

**(1973) 11 CAL CK 0013**

**Calcutta High Court**

**Case No:** Criminal Rev. No. 490 of 1972

Ram Chandra Banerjee and  
Another

APPELLANT

Vs

A.K. Chatterjee and The State

RESPONDENT

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**Date of Decision:** Nov. 14, 1973

**Acts Referred:**

- Drugs and Cosmetics Act, 1940 - Section 25
- Prevention of Food Adulteration Act, 1954 - Section 10(1), 11, 13, 13(2), 13(2)

**Citation:** 78 CWN 397

**Hon'ble Judges:** N.C. Talukdar, J; A.N. Banerjee, J

**Bench:** Division Bench

**Advocate:** Samarendra Kumar Dutta, for the Appellant; Mukti Prasanna Muhherjee, for the Respondent

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### **Judgement**

N.C. Talukdar, J.

This Rule is at the instance of the two accused petitioners, Ram Chandra Banerjee and Sarat Lal Jain, praying for quashing the Criminal Proceedings pending in the Court below u/s 16(1) (a) (ii) of the Prevention of Food Adulteration Act, 1954 or in the alternative for transferring the case to some other court and/or for directing the public Analyst to be recalled. The facts leading on to the Rule can be put in a short compass. A prosecution was launched u/s 16(1) (a) (ii) of the prevention of Food Adulteration Act, 1954 by Dr. A.K. Chatterjee, Divisional Medical Officer, Eastern Railway, Howrah, against the two accused persons stating that he collected a sample of milk from the stall of the accused on 30.12.66 after complying with the necessary formalities and the same when analysed was found to be adulterated. In the report of the Public Analyst dated 12.1.67, the milk was kept in the stall for the preparation of tea by the accused persons at the Bandal Railway Station. The complaint was filed ultimately on 26.3.68 about 15 months after the date of the incident. The accused persons were placed on their trial before the learned

Sub-divisional Judicial Magistrate, Hooghly, to answer a charge u/s 16(1) (a) (ii) of Act XXXVII of 1954. The accused pleaded not guilty. Two witnesses were examined on behalf of the prosecution on 11.11.68 and the Analysts report was proved. A material application was filed on behalf of the accused persons before the learned Magistrate on 4.12.70 u/s 13(2) of Act XXXVII of 1954 exercising the right of the accused to pray for sending the sample in question to the Director of Central Food Laboratory for a certificate. The learned trying Magistrate ultimately by his order dated 12.1.71 was pleased to reject the aforesaid application on the ground that it would be infructuous inasmuch as the sample was taken away back on 30.12.66, Thereafter the public Analyst was examined as a court witness. On 26.5.71 an application was filed by the accused petitioners praying that the said court witness may be recalled to put some material question to him on the point of co-relation between fat and solids-not-fat percentage as observed in Richmond's Dairy Chemistry. The said application was also rejected by an order dated 1.9.71 by Shri D.N. Mondal, Judicial Magistrate, 1st Class, Hooghly. The petitioners apprehended that they would not receive an impartial trial and prayed for transfer but the same was also rejected. The aforesaid orders were impugned and the present Rule was issued.

2. Mr. Samarendra Kumar Dutta, Advocate, appearing on behalf of the accused-petitioners, did not press the other two grounds relating to transfer and the recall of the public Analyst and he pin-pointed one material ground, viz. that a continuance of the proceedings in the court below would be an abuse of the process of the Code because of a non-conformance to the provisions of section 13(2) of the Prevention of Food Adulteration Act, 1954. In this context he further submitted that the sample taken as far back as on 30.12.66 was completely rotten and even the learned Judicial Magistrate himself found that it was infructuous to allow the prayer for sending the other part of the sample to the Director of Central Laboratory for the requisite certificate, but there is a clear non-consideration resulting in a failure of justice of the material fact that this had denied a valuable right to the accused in a criminal trial and through no fault of the accused. Mr. Dutta further contended that there is a non-conformance of the provisions of section 10(1) inasmuch as the Food Inspector had no power to take sample of the article of food which was not meant for sale by the accused persons inasmuch as this was kept there for the purpose of preparing tea by the vendor, Mr. Mukti Prasanna Mukherjee, Advocate appearing on behalf of the State, joined issue. Mr. Mukherjee contended that it is rather late in the day to raise objections u/s 10(1) inasmuch as those are more technical than real. As to the main ground taken by Mr. Dutta, Mr. Mukherjee's reply shortly is that the accused should have availed of the right u/s 13(2) at the proper stage and the learned Judicial Magistrate was right in rejecting the said application because at that point of time it was quite infructuous.

3. We will take up for consideration the first ground relating to a nonconformance to section 13(2) of the Prevention of Food Adulteration Act, 1954 as taken up by Mr.

Dutta because it goes to the very root of the case. A reference is necessary to the provisions that after the institution of a prosecution under this Act the accused vendor or the complainant may, on payment of the prescribed fee, make an application to the court for sending the part of the sample mentioned in sub-clause (1) or sub-clause (iii) of clause (c) of subsection (1) to section 11 to the Director of Central Food Laboratory for a certificate. It has been laid down in subclause (3) to section 13 that the certificate issued by the Director of the Central Food Laboratory under subsection (2) shall supersede the report given by the Public Analyst under subsection (1). Mr. Dutta contended that the Public Analyst's report (Ext. 6) was wholly unsatisfactory and one looks in vain to the same to ascertain as to whether the sample was of cow's milk or of buffalo's milk. Apart from that he made an ancillary submission that the manner and the method of taking the sample has also been in contravention of the mandatory rules framed under the Prevention of Food Adulteration Act, 1954. In any event, Mr. Dutta urged, the accused persons were not satisfied with the Analyst's report in such a border line case and, therefore, wanted to exercise their rights enjoined u/s 13 (2) of Act XXXVII of 1954. The application having been rejected on the ground that the same was infructuous, has materially prejudiced the accused petitioners in establishing their case in a criminal trial and as such the same should not be allowed to proceed. It is material to consider in this context that the Sanitary Inspector took the sample of the boiled milk from the accused persons on 30.12.66. and that the Public analyst Completed his Report by 12.1.67. Thereafter there was a delay of about 15 months when the sample was taken. The contention raised now on behalf of the State that because of the delay the learned Judicial Magistrate rightly jettisoned the prayer made on behalf of the accused persons. We have given our anxious consideration to the facts of the present case and we hold that the boot is on the other leg. If there has been a delay the prosecution has to thank itself for the same. An accused in a trial under the prevention of Food Adulteration Act has no access to the report given by the public Analyst and in this case it was only after the prosecution was launched after 15 months and the Public Analyst was examined in court that the accused could come to know about the details of the report and the purported non-conformance. As soon as the accused persons came to know about the same, they exercised their option u/s 13(2). If such an option had become infructuous that is not due to the laches of the accused persons as the learned Judicial Magistrate appears to be of the view but due to the belated prosecution launched. The position under the Prevention of Food Adulteration Act is quite different from that obtaining under the Drugs and Cosmetics Act, 1940 wherein there is a material provision in section 25 of the Act relating to the reports of Government Analyst. Under sub-section (1) to section 25 of the Drugs and Cosmetics Act, 1940 the Government Analyst to whom the sample of the drug has been submitted for test delivers to the inspector with a signed report in triplicate in prescribed form and under sub-section (2) the Inspector on receipt thereof is to deliver one copy of the report to the person from whom the sample was taken. Sub-section (3) provides that any document purporting to be a

report signed by a Government Analyst under this Chapter shall be evidence of the facts stated therein, and such evidence shall be conclusive unless the person from whom the sample was taken has within 28 days of the receipt of a copy of the report, notified in writing the Inspector or the Court before which any proceeding in respect of the sample are pending that he intends to adduce evidence in controversion of the report. As we have already Observed, there is no provision *Pari materia* under Act XXXVII of 1954. Therefore, there is no opportunity for the accused to have any knowledge before the prosecution and the disclosure of the public Analyst's report. The date of the prosecution makes it abundantly clear that it is a very much belated one and if the prayer for a further examination by the Director of Central Food Laboratory had become infructuous it is due to this delay and the accused in a criminal trial should not be saddled with the responsibility therefor.

4. We may now refer to the imprimature of judicial decisions on the point. In the case of (2) [Municipal Corporation of Delhi Vs. Ghisa Ram](#), Bhargava, J., delivering the judgment of the Court, observed that "When a valuable right is conferred by section 13(2) of the Act on the vender to have the sample given to him analysed by the Director of the Central Food Laboratory, it is to be expected that the prosecution will proceed in such a manner that the right will not be denied to him". It was further observed by the Supreme Court that the said right is a valuable one, because the certificate of the Director supersedes the report of the Public Analyst. We respectfully agree with the principles laid down therein. A reference against may be made to the (1) [Mansoor and Others Vs. State of Madhya Pradesh](#), P. Jaganmohan, J. delivering the judgment of the court, laid down that the defence that the accused has been deprived of his right u/s 13 (2) to send the sample in his custody to the Director, Central Food Laboratory due to delay in launching the prosecution is not open when the accused has not filed an application u/s 13(2) during the trial and there is no evidence to show that no preservative was added to the sample. In the instant proceeding such an application was in fact made and rejected on the ground that the same was infructuous. We respectfully agree with the observations made by the Supreme Court in the aforesaid cases and we hold that a valuable right has been denied to the accused in a criminal trial, in as much as, because of the inordinate delay made by the prosecution it was not possible for the accused to avail of the provision enjoined u/s 13(2) of Act XXXVII of 1954, thereby prejudicing them materially in their defence. The failure to take the same into consideration on the part of the learned Judicial Magistrate has resulted in a failure of justice.

5. The point at issue may be approached from another stand point viz., that the rejection of the application made on behalf of the accused u/s 13(2) of Act XXXVII has ultimately resulted in a material non-conformance to the procedure established by law. As was observed by Lord Roche in the well-known case of (3) *Nazir Ahmad, Appellant v. The King Emperor, Respondent*, reported in 63 IA. 372 at pages 381-82 that "where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily

forbidden." The order of rejection passed by the learned Judicial Magistrate ultimately resulted in a non-conformance to the material provisions of law ensuring to the benefit of the accused in a criminal trial and approached from this standpoint also the order of rejection has been bad and repugnant and in any event the proceedings should not be allowed to continue denying such a valuable right to the accused under the Act. The first contention of Mr. Dutta accordingly succeeds.

6. In view of our findings on the said point, we need not enter into the other points. Mr. Mukherjee appearing on behalf of the State had submitted that the matter may be sent back for proceeding further from the stage reached, after giving due opportunity to the accused as enjoined under the provisions of the Statute. It will be an ill wind that blows nobody any good and at this belated stage that will not serve any useful purpose, more so, when the learned Judicial Magistrate has himself found the prayer as infructuous because of the efflux of time.

7. It should not also be overlooked that in the absence of any opportunity enjoined u/s 13(2) of Act 37 of 1954, the resultant proceedings would be an abuse of the process of the court. As to Mr. Mukherjee's other submission that quashing at an interlocutory stage in an extraordinary procedure and should therefore be reluctantly resorted to, Mr. Mukherjee is certainly right on principle but each case must depend on its own facts. We have given out anxious consideration to the facts of the present case and we hold that a continuance of the present proceedings in the present shape without affording to the accused the valuable rights enjoined under the Act would be merely an abuse of the process of the court. A reference in this context may be made to the case of (4) R.P. Kapoor v. State of Punjab, Mr. Justice Gajendragadkar (as His Lordship then was) delivering the judgment of the court observed at page 869 that "It is well established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice." The Supreme Court had undoubtedly observed therein that "Ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage." The Supreme Court however has ultimately observed that "There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against the accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice". We respectfully agree with the aforesaid observations and we hold, in the facts and circumstances, that a continuance of the proceedings in the court below would amount to an abuse of the process of the court. A failure to do the same would result in a denial of justice. Looked at from this point also the present proceedings pending in the court below u/s 16(1) (a) (ii) of the Prevention of Food Adulteration Act should be quashed.

In the result, we make the Rule absolute; and we quash the proceedings pending in the court below u/s 16(1) (a) (ii) of the Prevention of Food Adulteration Act, 1954 being Miscellaneous Case No. 439 of 1968.

Let the records go down as early as possible.

A.N. Banerjee, J.

I agree.