(1985) 12 KL CK 0025

High Court Of Kerala

Case No: Criminal A. No. 205 of 1983

Food Inspector, Palghat Municipality		APPELLANT
	Vs	
Karingarappnlly Co-Op Milk Society Ltd. and Others		RESPONDENT

Date of Decision: Dec. 10, 1985

Acts Referred:

- Prevention of Food Adulteration Act, 1954 - Section 10, 11, 11(1)(c), 11[1)[b), 13

Citation: (1986) 23 KLJ 29

Hon'ble Judges: U.L. Bhat, J; K.G. Balakrishnan, J

Bench: Division Bench

Advocate: K.J. Joseph and Raju Joseph, for the Appellant; M.N. Sukumaran Nair, for the Respondent

Judgement

Bhat, J.

This appeal has come up before us on a reference by a learned single Judge of this Court who took the view that the decisions of single Benches of this Court in Savanna v. State of Kerala (1985 KLT 463) Karunan v. State of Kerala (1985 KLT 523) and Chockalingam v. Food Inspector (1981 KLT 628) require re-consideration. Appellant, Food Inspector, Palghat Municipality, preferred complaint against the four respondents herein under Sec. 16 [1] [a] [i] and (ii) read with Sections 7 (i) and (v) and Sec. (ia) (m) of the Prevention of Food Adulteration Act 1954 (for short ''the Act'') and Rules 44(b) and 50(a) of Prevention of Food Adulteration Rules, 1955 (tor short ''the Rules''). First respondent is the Karingarappulty Co-operative Milk Supply Society to which respondents 2 and 3 are Secretary and President respectively. Fourth respondent is a paid salesman. Registered office of the Society is in Kodumba. It appears, the society sells milk within the limits of Palghat Municipality, though without licence. On 10-12-1980 at about 8 a.m., when the fourth respondent was carrying cows'' milk for sale, Food Inspector, P.W. 1, stopped him and after

observing the necessary legal formalities, purchased from him 750 ml. of milk for the purpose of analysis. The milk was dealt with in accordance with law and one of the samples sent to the Public Analyst for analysis. The Analyst submitted Ext.P12 report to the effect that the sample contained.

Milk fat	-	5,6 percent
Milk solids non fat	-	7.6 percent
Test for starch	-	Negative
Test for cane sugar	-	Negative.

The Public Analyst opined that the sample did not conform to the standards prescribed for Cow''s milk under the Rules and was therefore adulterated. He was further of the opinion that the sample contained not less than 10 percent of added water as calculated from the milk solids non fat content. He stated that the sample was received properly sealed and fastened and the seal was intact and unbroken and the seal on the container tallied with the specimen impression of the seal separately sent by the Food Inspector and the sample was in a condition fit for analysis.

2. The complaint presented by P.W. 1. the Food Inspector, before the the Chief Judicial Magistrate was dated 17-1-1981. It bears the court seal on 20-1-1981 and was taken on file and summons ordered on 21-1-1981. The Local (Health) Authority despatched to the respondents, copies of the Public Analyst''s report along with intimations as required under Sec. 13(2) of the Act and Rule 9(A) of the Rules. Copies of the intimation are Ext.P15 series and acknowledgements are Ext.P16 series Copies bear the date 17-1-1981. One of the acknowledgements bears the date 19-1-1981. It is not clear when the other respondents were served.

3. Respondents denied their guilt. Prosecution examined three witnesses and marked Exts P1 to P18. Defence examined one witness and marked Exts Dl to D3. Trial court accepted the prosecution case and held that the sample did not conform to the standards prescribed under the Rules, that the milk belonged to the society and was sold by the fourth respondent, that respondents 2 and 3 were responsible for the conduct of the business and were therefore liable and there was contravention of Rule 50 (a) of the Rules also and accordingly convicted all the respondents under Sec. 16 (1) (a) (i) read with Sec. 7 (1) of the Act as well as Rule 50 (a) of the Rules and sentenced all of them under the former count though not under the latter count. In appeal by the respondents, learned Sessions Judge took the view that respondents 2 and 3, President and Secretary of the Society, were not liable as they were not impleaded personally, that rule 50 (a) was not violated and that there

was non-compliance with Sec. 13 (2) of the Act and Rule 9-A of the Rules, and accordingly set aside the conviction and sentence and acquitted the respondents.

4. Though all the accused are respondents in the appeal, appellant seeks reversal of acquittal only in regard to respondents 1 and 4. According to the appellant. Rule 9-A of the Rules which effectuates Sec. 13 (2) of the Act has been complied with and in any event, since there has been substantial compliance and no prejudice has been made out, acquittal cannot be sustained. This contention is rebutted by the learned counsel for the respondents who would content that Sec. 13(2) of the Act and Rule 9-A of the Rules are mandatory provisions which require to be strictly complied with and any non-compliance to any degree gives rise to presumption of prejudice and therefore acquittal has to be sustained. Learned counsel raised a further contention that proviso to Sec. 2(ia)(m) of the Act would be attracted in the case since milk is primary food and the fall in standards evidenced by the deficiency in milk solids non fat content in the sample was due solely to natural causes and beyond the control of human agency. Public Analyst reported that the sample contained 10 percent added water. This opinion was based not on the result of Hortvet''s method (freezing point test) which alone is the reliable test. It was based on calculation from the milk solids non fat content, which is an unreliable method. Hence the presence of added water cannot be said to be proved beyond reasonable doubt. Public Analyst reported that sample contained 5.6 percent of milk fat (as against the prescribed statutory minimum of 3.5 percent) and 7.6 percent of milk solids non fat (as against the prescribed statutory minimum of 8.5 percent). In the absence of added water since there was excess of milk fat content, percentage of milk solids non fat could not be less than the minimum prescribed. Therefore, according to learned counsel, a presumption could be drawn that the deficiency in milk solids non fat was due solely the natural causes and beyond control of human agency. At any rate, it is contended, this would disclose that there must have been mistake in analysis or error in calculation by the Public Analyst.

5. We will first take up for consideration the contention relating is to proviso to Sec. 2(1a)(m) of the Act. According to this provision an article of food shall be deemed to be adulterated "if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities, not within the prescribed limits of variability but which does not render it injurious to health". The proviso states "where the quality or purity of the article, being primary food, has fallen below the prescribed standards or its constituents are present in quantities not within the prescribed limits of variability, in either case, solely due to natural causes and beyond the control of human aqency then, such article shall not be deemed to be adulterated within the meaning of this sub-clause". According to Sec. 2(xii-a) ''primary food'' means any article of food, being a produce of agriculture or horticulture in its natural form. Sec. 2(xii) states that "prescribed" means prescribed by Rules made under the Act.

6. Sec. 3 of the Act empowers the Central Government to constitute a committee called Central Committee for Food Standards to advise the Central Government and State Governments on matters arising out of the administration of the Act. Section 23 confers on the Central Government power to make Rules. Central Government may after consultation with the Committee make Rules to carry our the provisions of the Act. Such Rules may provide, inter alia, for defining the standards of quality for, and fixing the limits of variability permissible in respect of, any article of food. It was in exercise of this power that the Rules were framed.

7. Rule 50 (1) (a) states that no person shall manufacture, sell, stock, distribute or exhibit for sale milk of all classes and designations except under licence. Rule 44 (b) of the Rules state a that not with standing the provisions of Rule 43, no person shall either by himself or by any servant or agent sell milk which contains any added water. Rule 5 states that standards of quality of the various articles "of food specified in Appendix B to the Rules are as defined in the Appendix. Item All of Appendix B lays down the standards of milk and milk products. Milk of different classes and different designations shall conform to the standards laid down in the table below, item A. 11.01.11. In Kerala, minimum percentages in regard to cow''s milk are fixed as 3. 5 percent for milk fat content and 8 5 percent for milk solid non fat content.

8. This Court had occasion to deal with the nature of evidence required to show that a sample of milk contained added water contrary to Rule 44(b) of the Rules. The leading case on the point is Food Inspector v. Rajan (1976 KLT 74). A Division Bench of this Court, relying on Public Prosecutor Vs. Kalloor Rayavaram Co-operative Milk Supply Society Ltd., , M.R.Ruparelv. State of Mahalashtra (1965) II S. C. W. R 561), Gopinathan Nair v. Palatni (1974 KLT 248), State of Kerala v. Vasudevan Nair (1974 KLT 617) (F. B.) and certain passages in Pearson on Chemical Analysis of Foods (5th Edition page 336) and Woodman on Food Analysis held that freezing point test is a reliable method of finding out the water content in a sample of milk to see if there has been contravention of Rule 44 (b). In Vasudevan Nair''s case (1974 KLT 617 F.B), Kader J. observed that "Hortvet''s method has been accepted as a more dependable and safe method for determining whether there is added water or not in a given sample of milk". In order to convict an accused for violation of Rule 44 (b) of the Rules, it has to be proved beyond reasonable doubt that the milk dealt with by him contained added water. This Court has consistently taken the view that freezing point test or Hortvet''s method is a reliable and safe method for detecting presence and extent of added water. Conversely, presence and extent of added water detected on calculation of milk solids non fat content may not be acted upon to hold that contravention of Rule 44 (b) has been established beyond reasonable doubt.

9. In the present case, obviously, the Public Analyst did not adopt the Hortvet''s method for detecting added water. The report shows that his opinion that the sample contained not less than 10 percent of added water was based on calculation

from milk solids non fat content. Obviously, respondents cannot be found guilty of violation of Rule 44 (b) of the Rules. In Savanna''s case (1985 K. V T. 463) also, the Public Analyst gave his opinion regarding the presence of added water based on calculation of milk solids non fat content and without following Hortvet''s method. So also in Karunan''s case (1985 KLT 523). However the report clearly shows that the sample was deficient in milk solids non fat content and hence its quality fell below the prescribed standards. The sample has to be treated as "adulterated" within the meaning of Sec. 2(1a)(m) of the Act, The only defence open to the respondents is to invoke the protection of the proviso.

10. Undoubtedly, the burden of establishing that the proviso to Sec. 2(1a)(m) is attracted in a given case rests entirely on the accused It is for the accused to prove that the fall in standard was solely due to natural cases and beyond the control of human agency. No part of the burden rests on the prosecution. It has been so laid down in Janardhanan Nair v. Mohammadkunju (1981 K L, T. 327) and Rajan v Food Inspector (1982 K L. T, 706) and also in Bavanna''s case (1985 KLT 463). With great respect, we agree. Of course, the burden of proof resting on the accused is not as onerous as that resting on the prosecution. While prosecution has to establish the guilt of the accused beyond reasonable doubt, where the accused has to discharge the burden resting on him he need only establish preponderance of probability in favor of his case. He may do so by adducing independent evidence; he may do so even by relying on the evidence adduced by the prosecution, the material on record and the attendant circumstances.

11. This Court has consistently accepted that milk is primary food. See Food Inspector v. Abdul Khader (1978 KLT 830), Food Inspector, Alwaye v. A.V.S. Das (1985 KLT 858) and also Bavanna''s case (1985 KLT 463), This is not challenged by the appellant.

12. In Bavanna''s case (1985 KLT 463), relying on the observations in Rajan''s case (1976 KLT 74) and the decision of the Allahabad High Court in Dhani Ram v. State (1979 F. A. J. 107), State v. Gangadhar Abarao Mankape (1981 F. A. J. 77) it was held that burden of proving applicability of proviso to Sec. 2(1a)(m) is discharged and at any rate, genuine doubt is created in the mind of the court as to the correctness of the analysis. Learned Judge observed:

...when fat content was above the prescribed standard, deficiency in non fatty solids cannot lead to the conclusion that milk is adulterated. Ordinarily it is not possible to lake out non fatty solids alone out of the milk by artificial means without affecting the fat contents. The necessary consequence is that if non fatty solids are deficient in milk, fat also should be correspondingly so. If so, the conclusion must be that deficiency in non fatty solids alone cannot be caused by human agency without affecting the milk fat.

Learned Judge also relied on failure to conduct freezing point test to overrule case of adulteration. It was also held that these aspects created a genuine doubt regarding the correctness of the report. In Karunan''s case (1985 KLT 523;, this Court held that "where the report shows that milk contains solids-non fat and milk fat either slightly above or below the standard prescribed under the Act, it has to be inferred that it was due only to natural causes and was beyond the control of human agency. The proviso, therefore, applies and the benefit has to go to the accused." We also notice that certain other High Courts have taken more or less the same view. (See Puran Singh v. State of U. P. (1978 F. A. J. 168), Ujagar Supi v. The State of Punjab, 1980 (1) F. A. C. 432, Hans Raj v. State of Punjab, 1980 (ii) F. A. C. 396 and M. C D. v. Jawaharlal, 1982 F. A. C. 145).

13. Before the decision of the Supreme Court in Hazara Singh''s case (1975 KLT 275), relying on certain observations of the Supreme Court in Malwa Co. operative Union, Indore v. Bihari Lal (1973 F. A. C. 375), some High Courts had taken the view that minimum deficiency or marginal variations in milk components can be ignored and could not lead to conviction in food adulteration cases. In Hazara Singh''s case, (1975 KLT 275,) the Supreme Court disapproved this view as not supported by the ratio in Bihari Lai''s case (1973 F. A. C. 375). The Supreme Court also approved the decision of a Full Bench of this Court in Vasudemn Nair''s case (1974 K L. T. 617) In this case, Narayana Pillai J. observed:

The Act does make a distinction between cases coming under it on the basis of the degree of adulteration. It does not provide for aggravation of offence based on the extent of contamination. The offence and punishment are the same whether the adulteration is great or small. Food pollution, even if it be only to the slightest extent, if continued in practice, would adversely affect the health of every man, woman and child in the country. Hence even marginal or border line variations of the prescribed standards under the Act are matters of serious concern for all and as public interests are involved in them, the maxim, De Minimis Non Curat Lex law does not concern itself about trifles, does not apply to them.

15. The standard fixed under the Act is one that is certain. If it is varied to any extent the certainty of a general standard would be replaced by the vagaries of a fluctuating standard. The disadvantages of the resulting unpredictability, uncertainty and impossibility of arriving at fair and consistent decisions, are great.

16. The Act docs not provide for exemption of marginal or border line variations of the standard from the operation of the Act. In such circumstances to condone such variations on the ground that they are negligible is virtually to alter the standard itself fixed under Act.

17. The standards of qualities of the articles have been fixed by the Government under the provisions of the Act after due deliberation and after consulting a committee of competent men. It is for them to give due allowance for probable

errors before fixing standard. They may have done it also. There is no reason to assume otherwise. Therefore the conclusion is that for an article of food when a standard has been fixed under the Act it has to be observed in every detail.

(Emphasis supplied)

14 Kader, J. in a separate Judgment observed:

Cow milk, the quality of which does not come within the statutory standard prescribed must be deemed to be adulterated and the sale of such an article of food contravenes S. 7 of the Act and is an offence. Any person who sells milk which is non of the nature-substance or quality contravenes the provisions of the Act and thereby commits an offence. If the milk fat is less than the prescribed minimum or the milk solid-non-fat is less than the prescribed minimum the sample of milk would be deemed to be adulterated within the meaning of S. 2(i)(1) of the Act, irrespective of the presence of quantity of water. As already referred, sale of milk containing added water is prohibited under rule 44 and that by itself is an offence punishable under S. 16 of the Act. Milk added or diluted with water would come within the definition of the word "adulterated" under the Act. The purpose of rule 44 is to ensure that the article of food sold must be without any of the things or substances not permitted by law The fat contents of milk may vary in various States depending upon several factors and that is why the standards prescribed for fat contents of milk vary from State to State. The relevant rule under this Act has not prescribed a cast iron per-percentage. But, it has only prescribed a standard insisting only on a minimum percentage of certain ingredients or contents. In other words, it is laid down that to be within the standard prescribed the ingredients should not fall below a particular percentage. The constituents of an article of food should not de present in quantities which are in excess of the prescribed limits of variability. This is clear from the definition under S. 2 of the Act, and it is evident that the possibility of the contents of milk varying because of various factors have certainly been taken into consideration in prescribing the standard for cow milk under the Act insisting the compliance of certain minimum requirements. It may not therefore be proper for a court of law to go beyond the standard prescribed and assume that in certain circumstances the contents in the milk may go lower or higher than that prescribed in the statute. When a standard has been prescribed by law for an article of food and on analysis if it is found that it does not conform to the standard so prescribed, the sale of such an article of food contravenes the provisions of the Act and is an offence punishable thereunder.
(Emphasis supplied)

15. The ratio in Hazara Singh,s case (1975 KLT 275) has been followed in State of Punjab v. Teja Singh (1976 (2) F. A. C. 44) and State of Punjab v. Ramesh Kumar 1984 (4) F. A. J. 187), decisions of Full Bench and Division Bench respectively of Punjab and Haryana High Court.

16. In M. V. Joshiv. M. U. Shimpi and another (ATR 1961 S.C. 1494) the sample of butter was found on analysis to be not conforming to the standards prescribed for butter in A 1105 of Appendix B of the Rules. Question arose whether in spite of such non-conformity with the standards it would be open to the accused to prove that there was no adulteration. Expression "adulterated" has been defined in sub-sec. (1) as it originally stood of Sec. 2 and presently in sub-sec. (1a) of the Act. Supreme Court was dealing with clause (1) which was similar to clause (m). Subba Rao J. (as he then was) speaking for the Bench observed:

If the quality or purity of butter falls below the standard prescribed by the said rule or its constituents are in excess of the prescribed limits of variability, it shall be deemed to be adulterated within the meaning of S. 2 of the Prevention of Food Adulteration Act. If the prescribed standard is not attained, the statute treats such butter, by fiction, as an adulterated food, though in fact it is not adulterated. To put it in other words, by reason of the fiction, it is not permissible for an accused to prove that, though the standard prescribed is not attained, the article of food is in fact not adulterated. The non-conformity with the standard prescribed makes such butter an adulterated food

After referring to the provisions of the English statute, Supreme Court observed;

But in the Indian Act selling butter below the prescribed standard is deemed to be adulteration. If the standard is not maintained, the butter, by a fiction, becomes an adulterated food. A dealer in such butter cannot adduce evidence to prove that notwithstanding the deficiency in the standard, it is not adulterated.

(Emphasis supplied)

In Jagadish Prasad alias Jagdish Prasad Gupta v. The State of West Bengal (AIR 1972 S. C 2044) Supreme Court observed:

standards having been fixed as aforesaid any person who deals in articles of food which do not conform to them contravenes the provisions of the Act and is liable to punishment thereunder.

17, It was in the light of the above principles that Kader J. observed in Jagdish Prasad alias Jagdish Prasad Gupta Vs. State of West Bengal, :

It is evident that the possibility of the contents of milk varying because of various factors have certainly been taken into consideration in prescribing the standard for cow milk under the Act insisting the compliance of certain minimum requirements. It may not therefore be proper for a court of law to go beyond the standard prescribed and assume that in certain circumstances the contents in the milk may go lower or higher than that prescribed in the statute.

(Emphasis supplied)

18. In Rajan''s case (1976 K.L. T. 74). the Division Bench after referring to the fact that composition of milk may vary in individual cows and may also depend upon the manner of its feeding, the time of the year, the time of the day, the interval between milchings and other similar factors and after adverting to Woodman on Food Analysis and Pearson on Chemical Analysis of Food, observed:

The framers of the Prevention of Food Adulteration Act were not unaware of the above factors which affect the composition of milk and that is why a fixed percentage is not prescribed for either milk fat or milk solid-non-fat but only a limit of variability is mentioned in the standard. Wherever the standards are fixed by the Statute, it is not for the courts to consider their reasonableness or correctness. It is not permissible for an accused to prove that though the standard prescribed is not attained the article of food is not adulterated. The report of the Public Analyst being evidence In the case, in the absence of definite materials it is not open to an accused to say that it is erroneous and should not be acted upon.

(Emphasis supplied)

In that case though contravention of Rule 44 (b) of the Rules was held against, the sample was found to be adulterated under Sec. 2(1)(1) on account of non-conformity with standards.

19. The above position has been slightly changed by incorporation of proviso to Section 2(1a)(m) of the Act. Section 2(1a)(m) of the Act deals with non-conformity with standards. Even in such a contingency, in the case of primary food, the proviso enables the accused to show that nonconformity with standards was due solely to natural causes and beyond the control of human agency. In the decisions referred to above it was held that once non-conformity with standards is proved, the accused is not permitted to prove that nevertheless the article of food is not adulterated. Legislature has lifted such embargo to a limited extent by incorporating the proviso. Therefore, under the amended statute, where adulteration is of the kind falling u/s 2(ia)(m), it is open to the accused to show that the articles of food is primary food and the fall in standards was solely due to natural causes and beyond the control of human agency. The burden of proving this, as we have already pointed out, rests entirely on the accused. The Statute does not provide for any presumption in favor of the accused. That being so, the court would not be justified in invoking any presumption in favor of the accused insofar as the proviso is concerned. The presumption of innocence available in favor of an accused at the outset is displaced once the prosecution proves that the article of food falls within the mischief of Section 2(1a)(m) and thereafter there could be no presumption in favor of the accused and any person who pleads the benefit of the proviso should prove it to the satisfaction of the court by establishing the conditions requisite for attracting the proviso by preponderance of probabilities. No presumption of law can be invoked to discharge that burden.

20. What is the effect of Public Analyst''s report? Sub-section (5) of Section 13 of the Act states, inter alia, that the report of the Public Analyst may be used as evidence of the fact stated therein in any proceeding under the Act. The report is legal evidence even without the examination of the Public Analyst. If it is not challenged by the accused, certainly the court Would be justified in acting upon it. It is open to the accused to challenge the report either by citing the Public Analyst and examining him or by adducing independent evidence or by relying on any material intrinsic in the report or by causing one of the remaining samples to be sent to the Director of Central Food Laboratory for analysis or in any other legally permissible manner. If the accused does not choose to challenge the report in any manner known to law, the court would certainly be justified in acting on the report. If the report is challenged as aforesaid, the court has to consider the challenge and the materials presented and arrive at a conclusion. If the court feels any doubt about the contents of the report, it is open to it to summon the Public Analyst and examine him as a court witness. As observed in Rajan''s case (1970 KLT 74) in the absence of definite materials, it is not open to the accused to say that it is erroneous and should not be acted upon.

21. Of course, mistakes could be committed in the process of analysis; there could be mistakes committed in recording the result of analysis; there could be mistakes in calculation of the result of the analysis. Such mistakes could be brought to light by examining the Public Analyst and in some other appropriate way. Without doing so, it would not be possible to reject the report of the Public Analyst by a mere process of reasoning without the support of any data, scientific or otherwise. In Bavanna''s case (1985 KLT 463) Karunan''s case (1985 KLT 523) and certain decisions of other High Courts referred to earlier, it has been concluded that there must have been an error in analysis or calculation from mere circumstance that the milk fat content exceeded the minimum and the milk-solid-not-fat content was deficient.

22. In other words, in the above decisions, courts have proceeded on the assumption or presumption that where milk fat content is above the minimum, milk-solid-not-fat content cannot be deficient. We do not find any warrant for such an assumption or presumption. Percentages for various components are artificially fixed after taking into consideration all the relevant factors. The absolute minimum required from the point of view of public health and safety has been prescribed in the Rules. Our attention has been invited to certain passages in the two textbooks referred to earlier. These passages would indicate that the most common method of adulteration consists in addition of water or removal of cream. This would not mean that there could be no other method of adulteration. The textbooks also indicate that where the percentage of milk-solid-not-fat content is below 7.7 percent there could be suspicion of added water. The textbooks do not rule out the possibility of other forms of adulteration. Definition of "adulterated" in the Act is a broad one, casting its net wide and afar. An article of food is deemed to be adulterated if it contains any other substance or if the article is so processed, or if any cheaper

substance has been substituted wholly or in part or if any constituent has been wholly or in part abstracted so as to affect injuriously the nature, substance or quality thereof; it is deemed to be adulterated if it is not of the nature, substance or quality demanded and is to his prejudice or if the quality or purity falls below the prescribed standard or its constituents are present in quantity not within the prescribed limits, variability and also in certain other contingencies contemplated in Sec. 2 [1] of the Act. It is not only the act of adulteration which is penalised, but the act of manufacturing for sale, storing, selling or distributing any adulterated or misbranded food article is also rendered penal. The liability is an absolute one and the prosecution is not required to prove mens rea. Prosecution is not required to prove that the accused adulterated the article by adding something or by taking away something. It is sufficient if the person is shown to manufacture for sale, store, sell or distribute any such article of food.

23. It is not shown before us by reference to any scientific treatises or evidence of scientists that non-conformity with standards of a sample of milk which contains milk fat slightly above the minimum prescribed and milk solids-not-fat below the minimum prescribed is due solely to natural causes and beyond the control of human agency. There will be no justification to draw any such presumption from the data presented by the Public Analyst.

24. In considering whether the ingredients contemplated by the proviso are established by the accused, can the prosecution rely on the opinion of the Public Analyst that the sample contains added water based on calculation-method? We have already indicated that the consistent view taken by this court has been that freezing point test is a safe method to determine the presence and extent of added water and the calculation method in not such a safe or fool-proof method and on the opinion of the Public Analyst based on calculation method alone it would not be safe to hold that presence of added water has been established beyond reasonable doubt. But this is not, to say that the calculation method is something unknown to science or that it is of no efficacy at all. Woodman on Food Analysis deals with detection of watered milk at pages 148 to 152. At pages 148 and 149, it is stated;

since the variation in proportion of solids-not-fat in normal milk is much less than the range of total solids this is of distinct value in showing added water, Although, as indicated in the table of limiting values on page 124, the value for solids-not-fat may go as low as 7.5 percent, this is rather uncommon, and a fairer minimum would be 7.7 percent. A value below 77 percent would certainly be extremely suspicious of added water and if accompanied by correspondingly low values for the constants of the scrum could be regarded as direct evidence of adulteration. A better figure would be not the minimum but one nearer the value for normal milk, say 8.3 per cent. One thing is certain, however, the legal standard for solids-not-fat should not be given too great weight, other than to raise a presumption of watering or skimming, for the legal standards are often based on political expediency as well as

on scientific knowledge.

If the preliminary examination indicates a possibility of the samples being watered, an examination of the scrum should be made

Referring to freezing point, the author states at pages 151 and 152:

In doubtful cases, or as confirmatory evidence, it may be helpful to make the cryoscopic test as mentioned on page 140, if the necessary apparatus is available.

In general it may be stated that where the freezing point of the original whole milk is known, results are obtainable to within an error not far from 0.5 percent, and when the freezing point of the original milk is not known, as with herd milk, the addition of water may safely be reported in an amount as 3 percent.

25. The above passages would indicate that the content of solids-not-fat is of distinct value in showing added water. When it is coupled with correspondingly low value for the constants of the sorum, it could be regarded as direct evidence of adulteration. Of course, confirmation could be had from a more reliable test like Hortvet''s test. In the absence of confirmation by Hortvet''s test, it may not be possible to say that presence of added water is proved beyond reasonable doubt. This is not to say that the data provided by the calculation based on the content of milk solids - not - fat is no evidence at all or is of no value at all. It has some value though that by itself is not sufficient to hold an accused guilty of dealing in milk containing added water. But we see no reason why the data provided by the calculation method should not be looked into for the limited purpose of deciding whether the accused has proved that the fall in standards or deficiency of components was due solely to natural cause and beyond the control of human agency. The burden in this behalf rests on the accused and he has to establish preponderance of probabilities in favor of his case and in deciding whether such preponderance of probabilities has been established, certainly presence of added water as detected from calculation method could be looked into. This is one of the factors which could be taken into consideration in deciding whether application of the proviso has been established. When there is some material indicating that non-conformity with standards might not be due to natural causes, accused would certainly have to adduce better evidence or material in proof of his case. In this limited context, the opinion of the Public Analyst based on calculation method can be looked into.

26. In Bavanna''s case (1985 KLT 463) and Karunan''s case (1985 KLT 523), court entertained doubt regarding the correctness of the analysis. Doubt was based entirely on the assumption that without adding water, content of milk solids-not-fat cannot go below the minimum and the opinion regarding presence of added water was based entirely on calculation method. The court also assumed that fall in the percentage of milk solids-not-fat was due to natural causes and beyond the control of human agency. We find no support for any such assumption We therefore hold

that the proposition referred to above and laid down in these case is not good law.

27. It was not contended before either of the courts below that the proviso would be attracted in the case. Appellant did not examine the Public Analyst. He made no attempt to cause one of the samples to be sent to the Director of Central Food Laboratory for analysis. P. W. 1 was not cross-examined in this regard. No independent evidence was adduced, Therefore, we are not able to hold that the respondents have proved that they are entitled to the benefit of the proviso to Section 2(1a) of the Act.

28. We now turn to the contention regarding the alleged noncompliance with Sec. 13(2) and Rule 9A. The complaint was filed on 20-1-1981 but copy of the Public Analyst''s report with intimation contemplated under Sec. 13(2) was despatched on 17-1-1981 and perhaps they were served on or before 20-1-1981. This, it is contended, amounts to non-compliance with the provisions of Sect, 13(2) read with Rule 9A and the prosecution is vitiated since prejudice to the accused has to be presumed,

29. In State of Kerala v. John (1978 K. L, T 738) this Court had occasion to consider the case of adulterated buffalo milk. Kader J. observed that the right conferred under Sec. 13(2) of the Act is a very valuable one and the provisions contained therein are mandatory, in nature and those provisions have not been complied with, The learned Judge observed;

By flagrantly violating these mandatory provisions, the accused have been deprived of a valuable right conferred on them resulting in serious prejudice to them. In the circumstances, it would be unsafe to enter a conviction on the basis of the report of the Public Analyst.

In this view, the court declined to interfere with acquittal.

30. In a case where the sample of milk was found on analysis to be adulterated but prosecution was initiated several months later, a single Bench of this Court in State of Kerala v. C. Chako (1970K. L.T. 458) held that there was denial to the accused of the right conferred under Sec. 13 [2] of the Act in as much as milk would have got decomposed during the period and therefore the report of the Public Analyst could not be acted upon.

31. This decision was overruled by a Division Bench of this Court in Gopalakrishna Kurup v. State of Kerala (1971 KLT 16). Raghavan J., as he then was, speaking for the Bench, referred to the observations of the Supreme Court and stated;

If the accused wants his sample to be sent to the Central Food Laboratory, it should be done. If it is sent there and the report received from the Director says that the sample has deteriorated or decomposed, the accused should not be convicted on the basis of the certificate of the Food Analyst. If he is convicted, it is, in fact, depriving him of his right to have his sample tested by the Central Food Laboratory.

If the sample has deteriorated or decomposed, the fault is not of the accused, but of the prosecution in delaying the proceeding. Equally so the accused cannot claim that there was delay of four months or six months and by that fact alone, the sample should be presumed to have decomposed, There is no such presumption that after a particular period a particular food article (milk in these cases) has decomposed. It is not reasonable or right to lay down any such period: and the sample given to the accused should be tested.... Therefore, the delay, as such, in the prosecution is no reason for acquitting the ''accused, unless the delay has prejudiced him by depriving him of his valuable right under S. 73(2), which can be decided only if, on testing the sample given to him by the Director of the Central Food Laboratory, it is found to have decomposed.

(Emphasis supplied)

32. Though the applicability of Sec. 13 [2] of the Act did not arise directly for consideration in Sivanandan v. Food Inspector (1981 KLT 473), one of us (Bhat J.) considered the same in comparison with the provisions of Sec. 11 [1] [b] and Rule 16 [c] of the Rules and held that the former cannot be equated with the latter and the latter contains a mandatory provision in the nature of a procedural safeguard, and in passing, made an observation to the effect that a failure to follow the provisions of Sec. 13 [2] will necessarily vitiate the proceedings and the court would be bound to presume prejudice to the accused and acquit the accused.

33. Chockalingam v. Food Inspector [1981 K. L. 628] one of us [Bhat, J.] had to consider the effect of intimation which did not inform the accused of his right to move the court to get one of the samples sent to the Director of the Central Food Laboratory but merely invited his '', attention to the provisions of Sec. 13 [2] of the Act. Following State of Kerala v. John [1978 KLT 738] and Sivanandan''s case [1981 K. L. T 273], it was held that there was non-compliance with the provisions of Sec. 13(2) of the Act and the necessary inferences was that there was prejudice to the accused. The court also observed that the accused cannot move the court after the expiry of 10 days from the date on which he receives information under Sec. 13 [2] of the Act.

34. In Kunnappa v. Food Inspector [1982 KLT 95] Narendran J. held that Rule 9A of the Rules which requires copy of the report to be sent to the accused "immediately" after the institution of prosecution are mandatory. Since in that case report was sent more than a month after the institution of prosecution, the learned Judge held that the mandatory provisions had been violated and accused could not be convicted.

35. This decision was overruled by a Full Bench of this Court in Food Inspector v. Prabhakaran [1982 KLT 809]. The Full Bench considered the scheme of the provisions of the Act and the Rules with particular reference to old Rule 9 [j] and Rules 7 [3], 9A and 17, noticed the time schedule envisaged under the scheme commencing with the taking of sample by the Food Inspector under Sec. 10 of the Act and ending with forwarding a copy of the report and intimation by the Local

(Health) Authority to the accused. The Full Bench also noticed that the right conferred under Sec. 13 [2] is a very valuable right, since the certificate of the Director of the Central Food Laboratory would supersede the report of the Public Analyst. However, the Full Bench was not prepared to interpret the word "immediately" occurring in Rule 9A in the manner in which it was done in Kunhappa''s case (1982 KLT 95]. The court considered the matter thus:

It is well known that on occasions courts receive a number of of complaints on the same day and the courts may be unable even to number them on that day. It sometimes happens that complaints under Special Enactments are prepared by the prosecuting agency and filed in bulk on days convenient to them. The offices of Courts faced with such a situation take some time to go through them and number them. In such cases it is likely that the Food Inspector may intimate the Local (Health) Authority of the institution not on the day the complaint is filed in court. There may be other circumstances where neither due to the laches or due to the default some time is taken by the Local (Health) Authority to send the intimation under Rule 9A. There is no logic or reason to cut down the elasticity of term ''immediately'' by the court self-imposing any restriction as to the period within which copy of the report is to be sent if the object of providing that a copy of the report is to be sent by the Local (Health) Authority immediately to the vendor is to see that the trial was not protracted and there is no undue delay in the vendor being told about the result of the analysis so as to enable him to apply for an analysis of the remaining samples a delay of a day or two by itself may not be material. Therefore to say that the Local (Health) Authority should issue a copy of the report on the same day or at least next day would be unwarranted. We must also remember that the Local (Health) Authority has various functions to perform and it is the pressure of its work that must necessarily determine the speed and promptness with which it acts. That is not to say that it can afford to be not prompt. When the rule requires it to act immediately it must do so. But if the delay is such as it would not defeat the purpose for which the rule is made it could not be said that the action is not ''immediate''.
(Emphasis supplied)

36. With specific reference to the view taken in Kunhappa''s case, the Full Bench observed:

Such an approach would defeat the very purpose of the provision. It is no doubt true that the Act envisages absolute offences in the sense that even without mens rea a person may fall within the penal net of the Act. But this is not the only consideration that would weigh with a court in applying the provisions of the Act to prosecutions thereunder. The Act is intended to serve a social purpose, to punish offenders who indulge in a crime of great consequence to the health and life of the people No provision in an enactment of the nature of the Prevention of Food Adulteration Act should be read in such a way as to search for and find a purely technical reason for

dropping the penal proceedings. Prosecution against a person who has committed a very serious offence under the Act ought not to fail merely on account of some time, not unreasonable, taken by the Local (Health) Authority to issue a copy of the Public Analyst''s Report, a delay which is not shown in any way to cause injury or harm to the person prosecuted when there is on express provision providing for such consequence. Regard being had to the nature of'' the Act and the nature of the punishment under the Act any default or delay which would cause noticeable prejudice to the accused should be frowned upon and the prosecution must fail in (hat event. A different approach is beset with very evil (sic) as it may open the door for corrupt practices and render the enactment, which in its performance is already weak, weaker still.

(Emphasis supplied)

In this view, the Full Bench did not decide the question whether Rule 9A was mandatory or only directory, though its attention was drawn to the Full Bench decision of the Punjab and Haryana High Court in Kashmiri Lal v. State of Haryana (1982 Crl. L.J. 311) which held that the rule is only directory and not mandatory.

37. We may notice certain other decisions of Single Benches of this Court. In Food Inspector v. Pirayiri Co-op: Milk Supply Society Ltd. and others (1983 K.L.J. 579), one of us (Bhat, J.) took the view that the court has jurisdiction to send a sample on the application of the accused to the Director of the Central Food Laboratory for analysis even after the time limit of 10 days if the court is satisfied for proper and convincing reasons that the accused could not make the motion within a period of 10 days.

38. In State of Kerala v. Soman (1983 KLT 297), this Court rejected the plea of the accused that the intimation sent to him under Sec. 13(2) of the Act did not contain the number of the case and therefore there was violation of the provision The court held that the failure to give the number of the case did not amount to infraction of Sec. 13(2) of the Act and no prejudice was proved.

39. In Food Inspector v. Kodungallur S.S. Bank Ltd. (1984 K L. T. 27). this Court considered an argument that six months'' delay in launching the prosecution and further delay in sending the intimation should lead to acquittal. Sivaraman Nair J. observed:

I am of the view that in all cases of such delay, it is open for (he accused to prove that such delay has prejudiced him and only on proof of such prejudice can the accused be entitled to acquittal. In the present case, the 3rd accused had not availed of that opportunity and cannot therefore claim acquittal on the ground that prejudice was likely to him on the ground of delay, This is a matter requiring evidence even irrespective of the report of the Public Analyst or the Central Food Laboratory and none had been adduced.

40. In Balanv. Food Inspector (1984 KLT 280), one of us (Bhat, J) was dealing with a case where copy of the report and intimation were sent by registered post to the accused in the correct address but was returned with the endorsement "not known; no such addressee". The court held that the Local (Health) Authority had done whatever was expected of him by the statute and the Rules and therefore there was due compliance and the inability of the accused to take advantage of the opportunity to get a second opinion from the Director of the Central Food Laboratory would be attributable not to any non-compliance by the Local (Health) Authority, of the provisions of the Act and Rules, but to his own conduct and in such a contingency it cannot be said that there has been noncompliance with Sec. 13(2) of the Act and Rule 9A of the Rules, and it will not be possible for the defence to contend that the accused has been prejudiced by any default on the part of the statutory authority.

41. In Food Inspector, Corporation of Calicut v. Kochunni and another (1984 KLT 871) Bhaskaran Nambiar J held that since copy of the report was not given to one of the accused, there was violation of the mandatory provision in Sec. 13(2) of the Act and that was fatal for the prosecution.

42. In Bavanna''s case (1985 K. L T, 463), the Court considered an intimation sent to the accused stating that prosecution had been initiated in "Sub-divisional Magistrate''s Court, Hosdrug", though there was actually no such court in existence and as a matter of fact, complaint had been filed in Judicial First Class Magistrate''s Court, Hosdrug. Following the observations in Chockalingam''s case (1981 KLT 628), Food Inspector v. S.S. Bank Ltd (1984 KLT 27) and Kochunni''s case (1984 KLT 871), Padmanabhan J. held that the mandate of Sec. 13(2) had been violated, giving rise to prejudice and declined to interfere with acquittal

43. However, in Food inspector v. Usmart (1985 KLT 1038), Padmanabhan J, adverting to the decisions of the Supreme Court in Shambu DayaVs case (AIR 1979 S. C. 310). Shambhu Dayal Vs. State of Uttar Pradesh, and Tulsiram Vs. State of Madhya Pradesh, , took the view that that Sec. 13(2) of the Act and Rule 9A are not mandatory and noncompliance would vitiate prosecution only if prejudice is established.

44. Is the provision in question mandatory? Or is it directory? To answer this question, we have to take note of the broad purpose of the statute and object of the provision and examine the consequences of holding the provision to be mandatory or directory. If the intent of the statute is to prevent public mischief and the particular provision interpreted as mandatory will defeat the design of the statute, the provision must be regarded as directory in which case prejudice must be proved in order that court may rule against the prosecution. The use of the expression "shall" is not decisive. The court must adopt that interpretation which will promote the object of the statute and help suppress the public mischief sought to be avoided by the statute.

45. We will now examine some of the provisions of the Act, as they stood before the amendment in 1976. Sec. 11 of the Act dealing with procedure to b: followed by the Food Inspector required that the Food Inspector, after conducting sampling, should deliver one part of the sample to the person from whom the sample was taken, another part for analysis to the Public Analyst and retain the third part for production in court or for analysis at the Central Food Laboratory under Sec. 13(2). Provision regarding disposal of three parts was contained in sub-clauses (i) to (iii) of clause (c) of sub-sec. (1) of Sec. 11. Sub-sec. (1) of Sec. 13, as it originally stood, required the Public Analyst to deliver in the prescribed manner report to the Food Inspector of the result of analysis. Sub-sec. (2) stated that after the institution of the prosecution, either party may make an application to the court for sending one part of the sample mentioned in sub-clause (i) or (iii) of clause (c) of Sub-sec. (1) of Sec. 11 to the Director, Central Food Laboratory, for certificate. Thereupon, the court shall satisfy itself that the marks, seals and fastenings are in tact and may despatch one part of the sample under its own seal to the Director, who thereupon, shall send a certificate to the court specifying the result of analysis. Under sub-sec. (3), the certificate shall supersede the report of the Public Analyst. As per Sub-sec. (5), report of the Public Analyst may be used as evidence of the facts stated therein. Proviso to sub-sec. (5) stated that the certificate of the Director shall be final and conclusive evidence of the facts stated therein. Rule 9 (j) of the Rules required the Food Inspector to send, by registered post, a copy of the report of the Public Analyst to the person from whom the sample was taken within 10 days of the receipt of the said report.

46. The Supreme Court considered the provisions of Sec. 13(2) of the Act in Municipal Corporation of Delhi Vs. Ghisa Ram, and held that the provision conferred on the accused a valuable right to have the part of the sample given to him analysed at the Central Food Laboratory and therefore it was expected that the prosecution will proceed in such a manner that the right will not be denied to him. The Court observed:

The right is a valuable one, because the certificate of the Director supersedes 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:

(Emphasis supplied)

The Supreme Court did not hold in so many words that the provision was directory; bat that is the effect of the above observations.

47. In Dalchand Vs. Municipal Corporation, Bhopal and Another, , Supreme Court had to consider whether Rule 9(j) of the Rules (as it stood originally) was mandatory or directory in nature. Chinnappa Reddy, J. observed:

The broad purpose of the statute is important. The object of the particular provision must be considered. The link between the two is most important. The weighing of the consequence of holding a provision to be mandatory or directory is vital and, more often than not, determinative of the very question whether the provision is mandatory or directory. Where the design of the statute is the avoidance or prevention of public mischief, but the enforcement of a particular provision literally to its letter will tend to defeat that design, the provision must be held to be directory, so that proof of prejudice in addition to non-compliance of the provision is necessary to invalidate the act complained of. It is well to remember that quite often many rules, though couched in language which happens to be imperative, are no more than mere instructions to those entrusted with the task of discharging statutory duties for public benefit. The negligence of those to whom public duties are entrusted cannot by statutory interpretation be allowed to promote public mischief and cause public inconvenience and defect the main object of the statute. It is as well to realise that every prescription of a period within which an act must be done, is not the prescription of a period of limitation with painful consequences if the act is not done within that period. The period of 10 days was prescribed with a view to expedition and with the object of giving sufficient time to the person from whom the sample was taken to make such arrangements as he might like to challenge the Report of the Public Analyst, for example, by making a request to the Magistrate to send the other sample to the Director of the Central Food Laboratory for analysis. Where the effect of non-compliance with the rule was such as to wholly deprive the right of the person to challenge the Public Analyst''s Report by obtaining the report of the Director of the Central Food Laboratory, there might be just cause for complaint, as prejudice would then be writ large. Where no prejudice was caused there could be no cause for complaint. I am clearly of the view that R. 9 (j) of the Prevention of Food Adulteration Rules was directory and not mandatory.
(Emphasis supplied)

48. By amending Act 34/1976 several changes were brought about in Sections 11 and 3 of the Act. Under the amended provisions of Sec. 11(1)(c), Food Inspector is not required to deliver one part of the sample to the person from whom he obtained the sample and to retain the third part of the sample. Under the new provision the Food Inspector is required to send one part of the sample to the Public Analyst under intimation to the Local (Health) Authority and send the remaining two parts to the Local (Health) Authority for purposes of sub-sections (2) (2A) and (2E) of Sec. 13. The person from whom the sample is taken is no longest entitled to get

custody of one part of the sample and the Food Inspector is not enabled to retain any part of the sample with him. Custodial of two parts of the sample would be the Local (Health) Authority. Under sub-sec. (1) of Sec. 13, as amended the public Analyst is required to deliver in the prescribed form report to the Local (Health) Authority o the result of the analysis. Under sub-sec. (2), as it stands at present, o receipt of the report of the result of analysis under sub-sec. (1) to (sic) effect that the article of food is adulterated, the Local (Health) Athorin shall, after the initiation, forward in such manner as may be prescribe a copy of the report of the result of the analysis to the person concerned informing them that if they so desire, they may make application to the court within a period of 10 days from the date of received of copy of the report to get the sample of article of food kept by the Low (Health) Authority analysed by the Central Food Laboratory. Sub-s (2A) contemplates that the court should require the Local (Health) Author to forward part or parts of the sample kept by the said authority a casts a duty on the authority to forward part or parts of the sample the court within five days Sub-sec. (2B) lays down the procedure to followed by the court. "No changes have been brought about in sections (3) and (5)

49. Rule 9 (j) of the Rules has been replaced by Rule 9A. Rule is in pari materia with the amended provisions of Sec. 13(2) of Act and requires that the Local (Health) Authority, immediately a the institution of prosecution, should forward a copy of the Pt Analyst''s report by registered post or by hand, as may be appropria'' the accused and other persons concerned.

50. Statutory changes have been brought about only to strear the procedure and to plug some of the loopholes in the law and n confer more rights on the accused. It was noticed by thelegisl that even though large number of prosecutions were in it many of them ended in acquittal on the ground that the sample was shown to be adulterated and in the process valuable time of the was wasted and the accused were subjected to harassment. The old law did not prescribe any time limit for the accused to move the court to send apart of the sample to the Central Food Laboratory. In cases where prosecutions were launched after considerable delay, naturally, questions arose as to whether any prejudice had been caused to the accused and whether the accused moved the court within a reasonable time and consequently working of the law was rendered uncertain and unsatisfactory. There was also the possibility of the vendor tampering with the part of the sample delivered to him by the Food inspector and also the possibility of the vendor and the Food Inspector collusively tempering with the part of the sample retained by the Food Inspector. To avoid all these contingencies the amended law requires two parts of the sample to be delivered to an independent authority viz, the Local (Health) Authority, requires that authority to send a copy of the report to the accused and inform him that if he so desires, he can move the court to get the sample kept by the Local (Health) Authority analysed by the Central Food Laboratory, within 10 days from the date of receipt of a copy of the report. Thereby, the practice of the accused moving the court after considerable delay is sought to

be put an end to. Thus, we see that the changes have been brought about to plug the loopholes in the law and to ensure expedition in the termination of the trial and avoid prejudice to the prosecution as well as the accused.

51. No doubt, the statute creates absolute liability on persons who are found liable under the provisions thereof in the sense that means rea is not required to be established. A person manufacturing for sale, storing, selling or distributing an article of food which is adulterated or misbranded as defined in the Act would be liable to be prosecuted and punished irrespective of any criminal intention. This absolute liability is created in order to safeguard public health and public interest. Rules have been framed and amended with a view to shorten the period required for prosecution to be initiated from the day on which the sample is taken Public interest and the interest of the accused require that the entire exercise must be over within the shortest possible span of time So also, it is necessary that trial of the case should be completed as expeditiously as possible There should be no loopholes left for either side to protract the proceedings. At the same time, since absolute liability is created, a safeguard is given to the accused by giving him the right to move the court to send the sample to the Director of the Central Food Laboratory for analysis so that report of a more qualified and superior authority is made available to the court.

52. As observed by the Supreme Court in Ghisa Ram''s case (AIR 1967 S. C 970), the right conferred on the accused is a valuable right because the certificate supersedes the report of the Public Analyst and is conclusive evidence of its contents. Where there is denial of this right on account of the deliberate conduct of the prosecution, in the words of the Supreme Court, "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". The words of the Supreme Court are clear and unambiguous. There is a right conferred on the accused. It is a valuable right for the defence in the course of the trial. If the prosecution or the statutory authorities so manage the performance of their duties and functions so as to deprive the accused of the opportunity of exercising his right, he must be taken to be seriously prejudiced. That is because he tried to get a second opinion from a superior authority and he is successfully frustrated by the delay or inaction on the part of the prosecuting agency. In such a contingency, prosecution must accept the consequences and cannot succeed.

53. In Tulsiram v. State of Madhya Pradesh (MR 1985 S. C. 299), the Supreme Court considering the significance of the explanation "immediately" in Rule 9A of the Rules, held that the expression signified a sense of continuity rather than urgency and non-compliance with the rule is not fatal, as long as prejudice has rot been made out. The rationale of the provision of Sec. 13(2) of the Act and Rule 9A of the Rules has been explained thus;

the very basis of a prosecution for adulteration of food is the report of the Public Analyst that the article of food is adulterated. The accused is given the right to dispute the Public Analyst''s report by applying to the Court for an analysis by the Central Food Laboratory. If the report of the Central Food Laboratory is to the effect that the article of food is not adulterated the very basis of the prosecution will disappear. In such an event the further pursuit of the prosecution will be needless and the accused will have to be discharged or acquitted as the case may be It is therefore to be assumed that the report of the Public Analyst is to be made available to the accused-vendor at the commencement of the prosecution, that is to say, before the prosecution starts leading evidence in the case, and in good and sufficient time to enable the accused to exercise his right of having the sample '' analysed by the Central Food Laboratory if he so desires it.

Discussing the import of the expression "immediately" in Rule 9A, the Court observed:

In the context the expression ''immediately'' is only meant to convey, ''reasonable despatch and promptitude'' and no more. The idea is to avoid dilatoriness on the part of officialdom and prevention of unnecessary harassment to the accused But the idea is not to penalise the prosecution and to provide a technical defence....The real question is, was the Public Analyst''s Report sent to the accused sufficiency early to enable him to properly defend himself by giving him an opportunity at the outset to apply to the court to send one of the samples to the Central Food Laboratory for analysis ? If after receiving the Public Analyst''s Report he never sought to apply to the Court to have the sample sent to the Central Food Laboratory, as in the present case, he may not be heard to complain of the delay in the receipt of the report by him, unless, of course, he is able to establish some other prejudice.

(Emphasis supplied)

54. Considering the purpose of the statute, object of the provision and consequences of holding the provision to be mandatory or directory, we are of opinion that the provision is only directory. Of course, this provision of law must be obeyed; it is not left to the sweet will and pleasure of the statutory authority to obey the provision or not. The statutory authority has to discharge its functions as contemplated by law. Where there is a total denial of the right on account of the deliberate conduct of the statutory authority, where the effect of non-compliance with the provision is such as to wholly deprive the right of the accused to challenge the Public Analyst''s report by obtaining the certificate of the Director of Central Food Laboratory, it may perhaps be possible to say that serious prejudice has been caused. Whether prejudice has been so caused is a question of fact depending on the facts and circumstances of the case. It is for the accused to allege that he has been so prejudiced and satisfy the court about it. Non-compliance with or defective compliance, as long as there is no serious prejudice caused to the accused, cannot vitiate the prosecution or lead to acquittal. Courts cannot assume prejudice without

any factual foundation or data.

55. Finding regarding prejudice depends on the conduct of the accused also Merely because there has been non-compliance with or defective compliance, it would not be open to the accused to sit back, refrain from moving the court to send one of the samples in the custody of the Local (Health) Authority to the Director of Central Food (sic) for analysis and thereafter contend that there has been non-compliance with or defective compliance and therefore prejudice must be presumed. Prejudice is not a matter of presumption but one of fact to be established by the accused. Accused could very well apply to the court to send one of the samples to the Central Food Laboratory. If the Director of the Laboratory sends the certificate containing the result of analysis and his opinion, the certificate supersedes the Public Analyst''s report; in that case, accused has exercised his right. If the Director of the Laboratory finds the sample (or samples, as the case may be) unfit for analysis and if such unfitness of the sample could be referable to the delay in making the application on account of non-compliance with or defective compliance of Sec. 13(2) of the Act or Rules 9A of the Rules, it would mean that the accused has been deprived of his statutory right on account of the conduct of the statutory authority and prejudice has been caused to him. If he refrains from making any such application to the court to send the sample to the Central Food Laboratory, he cannot successfully contend that there has been prejudice, merely because of non-compliance or defective compliance with the provision of law. We hold that the observations in John''s case (1978 KLT 738), Svanandan''s case (1981 K, L T. 273), Chockalingam''s case (1981 KLT 628), Kochunni''s case (1984 K. L, T 871), Baxanna''s case (1985 KLT 463), contrary to what we have indicated herein do not lay down the law correctly.

56. In the present case, we are dealing with a contention that a copy of the report along with intimation or information as required under Sec. 13(2) of the Act was forwarded to the accused even before the initiation of the prosecution. The intimation as well as the complaint bear the same date. It may be that both were prepared on the same day but while intimation was forwarded immediately, complaint was filed only on the next working day. The right to apply to the court to send one of the samples to the Director of Central Food Laboratory is not taken away by the mere fact that the intimation was despatched prior to the date of filing of the complaint. Summons issued by the court was served on the respondents within a month and immediately they appealed in court and moved for and obtained through counsel bail. Of course, by that time the period of 10 days prescribed in '' Sec. 13(2) of the Act had expired.

57. The period of 10 days prescribed in Sec. 13(2) of the Act is not an inflexible one. The period has been prescribed only to ensure that steps are taken expeditiously with a view to avoid delay in the trial and the termination of the case. It is not as if the court has no jurisdiction to send a sample to the Central Food Laboratory, if an application is made. after the expiry of 10 days from the date of receipt of a copy of

the report and intimation by the accused. It is significant to note that there is no provision in Sec. 13 of the Act which specifically lays down that the accused has to make an application within this period or that the court cannot allow the application made after the expiry of the period. If an accused makes the application after the expiry of the period, naturally, he has to satisfy the court that there has been no laches on his part. It may be that the application could not be made within the period prescribed because of non-compliance with or defective compliance of the provision. It is open to the accused to satisfy the court about it. It is open to the court to invoke its power and jurisdiction and allow the application even if it is made after the expiry of the period. In any view of the case, it is not for the accused to anticipate that the court will not allow his application, if made, and refrain from making an application. If he refrains from making an application, it cannot be said that the right conferred on him under Sec. 13(2) of the Act has been denied on account of the act or omission of the prosecution. The fact that the intimation was forwarded before the filing of the complaint, and not after the initiation of the prosecution, does not take away the right conferred on the accused under Sec. 13(2) of the Act. In such a case, the court would not be justified in assuming that prejudice has been caused to the accused.

58. In this case, the accused could have made the application but failed to do so, and no explanation has been offered. He has failed to show that prejudice has been caused to him.

59. Learned counsel contended that various steps taken in the process of sampling were not spoken to by the Food Inspector. It has not been contended before us that the records in the case would not evidence that all the necessary steps had been taken by the Food Inspector. A similar argument was repelled by one of us (Bhat, J) in Food inspector v. The Pirayiri Co-op. Milk Society Ltd. (1983 K. L. J. 579) observing that:

Undoubtedly, it would be useful if the Food Inspector speaks to the details of the various steps taken to show that he had acted in conformity with the Act and the Rules. But where he give evidence only in a general way indicating the steps taken by him, but without specifically referring to the details, that cannot straight away lead to acquittal of the accused. His evidence may be corroborated by the mahazar and the other evidence and supported by the contents of the report of the Public Analyst unless the same is challenged in cross-examination or in some other way known to law. Where the accused refrains from cross-examining the Food Inspector in regard to these details and fails to suggest either non-compliance with any particular detail of a rule or prejudice having been suffered by the accused, he certainly runs a risk. In the absence of any inhibiting factor it is open to the court to presume that the official act has been regularly performed where it is shown that the official act has been regularly performed.

These observations were followed in Food Inspector v. Hameed (1983 KLT 901) The act of sampling is an official act. When it is proved that the act has been performed, the court is entitled to presume that it has been performed regularly by virtue of Sec. 114 of the Evidence Act and illustration (e) thereto, in the absence of any evidence or circumstances casting any doubt about the regularity of the act. Padmanabhan J. has taken the same view in Food Inspector v Abdulla Haji (1985 KLT 781). Food Inspector v. Usman (1985 K L. T. 1038) and Food Inspector v. Salish Kumar 1985 KLT 1093) and with respect, we agree with the same.

60. Learned counsel for the respondents contended that the milk in the container in the possession of the vendor was not stirred. It is pointed out that when milk is allowed to stand in a container, the fat content moves upwards and unless it is stirred the sample will not be a representative one

61. This is a case of sale by the vendor to the Food Inspector on the latter serving the appropriate notice and demanding sale of a sample for analysis. The evidence shows that the milk was measured from the container by the vendor and delivered to the Food Inspector. This is not a case where in the absence of the vendor or in the face of his non-co-operation, the Food Inspector took the sample. Neither the Act nor the Rules contain any provision to the effect that the entire quantity of milk in the container in the possession of the vendor should be stirred before effecting the sale to the Food Inspector. If the normal mode of serving or selling apart of the milk contained in a larger container involves stirring the entire quantity, the vendor should have done it. If that is not the normal mode, that wil not be done when the sale is made to the Food Inspector also. As observed in State of Kerala and Others Vs. Alasserry Mohammed and Others, , the question whether the sample taken by the Food Inspector is a representative sample does not arise for consideration at all since if the sale to the Food Inspector even for the purpose of sampling is a sale of adulterated food the offence must be said to the have been committed. This view has been taken by this Court in Food Inspector v. Hameed (1983 KLT 901). following the earlier decisions of this Court in State of Kerala v. John (1978 KLT 738), Alotius Wilson v. Food Inspector (1980 KLT 834) and Food Inspector, Corporation of Cochin v. Hasan & another (1982 KLT 941). In that decision, this Court also considered the decision of the Supreme Court in Food Inspector, Municipal Corporation, Baroda Vs. Madanlal Ramlal Sharma and Another, where the Supreme Court mentioned about the method of making the sample homogenous and representative and this Court indicated that the observation was made not with reference to the quantity of the food article taken from the vendor but with the mode of dealing with sample after the sale to the Food Inspector. We hold that where the vendor measures and sells the quantity of milk demanded by the Food Inspector for analysis, it is for the vendor to adopt whatever mode or procedure he deems fit and the Food Inspector is not obliged to stir the entire quantity of milk in the container. We have been referred to certain passages in Pearson on Chemical Analysis of Foods and Woodman on Food Analysis. These passages relate to the manner in which sample

is to be dealt with by the analyst and not at the stage of the purchase. We may with advantage refer in this connection to the decision in Bridges v. Griffin (1925) 2 K. B. 233. The case arose under the provisions of Sale of Food and Drugs Act, 1895, in that the sample of milk sold by the vendor contained less than a minimum percentage of milk fat content. Charge against the vendor was that he had sold milk which was not of the nature, substance and quantity demanded. One of the defences open to the vendor was that milk when sold was in its natural condition and nothing had been abstracted from it and nothing added to it and it was genuine new milk. The vendor had instructed his servant to stir the milk before effecting sale but the servant had omitted to stir it. It was contended that the milk was allowed to stand and the cream rose to the top and the milk as drawn by means of a tap near the bottom and therefore the defence had to be upheld. It was held that the milk sold was not of the nature, substance and quality demanded within the meaning of the law, that the vendor knew what result would probably follow if certain steps were not taken and he accordingly instructed the servant to stir the milk before starting on his round but the servant failed to do so and in these circumstances it was not possible to hold that the sample sold was at the time of the sale in the condition in which it came from the cow. This decision supports the view that we have indicated. In the case of sale to the Food Inspector in a case like this it is no defence to show that the Food Inspector did not stir the entire quantity of milk in the container. It would be the duty of the vendor to do so, if he so desire.

62. We have looked into the evidence in the case. The Food Inspector had deposed that the milk in the container was churned by repeatedly drawing off milk through the tap at the bottom and pouring it through the opening on top of the container and it was the vendor who took the milk from the container and gave it to him. The purpose of stirring would be only to see that the milk fat does not remain at the top. If that be the purpose, the purpose has been served in this case This contention has to fail. Learned counsel for the respondents prayed that an opportunity may be given to respondents 1 and 4 to prove the defence under proviso to Sec. 2(1a)(m) of the Act. Learned counsel for the appellant has no objection to this course. We are inclined to grant the request.

The acquittal of respondents 2 and 3 will stand. Acquittal of respondents 1 and 4 is set aside. The case is remanded to the trial court for fresh disposal in accordance with law after allowing an opportunity to respondents 1 and 4 to adduce further evidence and to decide whether they are entitled to the benefit of the proviso to Sec. 2(1a)(m) of the Act. Further evidence and consideration by the trial court will be confined only to this defence. If the defence is not made out, conviction and sentence have to follow. We dispose of the appeal accordingly.