by registered post or delivered to him or to any person authorised by him. The duties of the Public Analyst, as laid down in Rule 7, are that on receipt of a package containing a sample, for analysis from a Food Inspector, the Public Analyst shall compare the seals on the container and the outer cover with specimen impression received and shall note the condition of the seals thereon. Dealing with the evidence of the Food Inspector, A. K. De J. observed:

"It was contended that the prosecution had not proved that the specimen impression of the seal, used to seal the packet, was sent to the Public Analyst separately by registered post."

The evidence in that case showed that it was sent under a certificate of posting. The person, who is said to have posted that, was not examined to say that the cover containing the specimen impression of the seal was handed over by him to the postal clerk and that Exh. 12, the certificate of posting, was given to him for that by the said postal clerk. In this state of evidence it cannot be said for certain that the Food Inspector sent the specimen impression of the seal, used to seal the packet, to the analyst, for analysis as enjoined by Rule 18. It was contended in that case that the prosecution having failed to establish that the specimen impression of the seal was sent separately Rule 18 was not observed and from this Non-observance it should be held that Rule 7 (1) which required comparison by the Public Analyst of the condition of the seals thereon could not have been complied with. It was contended in that case on behalf of the State that Rules 7 and 18 were only directory and, even if there had been any non-compliance with those rules, the Court may on the evidence find that the sample examined by the Public Analyst was the one taken from the accused. It was also contended before the Calcutta High Court, that in view of the provisions of section 13 (2) of the Act, which lays down that the accused may make an application to the Court, for sending the part of the sample delivered to him u/s 11 (1) (c) (i) or the third

part retained u/s 11 (1) (c) (iii) to the Director for a certificate, and that as the accused had not availed himself of the provisions of section 13(2) it may be taken that the sample analysed by the analyst was the sample seized from the accused-opposite party. The Division Bench negated this contention and held that it was not acceptable to them. Referring to the evidence led in that case, De J. held (p. 1858):

"...In this case, we have held that the Food Inspector did not send the specimen impression of the seal and thus made it impossible for the Analyst to ensure himself that the sample sent to him was the sample seized from the accused. In a trial for an offence u/s 16 for violation of section 7 of the Act conviction rests only on the report of the Analyst as to adulteration. It is, therefore, necessary to see that the rules prescribed have been followed and that the report, after compliance with the rules, has been placed before the Court. Rule 18, read with Rule 7, prescribes that the memorandum and the specimen impression are to be sent separately. So far as that part is concerned it cannot but be mandatory, though one may argue that the manner of sending, namely, by registered post or by hand, is directory. Rule requiring the Food Inspector to send the specimen impression and the memo separately can only be complied with by the actually sending those. The manner of sending, may be taken as recommendatory and it may be proved by other evidence or legal presumption u/s 114 of the Indian Evidence Act, illustration (g) where available in a particular case that the articles sent otherwise than by the prescribed mode, actually reached the Analyst. We, therefore, for the purpose of the case, hold that observance of Rules 7 and 18, so far they prescribe sending of the specimen impression of the seal separately, is mandatory."

17. This judgment also approves the decisions in *Mary Lazrado v. The State*, *Belgaum Borough Municipality v. S. Shankar* and *State of M. P. v. Abbasbhai*.

18. The most important question that arises for my consideration is that if the Rules are mandatory, what is the meaning to be attached to the word "separately" in Rule 18. Mr. Bhonsale for the State has referred me to three judgments of our High Court, one judgment of the Supreme Court dealing with the question of the interpretation of Rule 18 and the nature of the Rule, whether they are mandatory or directory. He has relied upon the judgment in *Baliram Feru v. The State* (1968) 77 Bom. L R 350 by Vimadalal J. and submitted that though in this judgment the Rules are stated to be mandatory, it is distinguishable because of other judgments delivered by Vaidya J. and Malvankar J. He has also relied upon certain observations in *Krishna Rajaram Wani Vs. M.V. Koranne* and the *State of Maharashtra*, of Naik J. I will deal with these decisions now.

19. The first in point of time is *K. Rajaram v. Koranne*. This judgment deals with ; Prevention of Food Adulteration Act section 16 and Prevention of Food Adulteration Rules (1955) Rules 7 and 18, Report by the Public Analyst in Form III- Non-mention of comparison of seals-Effects-Presumption of regularity of

official acts. It is held by Naik J. that the report of the Public Analyst in Form No. III need not mention that the Analyst had compared the seal on the packet with the specimen seal and separately. The omission is not of vital importance. Naik J. further held that it would not be proper to place undue emphasis on one technical safeguard, the comparison of the seal of the container with the specimen of the seal. If the specimen seal was sent separately as required by rule 18, there is no reason why the Public Analyst should fail to discharge the duty enjoined on him. At any rate at least on that narrow point, it would be legitimate to draw a presumption u/s 114 of the Evidence Act. Naik J. has dissented from *State of Gujarat v. Shantaben* and *Mary Lazrado v. The State*. As regards the first proposition dealt with, we are not concerned here. In the report exh. 30, it has been specifically stated by the Analyst that he had compared the seals and he found them to be accurate. As regards the second part of the judgment, the judgment proceeds on the assumption that the specimen seal was sent separately as required by rule 18. Therefore, in my opinion, Mr. Bhonsale cannot rely upon this authority for the purpose of meeting the contention whether the Rules are mandatory or directory. Discussing *Mary Lazrado v. The State*, Naik J. has observed (p. 249):

"It appears that in that case there is nothing to indicate that the specimen of the seal was separately forwarded by the Food Inspector. That is why the learned Judge observed that it would not be possible to draw a presumption in favour of the Food Inspector saying that he sent the specimen of the seal. I have already stated that as a matter of fact that there is a document, though not produced, showing that the specimen of the seal was separately forwarded by Post to the Public Analyst. Apart from this point of distinction, I am not disposed to agree, with great respect, with the reasoning of the learned Judge of the Mysore High Court as also the reasoning of the learned Judge of the Gujarat High Court".

As observed before, the contention raised by Mr. Paranjpe in this case is based on positive evidence, wherein it is specifically admitted by the Food Inspector that at one and the same time, the sample bottle with Form No. VII and the specimen seal with the copy of Form No. VII was sent with a peon to the Analyst. The peon has not been examined. The receipt for the receipt of the sample seal and the sealed bottle containing the purchased Tur Dal has not been produced. In this state of facts, I do not think that the judgment in *K. Rajaram v. Koranne* is of any help to the State in this case.

20. Next in point of time is the judgment delivered by Vimadalal J. in *Baliram Feru v. The State*. This case also directly refers to *Mary Lazrado's* case. Vimadalal J. has observed (p. 351):

".... In a carefully considered judgment, the learned Judge of the Mysore High Court has, in the said case, stated (para. 12) that to raise a presumption u/s 114 of the Evidence Act. both in favour of the Food Inspector and the Public Analyst in the matter, is to render the Rules superfluous and meaningless. I agree with the view taken by him in the said decision. The position in the present case, no

doubt, is not one of non-compliance with those Rules, but the position is that compliance with those Rules, has not been proved by the prosecution by leading the necessary evidence. In my opinion, however, the effect of the prosecution not doing so is precisely the same, in so far as it deprives the report of the Public Analyst of its evidentiary value, and makes it impossible for the Court to base a conviction solely upon it as has been done by the trial Magistrate in the present case."

21. With these observations Vimadlal J approved what has been held in *Mary Lazrado v. The State* that the provisions of rules 7 and 18 of the said rules are mandatory and non-compliance affects the evidentiary value of the report of the Public Analyst.

22. Reliance was then placed by Mr. Bhonsale on two other unreported judgments of this Court. (I) *Ramdaur Sing Mahabal Singh v. Municipal Corporation* (1971) Criminal Appeal No. 1593 of 1971 (Unrep.) 1969, decided by Malvankar J., on July 15 and (2) *Ramkishore Sharda Prasad Jaiswal v. The State of Maharashtra* (1973) Criminal Appeals Nos. 669, 670 and 671 of 1972, decided by Vaidya J., on November 8, 1973 (Unrep.). Dealing with the contention raised with regard to the noncompliance of rule 18 read with rule 7 of the said Rules, Malvankar J. observed as follows:

"Now, the argument is that there is no evidence in this case to show that the Food Inspector had sent a copy of the memorandum and a specimen impression of the seal used to seal the packet to the Public Analyst separately. Now, the Food Inspector has clearly said in his evidence that he had sent the second part of the (sample to the) Public Analyst along with memorandum and specimen of seal. He further says that he also received two receipts from the Public Analyst which are produced at Ex. C collectively. Both these receipts also show that the Food Inspector had complied with rule 18. Further, the report, Ex. E shows that the copy of memorandum and specimen impression of the seal were sent separately. It is true that the Food Inspector does not state in his evidence that he had sent them separately."

Relying upon section 13 (5) of the Act, that a report of the Public Analyst can be used as evidence of the facts stated therein in any proceeding under the Act, Malvankar J. came to the conclusion that once, therefore, the evidence of the Food Inspector and the documentary evidence of the record are accepted, it is impossible to hold that the provisions of rule 18 were not complied with by the Food Inspector. Thus, in this case, on the evidence, which has been analysed, Malvankar J. came to the conclusion that the provisions were complied with. In my opinion, this judgment also cannot help Mr. Bhonsale. No doubt, there is observation made by Malvankar J. that the statements made in the report can be said to have been proved by the production in the Court and in that particular case also, there was a statement that the memorandum and the specimen impression of the seal used to seal the packet to the Public Analyst were sent separately. My reading of the judgment is that if there is contrary evidence, viz,

that the two things required to be sent separately under rule 18 are shown not to have been sent separately then mere statement in the report of the Public Analyst that he had received them separately is not sufficient for the purposes of proving that rule 18 was complied with. As observed before, in the case before me, on p. 12 there is a categorical admission that both the seal, sample with Form No. VII and the specimen impression of the seal with a copy of Form No. VII were sent at one and the same time together with one and the same peon. The other distinguishing feature is that in the case before Malvankar J., there were two receipts produced for delivery of an article and in view of this difference, I am of the opinion, that this judgment also, which has been based on the facts and evidence proved before the Court, cannot be said to lay down that in the absence of evidence to show that the two things required to be sent separately were so sent separately merely on the statement in the report that they were received separately, the Court can infer by drawing a presumption u/s 114 (g) of the Evidence Act that rule 18 was complied with.

23. The other decision in Ramkishore Sharda Prasad Jaiswal v. The State of Maharashtra of Vaidya J. is rather on the question whether uncorroborated testimony of the Food Inspector can be relied upon for passing conviction under the said Act or not when the panch witness has turned hostile and the Food Inspector's evidence is acceptable to the Court. Vaidya J. laid down, following the decision in Babu Lal Hargovindas Vs. The State of Gujarat, , that the evidence of the Food Inspector alone, if believed, can be relied on for proving that the samples were taken as required by law. Dealing with the contention raised in those appeals, viz., that the Food Inspector had not examined the peon who carried copy of the memorandum and specimen impression of the seal used to seal the bag sent to the Public Analyst, and, therefore, there was non-compliance of rule 18 and, therefore, the prosecution was bad, against relying upon the evidence of the Food Inspector, who had deposed in that case that he had sent the samples to the Public Analyst along with the memorandum the unchallenged evidence of the Food Inspector coupled with the presumption arising u/s 114 (g) of the Evidence Act, viz., that the Food Inspectors were acting officially and official acts must be presumed to have been carefully performed unless there was something to show that they were not done so, and relying upon the two acknowledgment receipts, which were marked as Exhs. E and F in all the three cases, as sufficient corroboration to the evidence of the Food Inspector, Vaidya J. held that even though the peon was not examined, it cannot be said that Rule 18 was not complied with. The judgment of Vimadalal J. in Baliram Feru v. The State holding that Rules 7 and 18 of the said Rules were mandatory has not been dissented from but has been accepted by Vaidya J. But, ON the facts of the case before him, Vaidya J. held that it was established by the evidence of the Food Inspector, coupled with the production of the two receipts for two articles have been received separately by the Public Analyst, that Rule 18 was complied with.

24. These are all the cases cited before me for the purpose of consideration

whether the Rules under the Prevention of Food Adulteration Act are mandatory or not and secondly in the absence of specific evidence that they were complied with as required under Rule 18 is the prosecution vitiated or not or, in other words, without establishing the compliance of the Rules, can the prosecution merely on the report of the Public Analyst call upon the Court to raise the necessary presumption u/s 114(g) because the Public Analyst's report is in form No. III, which has the printed clauses to indicate that various rules had been observed.

25. The main question before me is the observance of Rule 18. That Rule requires that a copy of the memorandum and specimen impression of the seal used to seal the packet shall be sent to the Public Analyst separately by registered post or delivered to him or to any person authorised by him. Rule 17 requires that the container of sample for analysis shall be sent to the Public Analyst by registered post or railway parcel or air freight or by hand or by any other suitable means a transport available in sealed packet, enclosed together with a memorandum in Form VIE in an outer cover addressed to the Public Analyst. What is the Meaning to be attached to the word "separately"..

26. The word "separately" has been defined in the Oxford English Dictionary as follows:-"in a separate manner, singly, severally apart." It has also been pointed out that it is in contrast to the word "together." How in the light of the evidence discussed above, can the Court hold that in this particular case what was required to be sent under Rule 17 and what was required to be sent under Rule 18, were sent separately.

27. The intention behind the provisions of these rules is not far to see. The Act prescribes certain acts on the part of the dealer as absolute offences. There is no necessity of mens rea or particular intention to establish the guilt under the Food Adulteration Act. Once it is established that an adulterated food or misbranded food has been sold and it is further established that the Food Inspector has followed the procedure laid down by the Act and the Rules and the Public Analyst's report to indicate that there is a breach of the rule as regards the article of food, the offence is absolute. It prescribes under certain circumstances minimum sentence of six months and a fine of Rs. 1000. Therefore, the Legislature, in its wisdom to protect the interest of the accused persons who are being tried under this Act and to see that before a man is convicted, has provided various rules which are to be observed. These Rules are made to curb the abuse of powers given under the Prevention of Food Adulteration Act. These Rules are for the protection and for the benefit of the accused and if one comes to the conclusion that they are mandatory, non-observance of those rules is bound to affect the result of the trial. As observed before, (on p. 12, ori. evidence and typed p. 90), the Food Inspector has unequivocally admitted that at one and the same time with the same peon he had sent both the sample of Tur Dal for analysis with Form No. VII and the copy of the memorandum with specimen impression of the seal used to seal the packet together. This admission

on the part of the Inspector clearly shows that they were not sent separately. More so, the prosecution has not examined the peon nor have they produced any separate receipts for separately sending the two Articles, required under Rules 17 and 18.

28. It was urged before me, that the main purpose behind this Rule 18 is to prevent possibility of tampering by the third person in whose hand the sample as well as the specimen seal are put. In order to avoid tampering, the Rule provides that the two things are not sent together but they must be sent separately so that the mischief of tampering the entire sample by changing the seal on the packet as well as the specimen seal sent in another packet is prevented. I see considerable force in this argument and I am of the opinion following the decisions which we have been already cited that the rules are mandatory and in this particular case, the prosecution has not established that the rules were observed, and that the Food Inspector has not said that he had carried out all the procedure as required under the Rules. The prosecution has not examined the peon. No other evidence has been led and there is a positive admission on the part of the Food Inspector that both the things required to be sent separately were sent together; there is a violation of the observance of Rules 17 and 18. Once I come to the conclusion that the rule has not been observed as required to be observed and holding that the Rules are mandatory, the natural effect thereof is that it cannot be said that the sample which was examined by the Public Analyst and who has submitted his report Exh. 30 was the very sample which was taken charge of from the shop of the accused person. In this view of the case, the accused are entitled to get the benefit of the Rules not having been observed and the conviction cannot be said to be proper.

29. The next contention raised before me by Mr. Paranjpe was that the Food Inspector has not followed Rule 14 also. Rule 14 runs as follows :

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

Mr. Paranjpe has submitted before me that there is no evidence to show that the samples were taken in clean dry bottles or jars or that the containers were closed sufficiently tight to prevent leakage, evaporation or entrance of moisture. He has drawn my attention to the evidence of Food Inspector Jadhav at p. 84 where Jadhav has deposed to only one fact that he had used clean bottles. He has not stated on oath that he had used dry bottles. Even when he was cross-examined at p. 90 he has only stated that the bottle was clean. With regard to the second part, namely, the closing of the bottle sufficiently tight to prevent leakage, evaporation or entrance of moisture, Mr. Paranjpe submitted that fortunately for the accused in this particular case, an act on the part of the prosecutor, while cross-examining the defence witness No. 2, in order to put certain questions to the defence witness, he on his own opened the sealed bottle

which was produced by the Food Inspector and the prosecution in the Court. When that bottle was opened in the Court it was found to contain the contents in a decayed and decomposed condition. The learned Magistrate has made a note that the contents are decayed and decomposed. Mr. Paranjpe urged that from this condition of the contents of the bottle, the necessary inference is to follow, viz., that the bottle in which the contents were put, was not a dry bottle or that in any event the bottle was not closed sufficiently tight to prevent leakage, evaporation and entrance of moisture. He submits that in a dry and clean bottle if the Tur Dal is properly closed and sealed, it would not decay. Mr. Paranjpe submits, therefore, it is proper for the Court to draw an inference that Rule 14 was not observed; that the dry bottle was not used or in any event, the bottle was not so closed sufficiently tight as to prevent leakage, evaporation or entrance of moisture. There is much force in this contention.

30. Mr. Bhonsale for the State with regard to the finding of decayed and decomposed Tur Dal from the sample which was opened in the Court, submitted that the Court is not the proper authority to find the contents decayed or decomposed; that the Court ought not to have taken up the position of an expert to express the opinion that the contents were decayed or decomposed; that in any event the expression of that opinion should not carry the necessary weight to come to the conclusion that the article was decayed or decomposed. Mr. Bhonsale submitted that if the Court had any doubt about the contents, it was open to the Court to send to the Director, Central Food Laboratory, Calcutta and obtain his opinion about the condition of the contents. I see no force in the argument of Mr. Bhonsale I do not think that it, is a matter for an expert to opine whether the condition of the Tur Dal which was seen by the Court was in a decayed or decomposed condition It is a matter of commonsense. Everybody uses Tur Dal and the learned Magistrate, who had the experience to see the Tur Dal in a fresh condition and in a decayed and decomposed condition, can at least make out the difference between the two.

31. Having thus established that the contents had not remained in the same condition in which they were sealed, Mr. Paranjpe urges that there is no guarantee that the samples which were sent to the Public Analyst were sent in a container which was clean or dry or which was sufficiently tight to prevent leakage, evaporation or entrance of moisture. It is true that the report of the Public Analyst only discloses that Tartrazine, a coal tar dye was used on the Tur Dai By the mere fact that the contents were not properly sealed or that they were not put in a clean and dry bottle or that they were not closed sufficiently tight Tartrazine cannot be created in the sample bottle and therefore, it cannot be said that the result of the report of the Public Analyst has been in any manner affected because of the non-observance of Rule 14. But, there is another aspect and which is an important aspect resulting from the prosecutor opening the sealed bottle in the Court and when the contents were seen by the Court, they were found in a decayed and decomposed condition. I will deal with this aspect of the right of the accused person u/s 13 (2) at any stage of the trial to apply for

sending the sample to the Director of Food Laboratory, Calcutta, who has been deprived of it. For the purpose of the contention that the Rule 14 (2) was not observed, on the evidence on record, I am of the opinion that the Food Inspector had not complied with the requirements of Rule 14 and to that extent and to that extent only he committed a breach of Rule 14.

32. The next argument submitted by Mr. Paranjpe was that in the present case, the prosecution has deprived the accused to avail himself of the right u/s 13 (2) of the said Act. He submitted that the deprivation of this right goes to the root of the matter and the conviction cannot be passed on the report of the Public Analyst when a right is created in the accused to obtain a report of the Director of Food Laboratory, Calcutta, which report is to be the final word on the analysis. In order to appreciate this submission of Mr. Paranjpe, one has to carefully consider section 13 and some of the decisions cited in this behalf. Section 13 reads as follows:

"13. Report of public analyst.-(1) The public analyst shall deliver, in such form as may be prescribed, a report to the Food Inspector of the result of the analysis of any article of food submitted to him for analysis.

(2) After the institution of a prosecution under this Act the accused vendor or the complainant may, on payment of the prescribed fee, make an application to the Court for sending the part of the sample mentioned in sub-clause (i) or sub-clause (iii) of clause (c) of sub-section (1) of section 11 to the Director of the Central Food Laboratory for a certificate; and on receipt of the application the Court shall first ascertain that the mark and seal or fastening as provided in clause (b) of sub-section (1) of section 11 are intact and may then despatch the part of the sample under its own seal to the Director of the Central Food Laboratory who shall (hereupon) send a certificate to the Court in the prescribed form within one month from the date of receipt of the sample, specifying the result of his analysis.

(3) The certificate issued by the Director of the Central Food Laboratory under sub-section (2) shall supersede the report given by the public analyst under sub-section (1)."

The submission of Mr. Paranjpe is that under this section, the certificate issued by the Director of Central Food Laboratory supersedes the certificate given by the Public Analyst and, therefore, his word is a final one and the report of the Public Analyst is not conclusive. He submitted that the right conferred u/s 13 (2) of the Act is a valuable right. He submitted that this right can be exercised by making an application to the Court and requesting the Court to send the sealed samples either which has been kept by the Food Inspector or which has been given to the accused. He submitted that if the sealed packet in which the sample was kept and which was produced by the Food Inspector in the Court, if that seal has been broken by the prosecuting agency itself, and as a result of the opening of the sealed sample, the contents were found to be decayed and decomposed, the

necessary corollary which follows from this is that there could not have been any other report from the Director of Food Laboratory, viz., that it was decomposed and decayed and in that condition there could not have been any analysis made by the Director, Central Food Laboratory. According to Mr. Paranjpe, depriving the accused of either of the two samples is sufficient to deprive him of his right u/s 13 (2) of the Act. In support of his proposition, Mr. Paranjpe relies upon V. Jayavelu and Another Vs. Food Inspector, Corporation of Madras, , where following Municipal Corporation of Delhi Vs. Ghisa Ram, , Krishnaswamy Reddy J. observed:

"A valuable right is conferred on the vendor to have the sample given to him analysed by the Director of the Central Food Laboratory and that right cannot be denied to him under any circumstances. When the accused chooses to send for the sample retained by the Food Inspector, it cannot be refused. It is the duty of the Court to comply with the request of the accused. The order has to be made by the Court. If, for some reason, the sample retained by the Food Inspector is not made available and hence the Court cannot comply with the request of the accused, it must be deemed that the valuable right conferred on the accused was deprived of, by the prosecution which must be held to have resulted in vitiating the conviction."

As to at what point of time this right can be exercised it is held in that very judgment as follows:

"No limitation is placed in section 13 (2) of the Act as to when the accused can exercise the right conferred thereunder on him. It is not always necessary that immediately after the prosecution is instituted, the accused should take steps for sending the sample to the Director of the Central Food Laboratory. It is left to the accused to wait till the examination of the Public Analyst in Court and if the evidence of the Public Analyst is not unfavourable to him, he may even decide not to exercise the right conferred on him. No time limit can be prescribed for the accused to exercise his right save that he should exercise such a right before the close of the trial."

33. Relying upon this authority, Mr. Paranjpe submits that in the Madras case sample was not made available to the accused whereas in the present case, the sample which was produced in the Court had been opened at the instance of the prosecutor himself and that the result thereof was that the seal was broken and that the contents were found to be decayed and decomposed. Mr. Paranjpe relied upon Kanhaiya Lal Vs. State, . This decision, following the decision in Munpl. Corpn. of Delhi v. Ghisa Ram, lays down : Inordinate delay in launching prosecution-applicant thereby deprived of his right of getting sample analysed by Directory, Central Food Laboratory,-the conviction cannot be upheld as applicant was seriously prejudiced. Dealing with the contention raised u/s 13 (2) of the said Act, Tripathi J. has observed in the decision as follows (p. 1212):

"There is a report on the file, which indicates that the original record of the case

is not traceable. From the impugned orders of the trial Magistrate and the Sessions Judge, however, it is clear that the sample of Khoya-Ka Pera was taken on 27-6-1966 at 2 p. m. and that the prosecution was launched against the applicant sometimes in the year 1968 as is evident from the fact that it has been numbered as Criminal Case No. 260 of 1968. Learned Counsel before me from his file a copy of printed form, which appears to have been submitted by the Food Inspector to the S. D. M., Gyanpur indicating therein that the sample of Khoya-Ka-Pera was taken on 27-6-1966 at 2 p. m. and praying that the applicant be prosecuted u/s 16 for the breach of section 7 of the Prevention of Food Adulteration Act. There is an endorsement on this printed application, which bears the signature of District Medical Officer of Health, Varanasi dated 30-6-1967 according the sanction for the institution of the complaint."

From these facts, the learned Judge found that the sample was taken and the sanction was accorded for the prosecution of the applicant was correct and that the prosecution was launched for more than two years after taking the sample. Considering the right of the accused u/s 13(2) and the delay caused and the article was milk preparation, the learned Judge observed (p. 1212):

"....In (his case, the prosecution was launched more than two years after taking of the sample. It is obvious that the milk contents of Pera could not have remained in a fit condition for being examined by the Director within the meaning of section 13 (2) after a lapse of such a long time. In such circumstances, there is nothing surprising if the applicant did not apply to the Court for getting the sample analysed by the Director as his attempt would have proved of no avail. I am, therefore, of the opinion that in the light of the decision of the Supreme Court in the case of Municipal Corporation of Delhi v. Ghisa Ram, it must be held that the applicant has been deprived of his valuable right, which is conferred on him u/s 13 (2) of the Act for getting the sample analysed by the Director of Central Food Laboratory on account of an inordinate delay in launching the prosecution against him. That being so where there is denial of this right to the vendor, there is no doubt that the vendor applicant is seriously prejudiced in the trial and it would not be proper to uphold his conviction on the basis of the report of the Public Analyst."

34. In Munpl. Corpn. of Delhi y. Ghisa Ram, the Supreme Court judgment delivered by the Bench consisting of Hidayatullah and Bhargava JJ. it has been laid down that the provisions of section 13(3) and (5) are attracted when, in fact, an analysis of the sample sent to the Director of the Central Food Laboratory is made by him on the basis of which he issues a certificate. If, for any reason, no certificate is issued, the report given by the Public Analyst does not cease to be evidence of the facts contained in it and does not become ineffective merely because it could have been superseded by the certificate issued by the Director of the Central Food Laboratory. Further, when there is no certificate issued by the Director of the Central Food Laboratory, no question can arise of his certificate becoming final and conclusive evidence of the report contained in it. Dealing with

section 13 (2), the Supreme Court observed that when a valuable right is conferred by section 13 (2) of the Action the vendor to have the sample given to him analysed by the Director of the Central Food Laboratory, it is to be expected that the prosecution will proceed in such a manner that that right will not be denied to him. The right is a valuable one, because the certificate of the Director supersede? the report of the Public Analyst and is treated as conclusive evidence of its contents. Obviously, the right has been given to the vendor in order that, for his satisfaction and proper defence, he should be able to have the sample kept in his charge analysed by a greater expert whose certificate is to be accepted by Court as conclusive evidence. In a case where there is denial of this right on account of the deliberate conduct of the prosecution, e.g. delay in prosecution, as a result of which, the sample is highly decomposed and could not be analysed, the vendor, in his trial is so seriously prejudiced that it would not be proper to uphold his conviction on the basis of the report of the Public Analyst, even though that report continues to be evidence in the case of the facts contained therein. The Supreme Court has further held that the principle, must, however, be applied to cases where the conduct of the prosecution has resulted in the denial to the vendor of any opportunity to exercise this right. Different considerations may arise if the right gets frustrated for reasons for which the prosecution is not responsible.

35. One more case has been cited by Mr. Paranjpe which is reported in a series of All India Prevention of Food Adulteration Cases, 1974 Part 1. It is a decision of the Madras High Court. It deals with, the question of exercising the right u/s 13 (2) of the Act. In the case of State v. K. Chinnamuthu Naidu (1974) All India Prevention of Food Adulteration Cases, Madras 1, N.S. Ramaswami J. deciding Criminal Revision Case No. 1186 and Criminal Revision Petition No. 1152 on December 22, 1972, held as follows:

"When the section itself gives a discretion to the excused regarding which sample has to be sent to the Central Food Laboratory for analysis, it cannot be said that the accused should retain the sample bottle given to him and if he does not retain the same for being sent to the Central Food Laboratory, he loses the right conferred on him by section 13 (2). Even though, in this case, one part of the sample ought to have been given to the accused, it is quite possible that the accused might have mislaid it. Even otherwise, that is, even if the accused is deliberately withholding the sample bottle given to him, he cannot be denied the right conferred on him u/s 13 (2) referred to above. It cannot be said that as he is not producing the sample bottle given to him, he cannot have the other sample tested by the Central Food Laboratory. Therefore, as the third sample is not available for being sent to the Central Food Laboratory for analysis, it must be held that the accused had been denied a valuable right. Under such circumstances, he cannot be successfully prosecuted for having sold adulterated foodstuff."

36. Against these authorities cited and the submissions made by Mr. Paranjpe,

Mr. Bhonsale submitted before me that the right conferred u/s 13 (2) can only be considered by the Court, when the accused has made an application for sending the sample to the Director of the Central Food Laboratory. He submitted that when no such application has been made, the accused cannot ask the Court to consider the provisions of section 13 (2) and the benefits conferred upon the accused by that section. He submitted that after the judgment in *Munpl. Corpn. of Delhi v. Ghisa Ram* there are two later decisions of the Supreme Court and taking into consideration the effect of the judgments together, he submitted that when the accused failed to make an application for sending a sample to the Director of the Central Food Laboratory for any reason whatsoever, the accused is not entitled to claim any benefit u/s 13 (2) of the said Act. The two latest decisions are (1) *Babulal v. State of Gujarat* and (2) *Ajit Prasad Ramkishan Singh Vs. The State of Maharashtra*, . He submitted that all these decisions have been considered by my brother Judge S.K. Desai J. in *Rambharoselal Bankelal v. The State of Maharashtra* (1973) Criminal Appeal No. 568 of 1972, decided by S. K. Desai J., on September 24, 1973 (Unrep.) and he relies upon this judgment also for his submission in the present case that in the absence of any application for sending the sample to the Central Food Laboratory, the accused is not entitled to raise the contention that he has been deprived of his right u/s 13 (2). I have already dealt with what has been held in *Munpl. Corpn. of Delhi v. Ghisa Ram*, which case, in my opinion, is very much nearer to the present case. There in that case the sample was received and analysed by the Director of the Central Food Laboratory, who reported that the sample had become highly decomposed and no analysis of it was possible and therefore, no opinion could . be expressed by the Director of Central Food Laboratory. In the present case, before any application for sending the sample could be made, the prosecution while cross-examining the witness produced by the defence, opened the sample bottle produced by the Food Inspector and the Court came to the conclusion that the contents were in a decomposed and decayed condition. I think, what has been observed by the Supreme Court in *Munpl. Corpn. of Delhi v. Ghisa Ram* is equally applicable to the facts of the present case, when the Court has come to the conclusion that the contents were decomposed. It would be futile for the accused to make such an application to send the sample for no purpose other than to report that he is unable to express any opinion because the condition of the samples was decomposed and decayed. As rightly held in *Ghisa Ram's* case that if because of the fault of the prosecution, the accused is deprived of his valuable right, the conviction cannot be sustained under the Act.

37. Mr. Bhonsale argued before me that though the second bottle was opened in the Court, it was not open for the accused to make a request to the Court to send the sample to the Director of Central Food Laboratory. As discussed in other cases and looking to the provisions of section 13, the right of the accused is to request the Court to send either of the samples as laid down in the other decisions, which I have referred to above, and as also laid down in *Ghisa Ram's* case that if the sample which was kept by the Food Inspector itself was not

available to the accused, it is sufficient to hold that he has been deprived of the right.

38. Relying upon the latest decision of *Ajit Prasad v. State of Maharashtra*, Mr. Bhonsale submitted that in that case the accused had not made an application by paying the prescribed fees and the Supreme Court had observed that the reasoning of the learned Magistrate that he had lost his valuable right was erroneous inasmuch as no application had been made by the accused for the exercise of that right. In the case before Desai J. in *Rambharoselal Bankelal v. The State of Maharashtra* also an application was made on July 16, 1971 by the accused seeking to exercise his right. Relying on these decisions, Mr. Bhonsale submitted that in the absence of any application by the accused I should reject the arguments advanced on behalf of the petitioners.

39. In the case before Desai J., after the application was made, the sample was directed to be sent to the Director, Central Food Laboratory, in the end of June, 1971 and in August 1971, the Director issued a memorandum that the sample was highly decomposed and unfit for analysis. The memorandum also required the counterpart of the sample to be sent for analysis. In that case also the contention of the defence that the accused had lost his valuable right u/s 13 (2) of the said Act was rejected by the Presidency Magistrate. According to the Presidency Magistrate, on the facts on record of the case, it could not be said that the prosecution was at fault in any way. The case of *Babulal v. State of Gujarat* was followed but that case was on the question of accepting the evidence of the Food Inspector alone, when the panchas turned hostile. The observations referred to by me in *Ghisa Ram's* case were not applied in *Babulal's* case where it was observed that such defence was not open to an accused person who had not filed any application u/s 13 (2) of the said Act. In the last case, viz. *Ajit Prasad's* case, the accused had not in fact made any application u/s 13 (2) of the Act after paying the prescribed fees and the Supreme Court observed that the reasoning of the learned Presidency Magistrate that the accused had lost his valuable right was erroneous.

40. After discussing all the three cases, Desai J. has observed as follows:

"In my opinion, it may be necessary for the accused person to establish in a given case that there has been some default on the part of the prosecution to secure an acquittal, and similarly in any given case it would be for the prosecution to show affirmatively the converse i.e. any default on the part of the accused, which would deny to him the argument which appealed to the Supreme Court. Where on the record it cannot be said decisively that there has been default on the part of the prosecution or of the accused, it is a matter entirely within the discretion of the Court to act or not on the report of the Public Analyst."

Finally, Desai J. has held:

"In my view the valuable right of the appellant u/s 13 (2) of the Act to have the

Public Analyst's report superseded has been lost to him. On the record, as it stands, it is not possible to say that this was on account of any fault or laches on his part. In the circumstances, I think the same considerations should be made applicable to this case as were made applicable by the Supreme Court in Ghisa Ram's case where it was clearly established that the default was that of the prosecution. In my view where it is not possible to say that for this loss of valuable right the accused must be held responsible, he would be normally entitled to an acquittal in respect of the prosecution Under the Prevention of Food Adulteration Act, 1954."

With respect, I entirely agree with the observations of Desai J. and considering the facts before me, I cannot hold that it is the fault of the accused, which has deprived him of his right u/s 13(2) of the Act. It is true that no application has been made by the accused, but in the light of the evidence led and the observations of the learned Magistrate that when the sample was opened the contents were in a decomposed and decayed condition, the mere fact that a redundant application was not made by the accused it cannot be said that the accused was in default. If, to a naked eye, the contents of the sample bottle which was sealed and produced by the Food Inspector when opened, showed that the contents were decomposed and decayed, I do not think that any useful purpose would be served by sending the sample bottle to the Director of Central Food Laboratory, as in the case of Ghisa Ram and as in the case before Desai J. the Director of Central Food Laboratory could only have sent back the memorandum by stating that the contents were so decomposed and decayed that he could not express any opinion regarding the same. I, therefore, cannot accept the arguments of Mr. Bhonsale that the accused is not entitled to the benefit u/s 13 (2) of the Act. I hold that the accused had been deprived of his valuable right u/s 13 (2) of the Act and the evidence on record shows that the contents of the sample kept by the Food Inspector and which were produced before the Court were decomposed and decayed. It might have been so because of the delay in the prosecution or because of the default on the part of the Inspector to observe Rule 14. In either event, the accused is entitled to the benefit and being deprived of his valuable right to obtain a report of the Director of Central Food Laboratory, the conviction cannot be sustained on the report of the Public Analyst.

41. The next contention raised by Mr. Paranjpe was that the accused was entitled to a defence u/s 19 of the said Act as he was a mere retailer who had purchased the Tur Dal from the licensed manufacturer and had properly stored and sold the goods in the same state as it was purchased by them. I do not purpose to deal with this contention in more detail because on both the conditions required u/s 19, both the lower Courts gave a concurrent finding of facts that the burden u/s 19 is on the accused and the accused have failed to discharge the burden by not leading proper and convincing evidence. As this is a revision petition, I would not like to interfere with the findings of fact, where both the Courts have concurred. It would not be possible to say that the findings of fact are wrong or erroneous

or perverse In this view of the matter, I hold that the accused was not entitled to the benefit u/s 19 as he has not established that the Tur Dal which he sold was purchased from the licensed manufacturer or was stored in the same condition in which it was so purchased.

42. The next contention raised by Mr. Paranjpe also, in my opinion is not well founded. According to Mr. Paranjpe the Food Inspector had not followed the provisions of section 10 (4), (5) and (7) of the said Act. According to Mr. Paranjpe, the Food Inspector had to follow the provisions of the Code of Criminal Procedure relating to the search, and inspection by a police officer executing a search warrant under that Code. Mr. Paranjpe submitted that what has been produced is the statement by the prosecution witness Kondaji and not a panchnama. He, therefore, submitted that the section has not been complied with as the provisions of the Code of Criminal Procedure relating to the search were not followed. Merely because the statement is called the statement or the panchnama, it does not constitute the panchnama. I have carefully gone through the document and as every panchnama is, the record of what the panch has seen being done, this document states what panch Kondiba has seen being done by the Food Inspector in his presence. It is true that it would have been much better if it would have been termed as a panchnama and recorded in better language. But, in my opinion, it cannot be said that the statement of Kondiba, which has been produced, cannot be said to apply what is required by the Food Inspector to do, namely, the presence of an independent person in whose presence the purchase was to be made and samples were to be separated and to be delivered and taken according to law. Mr. Paranjpe contended that it was admitted that it was not a panchnama but, in the view that I have taken, I do not think that there is much substance in this argument and I do not think it is necessary for me to go in further details about this.

43. The next contention urged by Mr. Paranjpe is of some importance. Mr. Paranjpe submits that under the Prevention of Food Adulteration Act, section 2 (i) defines the word "adulterated" as an article of food which shall be deemed to be adulterated and gives various sub-heads. Sub head (j) states :

"if any colouring matter other than that prescribed in respect thereof and in amounts not within the prescribed limits of variability is present in the article."

then it would be an adulterated food article. Mr. Paranjpe also relies upon Rules 28, 29 and 30 of the said Rules. Rule 28 reads as follows :

"28. Coaltar dyes which may be used.-No coaltar dyes or a mixture thereof except the following shall be used in food:-

and various other names of coaltar dyes in yellow, blue red and green are prescribed.

44. Rule 29 reads as follows :

"29. Use of permitted coaltar dyes prohibited-Use of permitted coaltar dyes in or

upon any food other than those enumerated below is prohibited:"

Rule 30 makes the maximum limit of permitted colours. It reads as follows:

"30. Maximum limit of permitted colours.-The maximum limit of any permitted coaltar colour or mixture of permitted coaltar colours which may be added to any food shall not exceed 0.2 gramme per kilogram of the final food or beverage for consumption."

The contention of Mr. Paranjpe is that before a food article can be said to be adulterated when a colouring matter is used u/s 2 (i) (j), it must be shown that the colouring matter other than the one mentioned in Rule 28 was used and the amount of coaltar colours which was added to any food exceeded the limit prescribed in Rule 30. He submits that under Rule 28 tartrazine is a coaltar dye permitted to be used under Rule 30, and the proportion of that coaltar dye shall not exceed 0.2 gramme per kilogram. He submits that in order to bring the article of food within the definition of adulterated food, when colouring matter is used, it must be shown that the coaltar dye other than the one mentioned in Rule 28 was used and that the coaltar dye that was used was more than 0.2 gramme per kilogram. Mr. Paranjpe submitted that the report of the Analyst shows that the coaltar dye used was tartrazine and that the report by the Public Analyst shows that in sample at Serial No. 46 an extraneous coaltar dye tartrazine was detected and does not conform to Rule 29 of the Prevention of Food Adulteration Rules, 1955. He submits that therefore it is not the prosecution case that the Tur Dal was mixed with a colour matter other than the one mentioned in Rule 28, nor it is the prosecution case that the coaltar dye was used was in amount not within the prescribed limit of variability prescribed in rule 30. He, therefore, submits that on a proper construction of section 2 (i) (j) read with Rules 28, 29 and 30 the Court should hold that it is not adulterated Tur Dal. He submits that even assuming that the report is correct, what the report says is that there is a breach of Rule 29 i, e. the permitted coaltar dye has been applied to non-permitted Tur Dal. He submits, that the main purpose of the Act is to preserve the health of the people and to prescribe the maximum limit of any permitted coaltar colour or mixture of permitted coaltar colours which may be added to any food and which shall not exceed 0.2 gramme per kilogram of the final food or beverage for consumption, and therefore, it cannot be said its use is harmful to human consumption. There being no proof that it was used exceeding 0.2 gramme per kilogram, it cannot be said that it was used in a manner to harm the human health. He further submitted that reading section 2 (i) (j) along with section 16 which prescribes punishment for adulteration and misbranding, it can be seen that the Legislature has made distinction between foodstuffs and the adulterated or misbranded foods on the one hand and other articles of food, in respect of which contravention of any provisions of this Act have been committed on the other. He submitted that the Legislature has prescribed different sets of punishments for adulterated and misbranded foodstuff being sold and other food stuff being sold but which have been subjected to contravention of any other

provision of the Act. He has submitted that reading section 2 (i) (j) of the said Act with Rules 28, 29 and 30 of the said Rules coupled with section 16 (1) (a) (i) and (ii) it cannot be said that the Tur Dal to which the colour tartrazine was mixed can be said to be an adulterated food stuff. Mr. Bhonsale submitted that the prohibition under Rule 29 is an absolute prohibition and therefore, even permitted coaltar dye if applied to a food article which is not covered by sub-rules (a) to (n) would be adulterating the food stuff. He submitted that it will not be proper to construe that if coaltar dye permitted under the rule is mixed with food stuff under rule 29 it would not mean adulteration but would only mean contravention of Rule 29. I am unable to agree with Mr. Bhonsale's submissions. Reading section 2 (i) (j) and looking to the scheme of the Act and looking to the provisions of Rules 28, 29 and 30 coupled with the clear intention on the part of the Legislature to provide distinct and separate arrangement for adulterated and misbranded articles and other articles of food in respect of which some contravention of the provisions of the Act has been made, there could be food stuff wherein coaltar dyes which are permitted under Rule 28 within the limit of 0.2 grammes per kilogram apply which are not the stuffs covered by Rule 29 and it would be hit by section 16 (1) (a) (ii) and not by section 16 (1) (a) (i). Thus, I am of the opinion that it is wrong to say that if tartrazine was mixed with Tur Dal, it would be an adulterated food stuff within the meaning of section 2 (i) (j).

45. The next contention of Mr. Paranjpe was that the Tur Dal the sample whereof was purchased, from the shop of the accused cannot be called to be misbranded within the meaning of section 2 (ix) (d). The said section reads as under;

" "Misbranded"-An article of food shall be deemed to be misbranded-...

(d) if it is so coloured, flavoured or coated, powdered or polished that the fact that the article is damaged is concealed or if the article is made to appear better or of greater value than it really is;"

A very ingenious argument was advanced by Mr. Paranjpe submitting before me that in construing section 2 (ix) (d) some meaning should be attached to the words: "to appear better or of greater value than it really is," and it cannot be that mere subjective test of an intention of a party applying colour that can decide whether the colour was applied to make the food stuff better or of greater value but there must be positive evidence led by the prosecution to show that by applying a particular colour, the result obtained by the dealer was that the food stuff appeared better or of greater value. Mr. Bhonsale meeting this contention submitted before me that such an argument cannot be accepted because applying tartrazine which is yellowish in colour could not be for any other purpose but for making the Tur Dal appear better or for the purpose of getting better value. He submitted that if a colour which is not a normal colour was to be applied, as for example, a black or blue colour to the Tur Dal, then there would be some justification that it was not applied with the intention to look better or to obtain greater value. The use of coaltar day or tartrazine which is yellow and which is the normal colour of the Tur Dal cannot be held otherwise than that it

was done with an intention to appear better and for obtaining greater value. I see much force in what Mr. Bhonsale has submitted. Though the argument of Mr. Paranjpe is an ingenious one, I do not think, in the present case, it can be stated that in the absence of evidence on the part of the prosecution that the sample Tur Dal, which was purchased, appeared better or of greater value, the prosecution has failed to establish that the article was misbranded. I am of the opinion that the Tur Dal when tartrazine or coaltar dye was applied to it, it was done with an intention to appear better or to obtain greater value and therefore, misbranded. Thus, though Mr. Paranjpe succeeds in showing that the Tur Dal was not adulterated, he has failed to establish that it was not misbranded, and, therefore, the last submission made by him that this is a case where the conviction should have been u/s 16 (1) (a) (ii) read with the proviso and not u/s 16 (1) (a) (i) does not succeed.

46. It becomes mere academic discussion on this finding. What would have happened if the conviction were u/s 16 (1) (a) (i) and whether the accused person whose conviction is u/s 16 (1) (a) (ii) could be given lesser sentence than the minimum prescribed including giving him the benefit of Probation of Offenders Act. As in the present case, I have held that the conviction cannot be sustained because there was violation of mandatory rules, I do not propose to deal with the submissions made by Mr. Paranjpe on the question of sentence. It was submitted before me that if I were to hold him guilty I should have convicted him u/s 16 (1) (a) (ii) read with the proviso and because of the extenuating circumstances, I should have given him the benefit of the provisions of the Probation of Offenders Act. I do not think that this question arises in the present case and I do not deal with it only for the purpose of academic question. Though it is not absolutely necessary for me to deal with the extraneous circumstances mentioned by Mr. Paranjpe, on the proper construction of section 16 (1) (a) (ii) coupled with the proviso, in my opinion, even in cases under the Prevention of Food Adulteration Act, in a fit case on exercising the judicial discretion, the Court can give lesser sentence and in a proper case, even the benefit of the Probation of Offenders Act can be given. As I have expressed my view, it will be unfair to Mr. Bhonsale if I do not refer to the authority which he has referred to while dealing with the question of sentence.

47. Mr. Bhonsale, relying upon the judgment of P.K. Tejani v. M.R. Dange, (judgment delivered by Krishna Iyer J.), argued that it has been observed that the Probation of Offenders Act is not applicable to offences under the Prevention of Food Adulteration Act, 1954. I have gone through that judgment. It has been observed in that decision:

"The rehabilitatory purpose of the Probation of Offenders Act, 1958, is pervasive enough technically to take within its wings an offence even under the Prevention of Food Adulteration Act. The kindly application of the probation principle to offences under the Prevention of Food Adulteration Act, however, is negatived by the imperative of social defence and the improbabilities of moral proselytisation.

No chances can be taken by society with a man whose anti-social operations, disguised as a respectable trade, imperil numerous innocents. Secondly, these economic offences committed by white collar criminals are unlikely to be dissuaded by the gentle probationary process. Neither casual provocation nor motive against particular persons but planned profit-making from numbers of consumers furnishes the incentive-not easily humanised by the therapeutic probationary measure. It is not without significance that the recent report (47th report) of the Law Commission of India has recommended the exclusion of the Act to social and economic offences by suitable amendments."

48. On reading these observations, it is clear that the neither the Prevention of Food Adulteration Act nor the Probation of Offenders Act prohibits giving of benefit of the said Act to the offenders under the Prevention of Food Adulteration Act. Once the Legislature in its wisdom has not laid down that any particular Act or the benefit under that Act should not be given to the offenders under any other legislation, whatever may be the view the Court may hold in respect of the nature of the offences, it cannot be said that there cannot be a fit or proper case where sufficient reasons can be shown to the Court that an offender is entitled to the benefit under the Probation of Offenders Act. Merely because a person is guilty under the provisions of the Prevention of Food Adulteration Act, it does not mean that all the offenders under the Prevention of Food Adulteration Act are to be tarred with the same brush. If the discretion is to be used in such a case, then that discretion must be used judicially. I am of the opinion that the discretion which is vested in the Court and which has to be exercised in a fit and proper case, where the Court comes to the conclusion that the Probation of Offenders Act may be made applicable, it cannot be said that it cannot do so. The observations of the Supreme Court that are made are general in nature that in cases of offences under the Prevention of Food Adulteration Act, which are against human health, the Court should be reluctant to release persons committing such offences, by giving them the benefit of the provisions of the Probation of Offenders Act. The above observations do not come in the way from exercising judicial discretion to avail the accused of the benefit under the provisions of the Probation of Offenders Act, even when the accused is convicted under the Prevention of Food Adulteration Act. As the question does not arise in the present case, I have come to the conclusion that the prosecution has not established the case against the accused and the accused is entitled to an acquittal. I do not propose to say anything more about the circumstances narrated by Mr. Paranjpe.

49. In the result, rule is made absolute, conviction and sentence passed by the learned Sessions Judge against the accused are set aside. Fine if paid be refunded. Bail bond of accused No. 2 is cancelled.