
(2015) 09 AHC CK 0025

In the Allahabad High Court

Case No : Criminal Misc. Writ Petition No. 23567 of 2015

Toni and Others

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 28-09-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173, 190(1)(d), 378
Food Safety And Standards Act, 2006 — Section 21, 22, 3, 3(j), 31
General Clauses Act, 1897 — Section 6
Mines and Minerals (Development and Regulation) Act, 1957 — Section 21, 4
Penal Code, 1860 (IPC) — Section 272, 273, 378, 379
Uttar Pradesh Excise Act, 1910 — Section 12, 13, 15, 16, 4

Citation : (2015) 09 AHC CK 0025

Hon'ble Judges : Vimlesh Kumar Shukla, J;Arvind Kumar Mishra-I, J

Bench : Division Bench

Advocate : Ashish Mishra, for the Appellant

Final Decision : Dismissed

Judgement

Vimlesh Kumar Shukla, J—Toni s/o Anup Singh and Ajai s/o Ramvir are before this Court with the request to quash the FIR dated 11.09.2015 registered as Case Crime No. 0353 of 2015 under Sections 60, 72 Excise Act and Sections 272, 273 IPC, P.S. Charthawal, District Muzaffar Nagar.

2. Brief background of the case is that Sub-Inspector of U.P. Police- Raj Kumar Singh lodged First Information Report on 11.09.2013 at 6:30 hours mentioning therein that while the members of law enforcing agency were on routine petrol duty, on a tip off given by the informant that the petitioners have brought illicit liquor from Haryana in Chhota Hathi Vehicle and were engaged in adulterating the same with some intoxicant in the jungle situated at Village Chimau behind Shiv Mandir. At the said point of time, Excise Inspector and his associates also came and confirmed the information and both the teams raided the said place and found that the accused persons were engaged in illegal activities. On the spot one Tata Super S. No. HR 58A 5423 with 69 boxes with 628 bottles of

country liquor in the name of Santra NV Distille Ries Ltd. Ambala Haryana was confiscated. Besides this one motorcycle and one plastic bag and other things were recovered. Based on the said raid that has been so conducted, present FIR in question has been lodged and same has impelled the petitioners to be before this Court.

3. Shri Ashish Mishra, counsel for the petitioners submitted with vehemence that once adulteration in question is being made in food stuff, then the entire activity of petitioners is covered by Special Act i.e. Food Safety and Standard Act, 2006 and authorities can take action only under aforementioned Special Act as it postulates an overriding effect over all other food related laws including the F.A. Act and accordingly, invocation of Section 272 and 273 of the Indian Penal Code in matter relating to adulteration is unjustifiable and accordingly, this Court should come to the rescue and reprieve of the petitioners.

4. From the side of the State, learned A.G.A. has contended that this is a glaring case wherein liquor in question has been smuggled from the State of Haryana and thereafter the liquor in question was being adulterated for being further sold and in view of this, the arguments that have been so advanced that action could have been taken under Food Safety and Standard Act, 2006 is wholly unjustifiable and once clear cut cognizable offence is disclosed from the reading of FIR, then to say that no offence has been committed is too far fetched.

5. As much emphasis has been laid on the various provisions of the Food Safety and Standards Act, 2006, hereinafter called "FSSA", we deem it proper to reproduce certain relevant provisions of the Act. FSSA was enacted by the Parliament with a view to consolidate the laws relating to food and to establish the Food Safety and Standards Authority of India for laying down science based standards for articles of food and to regulate their manufacture, storage, distribution, sale and import to ensure availability of safe and wholesome food for human consumption and for matters connected therewith.

6. The statement of object and reasons of the Act reads as under:--

"(1) Multiplicity of foods laws, standard setting and enforcement agencies pervades different sectors of food, which creates confusion in the minds of consumers, traders, manufacturers and investors. Detailed provisions under various laws regarding admissibility and levels of foods additives, contaminants, food colours, preservatives, etc., and other related requirements have varied standards under these laws. The standards are often rigid and non-responsive to scientific advancements and modernization. In view of multiplicity of laws, their enforcement and standard setting as well as various implementing agencies are detrimental to the growth of the nascent food processing industry and is not conducive to effective fixation of food standards and their enforcement.

(2) In as early as in the year 1998, the Prime Minister's Council on Trade and Industry appointed a Subject Group on Food and Agro Industries, which had recommended for one comprehensive legislation on Food with a Food Regulatory

Authority concerning both domestic and export markets. Joint Parliamentary Committee on Pesticide Residues in its report in 2004 emphasized the need to converge all present food laws and to have a single regulatory body. The Committee expressed its concern on public health and food safety in India. The Standing Committee of Parliament on Agriculture in its 12th Report submitted in April 2005 directed that the much needed legislation on Integrated Food Law should be expedited.

(3) As an on going process, the then Member-Secretary, law Commission of India, was asked to make a comprehensive review of Food Laws of various developing and developed countries and other relevant international agreements and instruments on the subject. After making an in depth survey of the International scenario, the then Member-Secretary recommended that the new Food Law be seen in the overall prospective of promoting nascent food processing industry given its income, employment and export potential. It has been suggested that all acts and orders relating to food be subsumed within the proposed Integrated Food Law as the international trend is towards modernization and convergence of regulations of Food Standards with the elimination of multi-level and multi-departmental control. Presently, the emphasis is on (a) responsibility with manufactures, (b) recall, (c) Genetically Modified and Functional Foods, (d) emergency control, (e) risk analysis and communication and (f) Food Safety and Good Manufacturing Practices and Process Control, viz., Hazard Analysis and Critical Control Point.

(4) In this background, the Group of Ministers constituted by the Government of India, held extensive deliberations and approved the proposed Integrated Food Law with certain modifications. The Integrated Food Law has been named as "The Food Safety and Standards Bill, 2005". The main objective of the Bill is to bring out a single statute relating to food and to provide for a systematic and scientific development of Food Processing Industries. It is proposed to establish the Food Safety and Standards Authority of India, which will fix food standards and regulate/monitor the manufacturing, import, processing, distribution and sale of food, so as to ensure and wholesome food for the people. The Food Authority will be assisted by Scientific Committees and Panels in fixing standards and by a Central Advisory Committee in prioritization of the work. The enforcement of the legislation will be through the State Commissioner for Food Safety, his officers and Panchayati Raj/Municipal bodies."

Section 3 of the Act is the definition clause and defines "adulterant" "contaminant" "food" "food additive" "food business" "hazard", "manufacture", "sale", "substance", "sub-standard" and "unsafe food" amongst other words, which read as under:--

"(a) "adulterant" means any material which is or could be employed for making the food unsafe or sub-standard, mis-branded or containing extraneous matter;

(g) "contaminant" means any substance, whether or not added to food, but

which is present in such food as a result of the production (including operations carried out in crop husbandry, animal husbandry or veterinary medicine), manufacture, processing, preparation, treatment, packing, packaging, transport or holding of such food or as a result of environmental contamination and does not include insect fragments, rodent hairs and other extraneous matter;

(j) "food" means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food, to the extent defined in clause (ZK) genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances:

Provided that the Central Government may declare, by notification in the Official Gazette, any other article as food for the purposes of this Act having regards to its use, nature, substance or quality;

(k) "food additive" means any substance not normally consumed as a food by itself or used as a typical ingredient of the food, whether or not it has nutritive value, the intentional addition of which to food for a technological (including organoleptic) purpose in the manufacture, processing, preparation, treatment, packing, packaging, transport or holding of such food results, or may be reasonably expected to result (directly or indirectly), in it or its by-products becoming a component of or otherwise affecting the characteristics of such food but does not include "contaminants" or substances added to food for maintaining or improving nutritional qualities;

(n) "food business" means any undertaking, whether for profit or not and whether public or private, carrying out any of the activities related to any stage of manufacture, processing, packaging, storage, transportation, distribution of food, import and includes food services, caterings services, sale of food or food ingredients;

(u) "hazard" means a biological, chemical or physical agent in, or condition of, food with the potential to cause an adverse health effect;

(zd) "manufacturer" means a person engaged in the business of manufacturing any article of food for sale and includes any person who obtains such article from another person and packs and labels it for sale or only labels it for such purposes;

(zr) "sale" with its grammatical variations and cognate expressions, means the sale of any article of food, whether for cash or on credit or by way of exchange and whether by wholesale or retail, for human consumption or use, or for analysis, and includes an agreement for sale, an offer for sale, the exposing for sale or having in possession for sale of any such article, and includes also an

attempt to sell any such article;

(zw) "substance" includes any natural or artificial substance or other matter, whether it is in a solid state or in liquid form or in the form of gas or vapour;

(zx) "sub-standard" - an article of food shall be deemed to be substandard if it does not meet the specified standards but not so as to render the article of food unsafe;

(zz) "unsafe food" means an article of food whose nature, substance or quality is so affected as to render it injurious to health:

(i) by the article itself, or its package thereof, which is composed, whether wholly or in part, of poisonous or deleterious substances; or

(ii) by the article consisting, wholly or in part, of any filthy, putrid, rotten, decomposed or diseased animal substance or vegetable substance; or

(iii) by virtue of its unhygienic processing or the presence in that article of any harmful substance; or

(iv) by the substitution of any inferior or cheaper substance whether wholly or in part; or

(v) by addition of a substance directly or as an ingredient which is not permitted; or

(vi) by the abstraction, wholly or in part, of any of its constituents; or

(vii) by the article being so coloured, flavoured or coated, powdered or polished, as to damage or conceal the article or to make it appear better or of greater value than it really is; or

(viii) by the presence of any colouring matter or preservatives other than that specified in respect thereof; or

(ix) by the article having been infected or infested with worms, weevils or insects; or

(x) by virtue of its being prepared, packed or kept under insanitary conditions; or

(xi) by virtue of its being mis-branded or sub-standard or food containing extraneous matter; or

(xii) by virtue of containing pesticides and other contaminants in excess of quantities specified by regulations."

Section 41 deals with power of search, seizure, investigation, prosecution and procedure whereas section 42 deals with the procedure for launching prosecution. Both the sections reads as under:--

41. Power of search, seizure, investigation, prosecution and procedure thereof -

(1) Notwithstanding anything contained in sub-section (2) of section 31, the Food

Safety Officer may search any place, seize any article of food or adulterant, if there is a reasonable doubt about them being involved in commission of any offence relating to food and shall thereafter inform the Designated Officer of the actions taken by him in writing:

Provided that no search shall be deemed to be irregular by reason only of the fact that witnesses for the search are not inhabitants of the locality in which the place searched is situated.

(2) Save as in this Act otherwise expressly provided, provisions of the Code of Criminal Procedure, 1973 relating to search, seizure, summon, investigation and prosecution, shall apply, as far as may be, to all action taken by the Food Safety Officer under this Act.

42. Procedure for launching prosecution - (1) The Food Safety Officer shall be responsible for inspection of food business, drawing samples and sending them to Food Analyst for analysis.

(2) The Food Analyst after receiving the sample from the Food Safety Officer shall analyse the sample and send the analysis report mentioning method of sampling and analysis within fourteen days to Designated Officer with a copy to Commissioner of Food Safety.

(3) The Designated Officer after scrutiny of the report of Food Analyst shall decide as to whether the contravention is punishable with imprisonment or fine only and in the case of contravention punishable with imprisonment, he shall send his recommendations within fourteen days to the Commissioner of Food Safety for sanctioning prosecution.

(4) The Commissioner of Food Safety shall, if he so deems fit decide, within the period prescribed by the Central Government, as per the gravity of offence, whether the matter be referred to,--

(a) a court of ordinary jurisdiction in case of offences punishable with imprisonment for a term up to three years; or

(b) a Special Court in case of offences punishable with imprisonment for a term exceeding three years where such Special Court is established and in case no Special Court is established, such cases shall be tried by a court of ordinary jurisdiction.

(5) The Commissioner of Food Safety shall communicate his decision to the Designated Officer and the concerned Food Safety Officer who shall launch prosecution before courts of ordinary jurisdiction or Special Court, as the case may be; and such communication shall also be sent to the purchaser if the sample was taken under section 40.

Chapter IX of the Act deals with the offences and Penalties with regard to adulteration of food stuff, the relevant provisions of the statute read as under:--

"48. General provisions relating to (1) A person may render any article of food injurious to health by means of one or more of the following operations, namely:---

- (a) adding any article or substance to the food;
- (b) using any article or substance as an ingredient in the preparation of the food;
- (c) abstracting any constituents from the food; or
- (d) subjecting the food to any other process or treatment;

with the knowledge that it may be sold or offered for sale or distributed for human consumption.

(2) In determining whether any food is unsafe or injurious to health, regard shall be had to--

(a) (i) the normal conditions of use of the food by the consumer and its handling at each stage of production, processing and distribution,

(ii) the information provided to the consumer, including information on the label, or other information generally available to the consumer concerning the avoidance of specific adverse health effects from a particular food or category of foods not only to the probable, immediate or short-term or long-term effects of that food on the health of a person consuming it, but also on subsequent generations;

(iii) to the probable cumulative toxic effects;

(iv) to the particular health sensitivities of a specific category of consumers where the food is intended for that category of consumers; and

(v) also to the probable cumulative effect of food of substantially the same composition on the health of a person consuming it in ordinary quantities;

(b) the fact where the quality or purity of the article, being primary food, has fallen below the specified standard or its constituents are present in quantities not within the specified limits of variability, in either case, solely due to natural causes and beyond the control of human agency, then such article shall not be deemed to be unsafe or sub-standard or food containing extraneous matter.

Explanation.--For the purposes of this section, "injury", includes any impairment, whether permanent or temporary, and "injurious to health" shall be construed accordingly.

49. General provisions relating to penalty - While adjudging the quantum of penalty under this Chapter, the Adjudicating Officer or the Tribunal, as the case may be, shall have due regard to the following:---

(a) the amount of gain or unfair advantage, wherever quantifiable, made as a result of the contravention,

- (b) the amount of loss caused or likely to cause to any person as a result of the contravention,
- (c) the repetitive nature of the contravention,
- (d) whether the contravention is without his knowledge, and
- (e) any other relevant factor.

50. Penalty for selling food not of the nature or substance or quality demanded - Any person who sells to the purchaser's prejudice any food which is not in compliance with the provisions of this Act or the regulations made thereunder, or of the nature or substance or quality demanded by the purchaser, shall be liable to a penalty not exceeding two lakh rupees.

Provided that the persons covered under sub-section (2) of section 31, shall for such non-compliance be liable to a penalty not exceeding twenty five thousand rupees.

51. Penalty for sub-standard food - Any person who whether by himself or by any other person on his behalf manufactures for sale or stores or sells or distributes or imports any article of food for human consumption which is sub standard, shall be liable to a penalty which may extend to five lakh rupees;

52. Penalty for misbranded food - (1) Any person who whether by himself or by any other person on his behalf manufactures for sale or stores or sells or distributes or imports any article of food for human consumption which is misbranded, shall be liable to a penalty which may extend to three lakh rupees.

(2) The Adjudicating Officer may issue a direction to the person found guilty of an offence under this section, for taking corrective action to rectify the mistake or such article of food shall be destroyed.

53. Penalty for misleading advertisement - (1) Any person who publishes, or is a party to the publication of an advertisement, which--

- (a) falsely describes any food; or
- (b) is likely to mislead as to the nature or substance or quality of any food or gives false guarantee, shall be liable to a penalty which may extend to ten lakh rupees.

(2) In any proceeding the fact that a label or advertisement relating to any article of food in respect of which the contravention is alleged to have been committed contained an accurate statement of the composition of the food shall not preclude the court from finding that the contravention was committed.

54. Penalty for food containing extraneous matter - Any person whether by himself or by any other person on his behalf manufactures for sale or stores or sells or distributes or imports any article of food for human consumption containing extraneous matter, shall be liable to a penalty which may extend to

one lakh rupees.

55. Penalty for failure to comply with the directions of Food Safety Officer - If a food business operator or importer without reasonable ground, fails to comply with the requirements of this Act or the rules or regulations or orders issued thereunder, as directed by the Food Safety Officer, he shall be liable to a penalty which may extend to two lakh rupees.

56. Penalty for unhygienic or unsanitary processing or manufacturing of food - Any person who, whether by himself or by any other person on his behalf, manufactures or processes any article of food for human consumption under unhygienic or unsanitary conditions, shall be liable to a penalty which may extend to one lakh rupees.

57. Penalty for processing adulterant - (1) Subject to the provisions of this chapter, if any person who whether by himself or by any other person on his behalf, imports or manufactures for sale, or stores, sells or distribute any adulterant shall be liable -

(i) where such adulterant is not injurious to health, to a penalty not exceeding two lakh rupees;

(ii) where such adulterant is injurious to health, to a penalty not exceeding ten lakh rupees.

(2) In a proceeding under sub-section (1), it shall not be a defence that the accused was holding such adulterant on behalf of any other person.

58. Penalty for contravention for which no specific penalty is provided -Whoever contravenes any provisions of this Act or the rules or regulations made thereunder, for the contravention of which no penalty has been separately provided in this Chapter, shall be liable to a penalty which may extend to two lakh rupees.

59. Punishment for unsafe food - Any person who, whether by himself or by any other person on his behalf, manufactures for sale or stores or sells or distributes or imports any article of food for human consumption which is unsafe, shall be punishable,--

(i) where such failure or contravention does not result in injury, with imprisonment for a term which may extend to six months and also with fine which may extend to one lakh rupees;

(ii) where such failure or contravention results in a non-grievous injury, with imprisonment for a term which may extend to one year and also with fine which may extend to three lakh rupees;

(iii) where such failure or contravention results in a grievous injury, with imprisonment for a term which may extend to six years and also with fine which may extend to five lakh rupees;"

Section 89 gives overriding effect of the Act over the other food related laws and reads as under:--

"89. Overriding effect of this Act over all other food related laws - The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

Section 97 of the Act seeks to repeal the enactment and orders specified in the Second Schedule immediately with effect from the date on which the Act is enacted and comes into force. It further provides that if there is any other law for the time being in force in any State, corresponding to the Act, the same shall, upon the commencement of the Act, stand repealed and in such case, the provisions of Section 6 of the General Clauses Act, 1897 shall apply.

"97. Repeal and savings - (1) With effect from such date as the Central Government may appoint in this behalf, the enactment and orders specified in the Second Schedule shall stand repealed:

Provided that such repeal shall not affect:---

(i) the previous operations of the enactment and orders under repeal or anything duly done or suffered thereunder; or

(ii) any right, privilege, obligation or liability acquired, accrued or incurred under any of the enactment orders under repeal; or

(iii) any penalty, forfeiture or punishment incurred in respect of any offences committed against the enactment and orders under repeal; or

(iv) any investigation or remedy in respect of any such penalty, forfeiture or punishment,

and any such investigation, legal proceedings or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed, as if this Act had not been passed:

(2) If there is any other law for the time being in force in any State, corresponding to this Act, the same shall upon the commencement of this Act, stand repealed and in such case, the provisions of section 6 of the General Clauses Act, 1897 shall apply as if such provisions of the State law had been repealed.

(3) Notwithstanding the repeal of the aforesaid enactment and orders the licences issued under any such enactment or order, which are in force on the date of commencement of this Act, shall continue to be in force till the date of their expiry for all purposes, as if they had been issued under the provisions of this Act or the rules or regulations made thereunder.

(4) Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act or

orders after the expiry of a period of three years from the date of the commencement of this Act."

7. FSSA was born out of the need for integrated food law, prioritising consumer safety and harmonising food standards with international regulation. FSSA integrates eight different food laws (i) Prevention of Food Adulteration Act, 1954 (ii) The Fruit Products Order, 1955 (iii) The Meat Fruit Products Order, 1973 (iv) The Vegetable Oil Products (Control) Order, 1947 (v) The Edible Oils Packaging (Regulation) Order, 1998 (vi) The Solvent Extracted Oil, De oiled, and Edible Flour (Control Order), 1967 (vii) The Milk and Milk Products Order, 1992 (viii) Any other order issued under the Essential Commodities Act, 1955 relating to food, into one and is comprehensive enactment aimed at ensuring public health and safety.

8. The provisions quoted above would go to show that it is an act to consolidate the laws relating to Food Safety and to establish the Food Safety and Standards Authority of India for laying down science based standards of articles of food and to regulate their manufacturing, storage, distribution, sale and import to ensure availability of sale and wholesome food for human consumption and for matters connected therewith or incidental thereto.

9. Under FSSA, in exercise of power conferred by Clause (o) of sub-section (2) of Section 92 read with Section 31, Regulations known as "The Food Safety and Standards (Licensing and Registration of Food Business) Regulation, 2011 has been framed. FSSA compels the licensing/registering of every single entity in food business. The entities have been categorised as petty food manufacturers and food business operators depending upon their manufacturing capacities. The said provision in question is self contained and the issue is that once alcoholic drink falls within the definition of "Food" under Section 3(j) and adulteration is being done after smuggling the liquor in question, then can action be taken under the provisions of U.P. Excise Act and Indian Penal Code or not.

10. Till date, Food Safety Standards Authority of India hereinafter called FSSAI has not set standards for alcoholic drinks including beer, whisky, vodka, brandy, gin and rum. FSSAI is a central body which lays down science based standard for articles of food and regulate their sale, manufacturing, storage, distribution and import to ensure availability of safe and wholesome food for human consumption. Till standards are not set for alcohol and alcoholic beverages, action is not at all feasible under FSSA.

11. Recently Apex Court while dealing with the matter of Mines and Mineral (Development and Regulation) Act 1957 vis-?-vis the provisions of Indian Penal Code has considered the issue at great length.

12. Apex Court, in the case of State of NCT New Delhi v. Sanjay, Criminal Appeal No. 499 of 2011, decided on 4.9.2014, while deciding the bunch matter has precisely taken the view, that the prohibition contained in Section 22 of the Act against prosecution of a person except on complaint made by the officer is

attracted only when such a person is sought to be prosecuted for contravention of provision of Section 4 of the Act and not for any act or omission which constitute an offence under Indian Penal Code. Relevant extract of the said judgment is as follows:

"Reading the provisions of the Act minutely and carefully, prima facie we are of the view that there is no complete and absolute bar in prosecuting persons under the Indian Penal Code where the offences committed by persons are penal and cognizable offence.

Sub-section (1A) of Section 4 of the MMDR Act puts a restriction in transporting and storing any mineral otherwise than in accordance with the provisions of the Act and the rules made thereunder. In other words no person will do mining activity without a valid lease or license. Section 21 is a penal provision according to which if a person contravenes the provisions of Sub-section (1A) of Section 4 shall be prosecuted and punished in the manner and procedure provided in the Act. Sub-section (6) has been inserted in Section 4 by amendment making the offence cognizable notwithstanding anything contained in the Code of Criminal Procedure 1973.

Section 22 of the Act puts a restriction on the court to take cognizance of any offence punishable under the Act or any rule made thereunder except upon a complaint made by a person authorized in this behalf.

It is very important to note that Section 21 does not begin with a non-obstante clause. Instead of the words

"notwithstanding anything contained in any law for the time being in force no court shall take cognizance.....", the Section begins with the words "no court shall take cognizance of any offence."

Considering the principles of interpretation and the wordings used in Section 22, in our considered opinion, the provision is not a complete and absolute bar for taking action by the police for illegal and dishonestly committing theft of minerals including sand from the river bed.

There cannot be any dispute with regard to restrictions imposed under the MMDR Act and remedy provided therein. In any case, where there is a mining activity by any person in contravention of the provisions of Section 4 and other sections of the Act, the officer empowered and authorized under the Act shall exercise all the powers including making a complaint before the jurisdictional magistrate. It is also not in dispute that the Magistrate shall in such cases take cognizance on the basis of the complaint filed before it by a duly authorized officer. In case of breach and violation of Section 4 and other provisions of the Act, the police officer cannot insist Magistrate for taking cognizance under the Act on the basis of the record submitted by the police alleging contravention of the said Act. In other words, the prohibition contained in Section 22 of the Act against prosecution of a person except on a complaint made by the officer is attracted

only when such person sought to be prosecuted for contravention of Section 4 of the Act and not for any act or omission which constitute an offence under Indian Penal Code.

However, there may be situation where a person without any lease or licence or any authority enters into river and extracts sands, gravels and other minerals and remove or transport those minerals in a clandestine manner with an intent to remove dishonestly those minerals from the possession of the State, is liable to be punished for committing such offence under Sections 378 and 379 of the Indian Penal Code.

From a close reading of the provisions of MMDR Act and the offence defined under Section 378, IPC, it is manifest that the ingredients constituting the offence are different. The contravention of terms and conditions of mining lease or doing mining activity in violation of Section 4 of the Act is an offence punishable under Section 21 of the MMDR Act, whereas dishonestly removing sand, gravels and other minerals from the river, which is the property of the State, out of State's possession without the consent, constitute an offence of theft.

Hence, merely because initiation of proceeding for commission of an offence under the MMDR Act on the basis of complaint cannot and shall not debar the police from taking action against persons for committing theft of sand and minerals in the manner mentioned above by exercising power under the Code of Criminal Procedure and submit a report before the Magistrate for taking cognizance against such person. In other words, in a case where there is a theft of sand and gravels from the Government land, the police can register a case, investigate the same and submit a final report under Section 173, Cr.P.C. before a Magistrate having jurisdiction for the purpose of taking cognizance as provided in Section 190(1)(d) of the Code of Criminal Procedure.

After giving our thoughtful consideration in the matter, in the light of relevant provisions of the Act vis-?-vis the Code of Criminal Procedure and the Indian Penal Code, we are of the definite opinion that the ingredients constituting the offence under the MMDR Act and the ingredients of dishonestly removing sand and gravel from the river beds without consent, which is the property of the State, is a distinct offence under the IPC. Hence, for the commission of offence under Section 378 Cr.P.C., on receipt of the police report, the Magistrate having jurisdiction can take cognizance of the said offence without awaiting the receipt of complaint that may be filed by the authorized officer for taking cognizance in respect of violation of various provisions of the MMRD Act. Consequently the contrary view taken by the different High Courts cannot be sustained in law and, therefore, overruled. Consequently, these criminal appeals are disposed of with a direction to the concerned Magistrates to proceed accordingly."

13. Here in the case in hand, the offence that has been alleged is one under Section 60/72 Excise Act and Section 272, 273 IPC, P.S. Charthawal, District

Muzaffar Nagar, inasmuch as, the liquor that was supposed to be sold in the State of Haryana has been smuggled inside the State of U.P. and thereafter in the said liquor in question, mixing was being done with the intent to further sell it.

14. In the State of U.P., import, export, transport, manufacture, sale and possession of liquor and intoxicating drugs are governed by the provisions of U.P. Excise Act, 1910. Under the said Act, Section 4 authorises that State Government is free to declare any substance to be "liquor" for the purpose of the said Act. Section 6 authorises State Government to declare limit of sale by "retail" and sale by "wholesale". Chapter III, Section 12 deals with import of intoxicants, Section 13 with export and transport of intoxicants; Section 15 provides for that passes are necessary for import, export and transport. Section 16 empowers Collector to issue such pass. Chapter IV deals with manufacture, possession and sale, and said activity cannot be carried out, without there being proper authorisation. Chapter X deals with offences and penalties. Section 60, 63 and 72 being relevant are extracted below:

"60. Penalty for unlawful import, export, transport, manufacture, possession, sale, etc.--(1) Whoever, in contravention of this Act or of any rule or provision made thereunder, or of any licence, permit of pass obtained thereunder:--

- (a) imports, exports, transports or possess any intoxicant other than charas; or
- (b) cultivated any hemp plant (*cannabis sativa*); or
- (c) collects or sells any portion of the hemp plant (*cannabis sativa*); or
- (d) collects or sells any portion of the hemp plant (*cannabis sativa*) from which any intoxication drug can be manufactured; or
- (d) constructs or works any distillery, brewery or vintnery; or
- (e) uses, keep or has in his-possession any material, still, utensil, implement or apparatus, whatsoever, for the purpose of manufacturing any intoxicant other than tari; or
- (f) removes any intoxicant from and distillery, brewery, vintnery or warehouse licensed, established or continued under this Act; or
- (g) bottles any liquor for the purposes of sale; or
- (h) sell any intoxicant, save in the case provided for by Section 61; or
- (i) taps, or draws tari from any tari-producing tree in the areas notified under Section shall be punished with imprisonment which may extend to two years and with fine which shall, in the case of an offence under clauses(i) not be less than ten times the amount of duty which would have been leviable if such intoxicant had been dealt with in accordance with this Act and the rules and orders made thereunder or in accordance with any licence, permit or pass obtained there under, and in any other case, not be less than ten times the amount of such

duty, or five hundred rupees whichever is greater.

(2) Whoever in contravention of this Act or any rule or order made thereunder or of any licence, permit or pass, obtained under this Act, manufactures any intoxicant or imports, exports, transports or possesses any charas, shall be punished with imprisonment which shall not be less than six months and which may extend to three years and also with fine which shall not be less than two thousand rupees and which may extend to five thousand rupees.

(3) Whoever, in contravention of this Act, or any rule or order made there under, consumes any intoxicant, shall be punished with fine which shall not be less than five hundred rupees and which may extend to one thousand rupees.

60- A. Penalty for use of place for commission of an offence respecting Cocaine.

60- B Security for abstaining from Cocaine offences.

63. Penalty for possession of intoxicant unlawfully imported, etc.--Whoever, without lawful authority, has in his possession any quantity of any [intoxicant] knowing them same to have been unlawfully imported, transported or manufactured or knowing the prescribed duty not to have been paid thereon, shall be punished with imprisonment for a term which may extend to [One year] or with fine which may extend to [Five thousand] rupees, or with both.

72. What things are liable to confiscation - (1) Whenever an offence punishable under this Act has been committed-

(a) every [intoxicant] in respect of which such offence has been committed;

(b) every still, utensil, implement or apparatus and all materials by means of which such offence has been committed;

(c) every [intoxicant] lawfully imported, transported, manufactured, held in possession or sold along with or in addition to any [intoxicant] liable to confiscation under clause (a);

(d) every receptacle, package and covering in which any [intoxicant]² as aforesaid or any materials, still, utensil, implement or apparatus is or are found, together with the other contents (if any) of such receptacle or package; and

(e) every animal, cart, vessel or other conveyance used in carrying such receptacle or package; shall be liable to confiscation.

(2) Where anything or animal is seized under any provision of this Act and the Collector is satisfied for reasons to be recorded that an offence has been committed due to which such thing or animal has become liable to confiscation under sub-section (1), he may order confiscation of such thing or animal whether or not a prosecution for such offence has been instituted:

Provided that in the case of anything (except an intoxicant) or animal referred to in sub-section (1), the owner thereof shall be given an option to pay in lieu of its

confiscation such fine as the Collector thinks adequate not exceeding its market value on the date of its seizure.

(3) Where the Collector on receiving report of seizure or on inspection of the seized thing, including any animal, cart, vessel or other conveyance, is of the opinion that any such thing or animal is subject to speedy wear and tear or natural decay or it is otherwise expedient in the public interest so to do, he may order such thing (except an intoxicant) or animal to be sold at the market price by auction or otherwise.

(4) Where any such thing or animal is sold as aforesaid, and -

(a) no order of confiscation is ultimately passed or maintained by the Collector under sub-section (2) or on review under sub-section (6); or

(b) an order passed on appeal under sub-section (7) so requires; or

(c) in the case of a prosecution being instituted for the offence in respect of which the thing or the animal seized, the order of the Court so requires;

the sale proceeds after deducting the expenses of the sale shall be paid to the person found entitled thereto;

(5) (a) No order of confiscation under this section shall be made unless the owner thereof or the person from whom it is seized is given -

I. a notice in writing informing him of the grounds on which such confiscation is proposed;

II. an opportunity of making a representation in writing within such reasonable time as may be specified in the notice; and

III. a reasonable opportunity of being heard in the matter.

(b) Without prejudice to the provisions of clause (a), no order confiscating any animal, cart, vessel, or other conveyance shall be made if the owner thereof proves to the satisfaction of the Collector that it was used in caring the contraband goods without the knowledge or connivance of the owner, his agent, if any, and the person-in-charge of the animal, cart, vessel or other conveyance and that each of them had taken all reasonable and necessary precautions against such use.

(6) Where on an application in that behalf being made to Collector within one month from any order of confiscation made under subsection (2), or as the case may be, after issuing notice on his own motion within one month from the order under that sub-section refusing confiscation to the owner of the thing or animal seized or to the person from whose possession it was seized, to show cause why the order should not be reviewed, and after giving him a reasonable opportunity of being heard, the Collector is satisfied that the order suffers from a mistake apparent on the face of the record including any mistake of law, he may pass such order on review as he thinks fit.

(7) Any person aggrieved by an order of confiscation under sub-section(2) or sub-section (6) may, within one month from the date of the communication to him of such order, appeal to judicial authority as the State Government may appoint in this behalf and the judicial authority shall, after giving an opportunity to the appellant to be heard, pass such order as it may think fit, confirming, modifying or annulling the order appealed against.

(8) Where a prosecution is instituted for the offence in relation to which such confiscation was ordered the thing or animal shall, subject to the provisions of sub-section (4), be disposed of in accordance with the order of the Court.

(9) No order of confiscation made by the Collector under this section shall prevent the infliction of any punishment to which the person affected thereby may be liable under this Act."

15. Once such is the factual situation that is so emerging that smuggling activity is there by bringing the liquor in the State of U.P. wherein the same is not all supposed to be sold without any authorisation and thereafter the said liquor in question was being adulterated for being further sold, then to say that prima-facie offence under Section 272, 273 IPC is not made out, cannot be accepted in the facts of the case. Sections 272 and 273 IPC reads as under:

"272. Adulteration of food or drink intended for sale:-- Whoever adulterates any article of food or drink, so as to make such article noxious as food or drink, intending to sell such article as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extended to six months, or with fine, which may extend to one thousand rupees, or with both.

273. Sale of noxious food or drink:-- Whoever sells, or offers or exposes for sale, as food or drink, any article which has been rendered or has become noxious or is in a state unfit for food or drink, knowing or having reason to believe that the same is noxious, or is in a state unfit for food or drink, knowing or having reason to believe that the same is noxious as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both."

16. Section 272 IPC, reproduced hereinabove, is attracted when a person adulterates an article of food with the intention to sell such an article or knowing that it is likely that the article will be sold as food or drink. Here, in the case in hand, the liquor in question illegally smuggled was being adulterated with the intention to sell such an article and once such is the factual that is so emerging then apart from the distinct offence under Section 60, 72 of the Excise Act, offences under Section 272, 273 IPC is also attracted, and the FIR in question by no stretch of imagination can be quashed as has been prayed for.

17. The Judgment in the case of M/s. Pepsico India Holdings (Pvt.) Ltd. & Another v. State of U.P. and others 2010 (6) ALJ 30 is not at all applicable or

attracted in the facts of the present case as in the said case, finding has been returned that there has been no allegation in the FIR that the petitioner-company or its employees or agents had kept its products with the intention to sell the same or knowing that the products are likely to be sold as food or drink or that the said products were exposed or offered for sale with the intention to sell the same on knowing that the products are likely to be sold as food or drink or the said products are for exports or for sale.

18. Once such is the background of the case, then the principles laid down therein is not at all applicable or attracted in the case in hand. In view of this, writ petition sans merit and is accordingly, dismissed.