(1968) 06 CAL CK 0041

Calcutta High Court

Case No: None

Shew Shankar Singh		APPELLANT
	Vs	
The State and Others		RESPONDENT

Date of Decision: June 12, 1968

Acts Referred:

- Constitution of India, 1950 - Article 227
- Essential Commodities Act, 1955 - Section 3, 7, 7(1), 7(1)(a), 7(1)(a)(ii)
- Penal Code, 1860 (IPC) - Section 367(2), 420, 510, 53, 60
- Prevention of Food Adulteration Act, 1954 - Section 16, 16(1), 19, 7
- Prisons Act, 1894 - Section 3, 3(2), 3(3), 59
- West Bengal Children Act, 1959 - Section 24

Citation: 74 CWN 56

Hon'ble Judges: S.N. Bagchi, J; A. Roy, J

Bench: Division Bench

Advocate: N.C. Banerjee, C.H. Roy and A.K. Das, for the Appellant;P.C. Ghosh for the State, for the Respondent

Judgement

1. The revision application u/s 435 of the Code of Criminal Procedure of 1898, being Rev. No. 803/67, is at the instance of the accused Petitioner Sheo Sankar Singh. The opposite parties are the State, Sm. Latika Banerjee and Shri Shanti Banerjee, P. Ws. 1 and 2 respectively in the case. The Petitioner was convicted u/s 7, Clause (ii) of the Essential Commodities Act, 1955 by Shri M. Rahaman, Magistrate, 1st Class, Howrah and was sentenced to T.R.C. (Till rising of the Court) and to pay a fine of Rs. 2,000/- in default, to Rigorous Imprisonment for two months. The Learned Magistrate further directed by his order that out of the fine, if realized, a sum of Rs. 500/- was to be paid to P.W. 1 or to her husband P.W. 2 as compensation. He also ordered to destroy alamat seized.

2. The other revision case, being No. 804 of 1967, arises our of a rule issued suo motu by this Court upon the District Magistrate of Howrah and the accused Agya Ram Gargi, alias Garg to show cause why the order dated 23rd March, 1966 discharging the said Agya Ram Gargi alias Garg passed by the learned Magistrate, Sri M. Rahaman, 1st Class, Howrah in the C.S. G.r. case No. 30/64, referred to in the petition, filed by the convicted accused Petitioner Sheo Shankar Singh, out of which arose the Revision Case No. 803/67, should not be set aside or such other or further order or orders made as to this Court might seem fit and proper.

3. The State appeared in both the Revision Cases through Mr. Prasun Kumar Ghose, learned Advocate representing the learned Deputy Legal Remembrancer of the State of West Bengal.

In the Revision Case No. 803/67 the accused Petitioner was represented by Mr. Chintaharan Ray, a learned Advocate of this Court with another learned Advocate, Mr. Arun Kishore Das Gupta. Agya Ram Gargi the opposite party in Revision Case No. 804/67 was represented by Mr. Nalin Chandra Banerjee, a learned Advocate of this Court. We heard both the two Revision Cases which arose out of the same criminal proceeding before the learned Magistrate, Shri M. Rahaman, and both the cases shall be governed by this judgment.

4. Latika Banerjee, who figured as P.W. 1 in the case addressed a petition of complaint to the Special Superintendent of Police, Enforcement Branch, West Bengal on 31.1.64 wherein she stated that she took delivery of 40 (forty) bags of cement from Agya Ram Garg (Cement Stockist) 413, G.T. Road, North Howrah on 17.1.64 vide the cash memo No. 597 against the Permit No. CM 2563/2 dated 7.1.64, issued by the office of the S.D.C., Supplies, Howrah. The License No. of the aforesaid stockist is 1899/40. After having tested by the qualified Mistry (Mason) engaged by the Petitioner for repairing her house and additions it was found that the cement was not genuine one and that it was not being concretized without which the cement work could not be done. The consignment involved Rs. 315/46 Np. which was fully paid. She complained further that she was deceived by the cement dealer against whom she could not take any action without bringing the matter to the notice of the addressee of the letter and his help. Accordingly, she prayed before the Special Superintendent of Police, Enforcement Branch to take up the matter. She had also dispatched sample of the said cement and a copy of the cash memo to the Special Superintendent of Police, Enforcement Branch along with the letter of complaint.

5. The petition of complaint, dated 31.1.64 addressed by Sm. Latika Banerjee to the Special Superintendent of Police, Enforcement Branch, West Bengal was forwarded with an endorsement dated 3.1.64 by the said Superintendent to Inspector, S. P. Ray Choudhury with a request to enquire and report. The Inspector, S. P. Ray Choudhury endorsed on the said application "forwarded to O/C, Golabari P.S. for starting an F.I.R. u/s 7(1) of Essential Commodities Act, 1955 for contravention of s.7(1) of

Essential Commodities Act, 1955, for contravention of para 3 of Cement (Quality and Control) Order, 1962 read with Section 420 I.P.C." On the basis of the written complaint as aforesaid, A.S.I. Swadesh Mukherjee filled up the prescribed First Information Report form of the said P.S. on 1.2.64 and started a case against Agya Ram Gargi u/s 7(1) of the Essential Commodities Act, 1955 for contravention of para 3 of Cement (Quality and Control) Order, 1962 read with Section 420 I.P.C. in the First Information Report form, the A.S.I., Swadesh Mukherjee recorded "on receipt of the written complaint I started this case. S.I. A. C. Das of Howrah DEB has take up the investigation of the case." The place of occurrence as recorded in the F.I.R. form - In the Cement Shop of Agya Ram Garg at 413, G. T. Road (North) The Charge-sheet No. 25 dated 10.5.65 on the basis of the F.I.r. No. 1 dated 1.2.64 referred to above was submitted by S.I. A. C. Das on 10.5.65. In the column of accused person in the Charge Sheet, Agya Ram Garg was shown absconding and Sheo Sankar Singh, Manager of Agya Ram Garg, was shown as released on bail. The relevant facts in the column of the Charge Sheet reading as charge or information as set forth therein are as follows:

6. On 1.2.64 on the complaint Sm. Latika Banerjee, Golabari P.S. case No. 1 dated 1.2.64 u/s 7(1) of Act X of 1955 and 420 I.P.C. was started by A.S.I. Swadesh Ranjan Mukherjee. The fact of the case was that the complaint took 40 bags of cement from the cement dealer Agya Ram Gargi on 16.1.64 with proper permit. After taking the cement bags to her house she found that the cement bags were not genuine cement and the cement dealer cheated her. During investigation the cement was found adulterated by the Chemical Examiner. The case was well proved against both the proprietor, Agya Ram Garg and Sri Sheo Sankar Singh, Manager of the firm as per Cols. 2 and 4 of the C.S. So I submitted C.S. No. 25 dated 10.5.65 u/s 7(1) of Act X of 1955 for violation of para 3 of Cement (Quality and Control) Order, 1962 and u/s 420 I.P.C. to stand the trial in Court."

7. On 3.6.65, when the learned Subdivisional Magistrate, Howrah received the Charge Sheet, the Petitioner, Sheo Sankar Singh was on police bail while Agya Ram was reported to be absconding. On 11.6.65 Sheo Sankar Singh appeared by a petition and was bailed out. On 13.7.65 both Sheo Sankar Singh and Agya Ram Garg appeared and Agya Ram was allowed bail and Sheo Sankar Singh was allowed to continu8e on his previous bail. The case was transferred by the Sub-Divisional Magistrate on that very date to Mr. M. Rahaman, Magistrate, 1st Class, Howrah. After the copies of the relevant documents were furnished to both the accused upon which the prosecution wanted to rely at the trial, several dates were fixed for framing charge against both the accused persons. On 23.3.66 Sheo sankar Singh, the present Petitioner in Criminal Revision Case No. 803/67 and Agya Ram Gargi, the opposite party in the Criminal Revision Case No. 804/67 were present when the Magistrate framed a charge u/s 7, Clause (ii) of Act X/55 and explained the same to the accused in a summary procedure. The accused person pleaded not guilty to the charge and claimed to be tried. The Magistrate recorded the following order on

23.3.66.

Accused present, Charge u/s 7(ii) Act X/55 explained to the accused in a summary procedure. Accused pleaded not guilty and claims to be tried. There is no element to consider any charge u/s 420 I.P.C. against the accused which has also been admitted by the C.S.I. Elements against accused Agya Ram is also wanting and he is discharged u/s 251 A(2) Code of Criminal Procedure To 26.5.66 for p.ws. Issue summons accordingly.

8. This order dated 23.3.66 discharging Agya Ram Gargi u/s 251 A(2) of the Code is the subject-matter of the revision Case No. 804/67 rising out of the rule issued by this Court suo-motu. Now, before proceeding to consider the revision application No. 803/67 we will deal with the legality of the order dated 23.3.66 passed by the learned Magistrate discharging the opposite party Agya Ram Gargi in the Criminal Revision Case No. 804/67 and his jurisdiction to pass such order against which the Rule was issued by this Court suo-motu. Section 262 of the Code says amongst other things, that the procedures prescribed for warrant cases shall be followed in warrant cases subject to certain exceptions mentioned in the Section. The case started on an information to the police and the charge sheet was submitted after completion of the investigation before the learned Sub-divisional Magistrate by the Investigating Officer. So, the case is one instituted on "police report." Accordingly, the procedure at the summary trial should have been u/s 251 A of the Code read with Section 262 and 263 of the Code. It is a warrant case, trial summarily for the purpose of procedure, instituted on a police report. Therefore, at the commencement of the trial the learned Magistrate was to have followed the procedure laid down in Sub-sections (4) and (5) onwards right up to Sub-section (13) of the Section 251 A of the Code. Upon consideration of all the documents referred to in Section 173 of the Code and upon the making of such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the learned Magistrate considers the charge against the accused to be groundless, he shall discharge him as Sub-section (2) of Section 251 A of the Code provides. If, upon such documents being considered and such examination if any, being made and the prosecution and the accused being given an opportunity of being heard the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under chapter XXI of the Code which such Magistrate is competent to try and which in his opinion could be adequately punished by him, he shall frame in writing a charge against the accused, as Sub-section (3) of Section 251A of the Code enjoins. In a summary trial of an accused under warrant procedure laid down in Section 251 A of the Code, instituted on police report, the Magistrate has to commence trial from the stage as provided for by Sub-section (4) of Section 251 A of the Code. The provisions in the stages at the trial, as provided for by Sub-Sections 2 and 3 of Section 251 A of the Code to which we have already made a reference need not be followed at the trial of a warrant case instituted on a police report in a summary procedure.

Sub-Section 4 of Section 251 A of the Code reads as follows: The charge shall then be read and explained to the accused and he shall be asked whether he is guilty or claims to be tried. The Section 263 of the Code amongst other things states that in cases where no appeal lies, the Magistrate or Bench of Magistrates need not record the evidence of the witnesses or frame a formal charge; he shall enter in the columns of the form the particulars as in Clauses (a) to (j) of Section 263 of the Code. Clause (f) of Section 263 of the Code reads as follows: The offence complained of and the offence (if any) proved, and in cases coming under Clause (d) Clause (f) or Clause (g) of Sub-section (1) of Section 260 the value of the property in respect of which the offence has been committed. Clause (g) of the said Section reads ''the plea of the accused and his examination (if any)'', "The offence complained of" as Clause (f) of Section 263 of the Code enjoins, is a charge within the meaning of "the charge" in Sub-Section 4 of Section 251 A of the Code which read as follows:

The charge shall then be read and explained to the accused and he shall be asked whether he is guilty or claims to be tried.

Sub-Section 6 of Section 251 A of the said Code reads as follows:

If the accused refuses to plead, or does not plead, or claims to be tried, the Magistrate shall fix a date for the examination of witnesses.

9. As those are the provisions of Section 251 A, Sub-Sections 4 and 6 which are relevant for our purpose in considering the legality and propriety of the order passed by the learned Magistrate on 23.3.66, discharging Agya Ram, we are to examine whether the learned Magistrate''s order discharging Agya ram after the framing of the charge could be supported in law and intra vires his jurisdiction. We have quoted the order of the learned Magistrate in extensor. Though no formal charge against Agya Ram Garge and Sheo Sankar Singh was required to be framed u/s 263 of the Code at the summary trial, the offence complained of and leveled against them and explained to them by the Magistrate by using the form prescribed u/s 263 of the Code to which they pleaded not guilty amounted to the framing of charge within the meaning of Section 251A, Sub-Sections 8 and 4 of the Code followed by taking of the plea of the accused to the charge when the case was instituted on a police report, and trial had commenced as a warrant case instituted on police report under the summary procedure. After the offence u/s 7, Clause (ii) of the Act X/55 had been explained by the learned Magistrate to both the accused Sheo Sankar Singh and Agya Ram Garge and when both of them pleaded not-guilty of the offence charged and claimed to be tried, it must be held that the Magistrate at that stage came down to the stage as laid down in Sub-Section 4 of Section 251A of the Code. So, the learned Magistrate had no other alternative after that stage than to fix a date for examination of the witnesses for trial of both the accused for the offence charged, under the summary procedure punishable u/s 7(i) (a) (ii), but not u/s 7 (ii) of the Act X/55, following the procedure laid down in Sub-Section 6 of Section 251A of the Code onwards which we have already referred to earlier. Sub-Section 7,

following Sub-Section 6 of Section 251A of the Code provides that on the date so fixed with reference to Sub-Section 6 of Section 251A of the Code, the Magistrate shall proceed to take all such evidence as may be produced in support of the prosecution. But what the learned Magistrate did after framing of the charge against Agya Ram and Sheo Sankar Singh u/s 7, Clause (ii) of Act X of 1955, which he had explained to both of them and to which both of them pleaded not guilty and claimed to be tried, was that the learned Magistrate recorded in the order dated 23.3.66 which we have quoted earlier in this judgment reading as "elements against accused Agya Ram is also wanting and he is discharged u/s 251A(2) of Code of Criminal Procedure This order discharging Agya Ram u/s 251 A Sub-Section 2 of the Code of Criminal Procedure was in clear violation of Sub-Sections 6 and 7 of Section 251A of the Code not to speak of the other Sub-sections right upto Sub-Section 13 of Section 251 A of the Code. In compliance with Sub-Section 4 of Section 251 A of the Code the formal accusation i.e. the substance of the complaint, as required by Clause (f) of the form, prescribed u/s 263 of the Code had been explained to both the accused and both the accused had pleaded not guilty to the formal accusation i.e. the charge, the Magistrate had no other alterantive but to fix a date for trial of both the accused on the charge u/s 7(ii) of Act X/55 following the procedure of summary trial u/s 263 read with Section 251A, Sub-Section 4 and other relevant Sub-sections of the Code. He had no jurisdiction to discharge Agya Ram at that stage u/s 251 A, Sub-Section 2 of the Code. If the materials placed before the learned Magistrate and considered by him did not satisfy him as sufficient in law, to lay an accusation for an offence, punishable u/s 7(ii) of Act X/55 against Agya Ram but sufficient against Sheo Sankar Singh, he could have, before explaining the accusation and taking pleas of both the accused, discharge Agya Ram and then could have explained the accusation only to Sheo Sankar, and framed a charge for an offence punishable u/s 7(1) (a) (ii) of Act X/55 against Sheo Sankar Singh and tried him for such offence following the procedure beginning from Sub-Section 4 onwards of Section 251 A read with Section 263 of the Code. After the learned Magistrate had followed the procedure of framing charge and explaining the same to both the accused who pleaded not guilty to the charge and claimed to be tried as provided for by Sub-Section 3 and Sub-Section 4 of Section 251 A, read with Section 263, Clause (f), as in the form prescribed u/s 263 of the Code, he lost jurisdiction to fall back upon Section 251 A. Sub-section (2) of the Code and to record an order of discharge only as against Agya Ram in respect of the offence punishable u/s 7 (1) (a) (ii) of Act X/55 in clear violation of the provisions of Sub-Section 6 and other Sub-section following Sub-Section 6 of Section 251 A of the Code. From this aspect only, the order of discharge passed by the learned Magistrate on 23.3.66 in favour of Agya Ram has been thoroughly illegal and without jurisdiction, and cannot sustain in law. The learned Magistrate considered the materials before him as against both the accused relating to an offence alleged u/s 420 I.P.C. He did not find the materials sufficient in law to level an accusation for an offence punishable u/s 420 I.P.C. as against both the accused, though both the accused were

chargesheeted for an offence, punishable u/s 7, Clause (ii) of Act X/55 as well as for an offence punishable u/s 420 I.P.C.

10. It would be very intriguing to note that the charge sheet did not state that the chemical examiner found the cement in question as being not of the ''prescribed standard''. In para 2, Clause (b) (i) of the Cement (Quality and Control) Order, 1962 it is stated: "prescribed standard" means the Indian Standard - (i) No. IS: 260-1958 relating to Portland cement, rapid hardening cement and low heat cement, and . . . Explanation - Cement shall not be deemed to be prescribed standard if it is not of the nature, substance or quality which it purports or it represents to be."

11. In the charge sheet, as we have already mentioned, the Sub-Inspector used the following words "during investigation the cement was found adulterated by the Chemical Examiner. There is no such expression as ''adulterated'' in the Cement (Quality and Control) Order, 1962. We have in it the expression "prescribed standard" statutorily defined and explained which we have already quoted. It is surprising to note that the Chemical Examiner in his report observed "samples marked (A) and (C) are genuine Portland cement while sample marked (B) is adulterated Portland cement." The Cement (Quality and Control) Order, 1962 does not define "adulterated cement." It speaks of "prescribed standard" and it lays down and explains such "prescribed standard". So, the Chemical Examiner''s report does not and cannot be considered as one which found the alleged offending cement to be not of "prescribed standard" within the meaning of para 2(b)(i) and the explanation thereto as appearing in the Cement (Quality and Control) Order, 1962. So, the question will not arise as to which is the most important element besides other elements that constitutes the offence charged against both Agya Ram and Sheo Sankar, punishable u/s 7(ii) of Act X/55 read with paragraph 3 of the Cement (Quality and Control) Order, 1962. The Chemical Examiner''s report is certainly one of the documents it would go to show if the offending cement was or was not of the "prescribed standard" which is one of the most important elements in the offence charged. If the Chemical Examiner''s report reveals that the offending cement was not of the ''prescribed standard'' within the meaning of Cement (Quality and Control) Order, 1962 then and then only, provided the other elements in the offence were present, the learned Magistrate could have leveled accusation against both the accused for having had contravened paragraph 3 of Cement (Quality and Control) Order, 1962 punishable u/s 7(1)(a)(ii) of Act X/55. But the learned Magistrate did not, as we find, look into the provisions of the Cement (Quality and Control) Order, 1962, nor did he examine the Chemical Examiner''s report keeping in view the definition ''prescribed standard'' as in paragraph 2 Clause (b) (i) and explanation thereto appearing in Cement (Quality and Control) Order, 1962. So, while framing the charge, or in other words, laying the accusation against both the accused for contravention of paragraph 3 of the Cement (Quality and Control) Order, 1962, punishable u/s 7 (1) (a) Clause (ii) of Act X/55, the learned Magistrate did not apply his mind to the materials gathered during investigation and placed before him to

ascertain whether the offending cement did or did not conform to the "prescribed standard" according to the report of the Chemical Examiner. The Chemical Examiner''s report, as we have seen, used the expression "adulterated ''but did not use the expression'' below the prescribed standard", if so found on analysis in regard to the alleged offending cement. The whole prosecution case appears to have rested mainly on the Chemical Examiner''s report. As the Chemical Examiner''s report does not show that the alleged offending cement did not conform to the ''prescribed standard'' as defined in paragraph 2, Clause (b) (i) and in explanation thereto of the Cement (Quality and Control) Order, 1962 there could be no framing of the charge within the meaning of Sub-Section 4 of Section 251 A read with Section 263 Clause (f) of the Code, as against both the accused Agya Ram and Sheo Sankar Singh by the learned Magistrate. It is not known, as the Chemical Examiner was not examined as a witness for the prosecution by the learned Magistrate, while trying Sheo Sankar Singh and convicting and sentencing him u/s 7(ii) of Act X/55 read with paragraph 3 of the Cement (Quality and Control) Order, 1962 as to whether by the expression "adulterated" used in his report, the Chemical Examiner had materials in his possession in his laboratory sheets, containing data found on examination of the alleged offending cement, available for the Court''s scrutiny indicating that the offending cement did not conform to the ''prescribed standard'' within the paragraph 2 Clause (b) (i) and explanation thereto of the Cement (Quality and Control) Order, 1962. If the Chemical Examiner''s laboratory sheets containing data establishing that the offending cement did not conform to the ''prescribed standard'' then and then only there could possibly be a charge against both the accused persons for having had violated paragraph 3 of the Cement (Quality and Control) Order, 1962, making themselves liable to be punished u/s 7 (1) (a), Clause (ii) of Act X/55 (Essential Commodities Act) provided of course, that the other elements constituting such offence alleged were also there in the materials placed before the Magistrate for consideration.

12. Now we come to the consideration of the revision application in Criminal Revision Case No. 803 of 1967, filed by Sheo Sankar Singh. In view of what we have just observed, the order date 23.3.66 discharging Agya Ram passed by the learned Magistrate cannot sustain in law and is without jurisdiction and must be set aside with such directions as we would hereafter record in the concluding portion of this judgment.

13. The trial, however, related only to Sheo Sankar Singh for an offence, punishable u/s 7, Clause (ii) of Act X/55 for his alleged contravention of paragraph 3 of the Cement (Quality and Control) Order, 1962 in regard to some quantity of Portland cement. Sheo Sankar Singh was found guilty of the offence so charged and was convicted by the learned Magistrate and sentenced in the following terms:

Accused Sheo Sankar Singh is convicted u/s 7 (ii) of Act X/55 and considering the serious nature of the offence committed by him, he is sentenced to T.R.C. and also

to pay a fine of Rs. 2,000/- (Two thousand) i.d. to R.I. for two months u/s 251 A (12) Code of Criminal Procedure Fine if realized, Rs. 500/- (Five hundred) should be paid to p.w. 1 or to her husband p.w. 2 as compensation.

14. We cannot help observing that the learned Magistrate while framing the charge did not even correctly specify the Section of law under which Sheo Sankar Singh was to be charged, punished and sentenced. The learned Magistrate framed the charge for the offence punishable u/s 7, Clause (ii) of Act X/55. The alleged offence should have been charged as punishable u/s 7 (1) (a) (ii) of the Essential Commodities Act read with paragraph 3 of the Cement (Quality and Control) Order, 1962 but the learned Magistrate recorded the order dated 23.3.66 wherein he had set forth "charge u/s 7(ii) of Act X/55 explained to the accused in a summary procedure . . . "In the form used by the learned Magistrate u/s 263 of the Code of Criminal Procedure in the column ''offence complained of and the date of its alleged commission'', the learned Magistrate recorded as follows:

On 17.1.64 you sold ten bags of Portland Cement to one Srimati Lalita Banerjee which was adulterated Portland cement. You violated Clause (3) of Cement (Quality and Control) Order and thereby committed an offence u/s 7(ii) of Act X/55.

15. Here, also, the learned Magistrate did not record, as he was to have recorded, the Section 7(1) Clause (a) (ii) of Act X/55. The importance of stating the precise Section, Sub-section, clause and the number of clause of the law for violation of which any offender is charged, tried and convicted, must appear in the charge-framed, as also in the judgment convicting and sentencing the offender to punishment prescribed by law. We have noticed sitting in this Bench in a number of cases such violations of law by a number of Magistrates dealing with cases under Essential Commodities Act (Act X/1955). We wish that the learned Magistrates would do well if they look into the precise provisions of law for violation of which an offender is to be charged, tried and either sentenced to punishment or acquitted.

16. Mr. Chinatharan Ray, the learned Advocate for the Petitioner, Sheo Sankar Singh in Revision Case No. 803/67 submitted that the elements constituting the offence charged were wanting and could not be established by the prosecution. The Chemical Examiner''s report was the sheet-anchor of the prosecution case for substantiating the offence charged against Sheo Sankar Singh. We have already dealt with the nature of the Chemical Examiner''s report and its inherent statutory insufficiency. The evidence as adduced before the learned Magistrate, did not establish that the alleged offending cement failed to conform to the ''prescribed standard'' as law enjoins and already explained by us. It may be that the Chemical Examiner may have in his possession data in his examination sheets which may prove or may not, if the alleged offending cement was or was not of the ''prescribed standard'', as defined by paragraph 2, Clause (b) (i) and the explanation thereto, of the Cement (Quality and Control) Order, 1962. In order to establish that the alleged offending cement was below the ''prescribed standard'' the prosecution was

required to examine Chemical Examiner who could have placed before the learned Magistrate the data of his analysis of the alleged offending cement if he maintained those in his examination sheets so that the Court could have decided whether the alleged offending cement fell below the ''prescribed standard'' as Law enjoins. Without the evidence of the Chemical Examiner, as we have already indicated, charge against either of the accused, as framed u/s 7(ii) of Act X/55 read with paragraph 3 of the Cement (Quality and Control) Order, 1962 could hardly sustain in law on the evidence of the Chemical Examiner''s worthless report only. The prosecution evidence based on Chemical Examiner''s report failed to establish whether the alleged offending cement fell below the ''prescribed standard'' as defined in paragraph 2, Clause (b) (i) and explanation thereto, of the Cement (Quality and Control) Order, 1962. Therefore, the learned Magistrate was not justified in law in framing a charge against Sheo Sankar Singh, the Petitioner in the Revision Case No. 803/67 for violation of paragraph 3 of the Cement (Quality and Control) Order, 1962 punishable, as the learned Magistrate recorded u/s 7(ii) of Act X/55 and trying, convicting and sentencing the said Petitioner on such a charge u/s 7(ii) of Act X/55.

17. The learned Magistrate in exercise of his powers u/s 545 of the Code passed the following order:

Fine if realized Rs. 500/- should be paid to p.w. 1 or to her husband p.w. 2 as compensation.

18. Mr. Ray submitted that the order being contrary to law could not sustain. The relevant portions of Section 545, Sub-section (1) of the Code reads as follows:

Whenever under any law in force for the time being a Criminal Court imposes a fine . . . . . or a sentence . . . .. of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied -

(b) In the payment to any person of compensation for any loss or injury caused by the offence, when the substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court.

19. The learned Magistrate erred in law while awarding compensation to p.w. 1 or to her husband p.w. 2 since compensation is payable to any person, who is in the opinion of the Court, can recover compensation in a Civil Court. The learned Magistrate should have awarded compensation to one person, but not alternatively as he did. Such order is clearly against law. In a Civil Court, the person entitled to compensation may be one person, or more than one person jointly, but not alternatively, suing as a Plaintiff or Plaintiffs in a suit for compensation. The person who is entitled before the Civil Court to compensation must, therefore, be a definite and ascertained individual. So, the learned Magistrate was to have awarded compensation to that person who only suffered the injury by the offence. It would have been a valid order had he had awarded compensation only to p.w. 1 or only to

p.w. 2 consistent with his definite finding as to who actually had suffered the injury by the alleged offence. The learned Magistrate did not find who actually had sustained injury by reason of the alleged offence. There could be no suit for a claim for compensation by two persons claiming alternatively as Plaintiff, for the same amount before a Civil Court, according to law. The learned Magistrate was to have found, which he did not, as to who was the individual who had suffered injury by the alleged offence and then he was to have awarded compensation to such definite individual entitled to it, according to the finding of the Magistrate, keeping in view that such person was also under the law, entitled as a Plaintiff, to sue and to get a decree for compensation, which the learned Magistrate awarded him, before a Civil Court, suing as the Plaintiff in a properly constituted suit. Therefore, the order of the learned Magistrate as quoted above has been thoroughly illegal and without jurisdiction and cannot sustain in law.

20. Mr. Ray, the learned Advocate for Sheo Sankar Singh submitted that the order "sentenced to T.R.C." was not a sentence according to law and that neither the conviction nor the sentence could be legally maintained. We have had occasions in several other revision cases to note where the Magistrates sentenced the accused persons on conviction for an offence to "T.R.C." or to "detention till rising of the Court" or to imprisonment till rising of the Court". In the present case, the learned Magistrate while sentencing the accused observed "considering the serious nature of the offence committed by him he is sentenced to "T.R.C." and also to pay a fine . . . "Chapter III of the Indian Penal Code under the heading of ''punishment'' begins with Section 53, the relevant portion of which reads as follows:

53. The punishments to which offenders are liable under the provisions of this Code are -

First . . . . .

Secondly . . . . .

Thirdly . . . . .

Fourthly - Imprisonment, which is of two descriptions, namely:

(1) Rigorous, that is, with hard labour

(2) Simple.

* * *

Section 60 of the Indian Penal Code reads as follows:

In every case in which an offender is punishable with imprisonment which may be of either description it shall be competent to the Court which sentences such offenders to direct in the sentence that such imprisonment shall be wholly rigorous, or that such imprisonment shall be wholly simple, or that any part of such imprisonment

shall be rigorous and the rest simple.

21. If the punishment is to be of imprisonment, it must be of either of the two descriptions either rigorous or simple, and Section 60 of the Code directs the Court, while sentencing an offender to imprisonment to record in the sentencing order that such imprisonment shall be wholly rigorous or wholly simple or that such imprisonment shall be partly rigorous, and the rest simple. So, any punishment of imprisonment must be either rigorous, or simple, or either partly rigorous, or partly simple, and such character of punishment of imprisonment must appear in the criminal Court''s judgment or order while sentencing an offender to imprisonment. We have got in all the punishing Sections of the Indian Penal Code and other Penal Laws in force in India the maximum limit of punishment of imprisonment where imprisonment is a statutorily prescribed sentence, but not the minimum of such sentence. Section 510 of the Indian Penal Code prescribes simple imprisonment for a term which may extend to 24 hours, or with a fine which may extend to Rs. 10/- or with both. This Section limits the maximum sentence of simple imprisonment up to 24 hours which, as we find, is the shortest maximum period of simple imprisonment prescribed by the Indian Penal Code. We could not find in the Indian Penal Code nor in the Essential Commodities Act (Act X/55) any punishment reading as either "detention till rising of the Court" or "sentenced to T.R.C." (it may be read as till rising of the Court) or sentenced to "imprisonment till rising of the Court". What we find is that if a Court awards a punishment of imprisonment, awardable under the law to an offender, the imprisonment must be either simple or rigorous partly simple or partly rigorous if so awardable for the offence, punishable under any particular law in force in India, and that the Court awarding the sentence of imprisonment must specify in the order sentencing the offender to imprisonment whether the imprisonment shall be simple or rigorous or partly simple or partly rigorous, having regard to the provisions of fourthly of Section 53 and of Section 60 of the Indian Penal Code and of the law under which a particular offender is punishable for the offence with imprisonment which may be prescribed as either simple or rigorous. Section 32, Sub-section (1) and (2) of the Code of Criminal Procedure authorize the courts of Magistrates to pass the following sentences:
The Courts of Magistrates may pass the following sentences, namely,

Imprisonment for a term not exceeding two years including such solitary confinement as is authorized by law;

Fine not exceeding two thousand rupees;

Imprisonment for a term not exceeding six months, including such solitary confinement as is authorized by law;

Fine not exceeding five hundred rupees; imprisonment for a term not exceeding one month;

Fine not exceeding one hundred rupee;

(2) The Court of any Magistrate may pass any lawful sentence, combining any of the sentences which it is authorized by law to pass."

We do not find either in Section 53 of the Indian Penal Code or in Section 32 of the Code of Criminal Procedure that a Magistrate may pass any sentence other than the sentence of imprisonment of either of the two descriptions . . . . simple or rigorous of varying terms, as authorized by law. We could not find either in Section 53 I.P.C. or in Section 32 of the Code of Criminal Procedure any authority for the Courts of Magistrates to sentence to a punishment reading as "detention till rising of the Court" or as "sentenced to T.R.C." or as "imprisonment till rising of the Court." So, as we will hereinafter discuss, the learned Judge in a case decided by the Andhra Pradesh High Court rightly observed "the sentence of imprisonment till rising of the Court is unknown to law." In the case of (1) Boddepalli Lakshminarayana Vs. Suvvari Sanyasi Appa Rao and Others, , High Court, at page the learned Judge sitting singly on the bench of Andhra Pradesh High Court at page 534 paragraph 17 of the report observed: "Apart from the fact that the sentence is unjustifiably lenient, the sentence of imprisonment till the rising of the Court is unknown to law, for the sentence of imprisonment involves the suffering of it outside the custody of the Court." The learned Judge, however, did not refer in his judgment to the provisions of Section 53, fourthly and Section 60 of the Indian Penal Code, and Section 32 of the Code of Criminal Procedure. Mr. Ghose, the learned Advocate for the State, however, brought to our notice a Division Bench decision of the Madras High Court in the case of and in regarding (2) Nathu Nadar reported in AIR 1945 Mad 313. The two previous single Bench decisions of the Madras High Court on the question of punishment sentencing an offender to imprisonment till rising of the Court had been over-ruled by the Division Bench decision of the Madras High Court referred to above. At page 314 of the report (2) (A.I.R. 1945 Mad) the Division Bench while disagreeing with the two earlier Single Bench decisions of the Court on the question of punishment sentencing an offender to imprisonment till rising of the Court observed - "The validity of a sentence of imprisonment till the rising of the Court is recognized in the Criminal Rules of Practice framed by this Court. Paragraph 1 of R. 102 says:

The Government consider the awarding of short term of imprisonment as undesirable and Magistrates, before passing such sentences, should consider whether imprisonments till the rising of the Court allowed by law could not appropriately be passed instead, or the provisions of Section 562, Criminal P.c. applied in favour of accused person.

Of course, if a sentence till the rising of the Court were not one allowed by law, we should not be bound to have regard to this rule, but it was inserted after consideration and we do not doubt the wisdom which lies behind it. "We have gone through this judgment of the Division Bench of the Madras High Court. The

provision of Sections 53 and 60 of the Indian Penal Code and Section 32 of the Code of Criminal Procedure, 1898 which we have considered and discussed earlier in this judgment and several other provisions of the Code of Criminal Procedure and the provisions of the Prisons Act, 1894 which we would hereafter discuss and consider in this judgment had not been considered and discussed by the Division Bench of the Madras High Court. The Criminal Rules and Orders, Vol. I (A.S.) framed by the Calcutta High Court, 1950 Education. do not make any provision similar to paragraph 1 of R. 102 of the Criminal Rules and practices, framed by the Madras High Court. The Division Bench of the Madras High Court observed that rule was inserted after due consideration and the Bench did not doubt the wisdom that law behind the rule. We, therefore, do not feel persuaded to accept the views of the Division Bench of the Madras High Court on the question now before us for consideration. We have already said that if any punishment is to be awarded being one of imprisonment as Section 53 fourthly of the Penal Code enjoins it must be either simple or rigorous imprisonment and Section 60 of the said Code enjoins that the sentence is to be either of simple imprisonment or of rigorous imprisonment or be partly of simple imprisonment, or partly of rigorous imprisonment, awardable under the law by the Court punishing an offender and sentencing him to imprisonment, the Court shall record in the order sentencing to offender to imprisonment the class on such imprisonment. The Division Bench of the Madras High Court as we noticed, did not consider whether the sentence of "imprisonment till the rising of the Court could be a punishment within the fourthly of Section of the Indian Penal Code, since words imprisonment as such is of a sentence that cannot be read as to its class whether simple or rigorous. A sentence of "imprisonment till the rising of the Court" is, therefore, a punishment unthinkable within the fourthly of Section 53 and Section 60 of the Indian Penal Code. That is why, we think, that the learned Judge of the Andhra Pradesh High Court observed that "an imprisonment till the rising of the Court" was unknown in law (1) Boddepalli Lakshminarayana Vs. Suvvari Sanyasi Appa Rao and Others, . We respectfully agree with this view.

22. So, we cannot consider the decision of the Division Bench of Madras High Court, reported in 1959 Madras 313 as an authority for the *** position that a punishment, sentencing an offender to "imprisonment till the rising of the Court" or ''to detention till rising of the Court'' or ''sentenced till rising of the Court'' as in the Revision Case No. 803/67 before us, is a punishment of imprisonment either simple or rigorous, within the fourthly of Section 63, read with the provisions of Section 60 of the Indian Penal Code. By using the expression ''sentenced to imprisonment till rising of the Court,'' or ''to detention till rising of the Court'' or ''sentenced till rising of the Court'' in the order or judgment convisting and sentencing an offender for the offence committed, the criminal Court, not only awards a punishment unthinkable in law violating the mandatory provisions of Sections 53 and 60 of the I.P.C. and Section 32 of the Code of Criminal Procedure, but lays down how such punishment shall be executed and executes such sentence itself in utter disregard of and in violation, of

specific provisions of law relating to execution of lawful sentences. The Court thus usurps the function of the legislature as it were, making a law both substantive and procedural. The expression sentenced till rising of the Court" as used by the learned Magistrate in the Revision Case No. 803 of 1967 cannot be read as a punishment of imprisonment, either simple or rigorous. The expression "imprisonment till the rising of the Court" in the word ''imprisonment'' may have the favour of a punishment of imprisonment though offender Section 53 fourthly and Section 60 of the Penal Code and Section 32 of the Code of Criminal Procedure but the expression "sentenced till the rising of the Court" or the expression "detained or detention till rising of the Court" cannot even have the flavour of a punishment of imprisonment since Section 53 fourthly and Section 60 of the Indian Penal Code enjoin that the punishment, if of imprisonment, shall be either rigorous or simple and shall be so expressed by the Court in the sentencing order itself. A Magistrate cannot create a punishment not authorized by law and cannot award such punishment or sentence violating Section 32 of the Code of Criminal Procedure. The Division Bench of the Madras High Court in (2) AIR 1945 MAD 313, at page 314 observed "the requirements of the Section (Section 383 of Code of Criminal Procedure .) that the Court passing the sentence shall forthwith forward a warrant to the jail in which the accused person is to be confined merely contemplates the case where the Court intends the sentence of imprisonment to be undergone in jail. It leaves entirely untouched the case where the Court passing the sentence directs that the imprisonment shall take place within the precincts of the Court. "So, the Division Bench of the Madras High Court considers that the Criminal Court as a place of detention of an offender for undergoing a sentence of imprisonment who, after trial, was convicted and sentenced with a punishment of imprisonment. We, however, cannot agree with such view. The Division Bench of the Madras High Court while making the observations quoted above had not considered various other relevant provisions of law, which we have already and would just now discuss in this judgment. Section 167, Sub-Section 2 and 3 of the Code of Criminal Procedure, read as follows:

167. Procedure when investigation cannot be completed in twenty four hours:

(2) The Magistrate to whom an accused person is forwarded under this Section may, whether has not jurisdiction to try the case, from time to time authorize the detention, of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. If he has not jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction.

Provided that no Magistrate of the third class, and no Magistrate of the second class not specify empowered in this behalf by the State Government shall authorize detention in the custody of the police.

(3) a Magistrate authorizing under this Section detention in the custody of the police shall record his reasons for so doing.

23. Those two provisions of law contemplate police custody for a limited period of an accused during investigation stage. Now, if a criminal Court thinks that the accused is to be detained in custody beyond the period, fixed, under Sub-Section 2 of Section 167 of the Code of Criminal Procedure 1898, other than in police custody that custody must be the Court''s custody. This brings us to Section 3, Sub-Sections 1 and 2 of the Prisons Act of 1894, which reads as follows:

3(1) - prison means any jail or place used permanently or temporarily under the general or special orders of a State Government for the detention of prisoners, and includes all lands and building appurtenant thereto, but does not include -

(a) any place for the confinement of prisoners who are exclusively in the custody of the police.

(b) any place specially appointed by the State Government u/s 541 of the Code of Criminal Procedure, 1882 (10 of 1882) or

(c) any place which has been declared by the State Government by general or special order to be a subsidiary jail.

3(2) - Criminal prisoner means any prisoner duly committed to custody under the writ, warrant or order of any Court or authority exercising criminal jurisdiction, or by order of a Court Martial.

So, "criminal prisoner" is one who is duly committed to custody under the writ, warrant or order of any Court. This custody of a criminal is Court''s custody in jail and such custody, other than the policy custody, is contemplated u/s 167 Sub-section (2) of the Code of Criminal Procedure during the investigation stage. For a term of 15 days at a time a criminal Court, during investigation, may keep an accused in policy custody but if the Court wants the custody of the accused other than in police custody during investigation the custody of such accused must be in jail since the accused in custody by Court''s order is a ''criminal prisoner'' as Section 3, Sub-section (2) of the Prisons Act, 1894 provides. After the trial by a criminal Court is concluded and the accused has been awarded punishment of imprisonment of either description he cannot be kept in the custody of the Court within the Court''s precincts or can be kept in the jail custody as a "criminal prisoner" as defined u/s 3(3), Sub-section (2) of the Prisons Act, 1894. The accused convicted and sentenced to imprisonment becomes a ''convicted criminal prisoner'' as defined by Section 3, Sub-Section 3 of the Prisons Act, 1894, which reads as follows:

3(3) ''Convicted criminal prisoner'' means any criminal prisoner under sentence of a Court or Court Martial, and includes a person detained in prison under the provisions of Chapter VIII of the Code of Criminal Procedure, 1882 (10 of 1882) or under the Prisoners Act, 1871 (5 of 1871)." A convicted criminal prisoner under a

sentence of a Court, and a "criminal prisoner" means any prisoner duly committed to the custody under writ, warrant or order of any Court.

24. Chapter XXIV under the heading "General provision as to inquiries and trials" of the Code of Criminal Procedure 1898 commences with Section 337. Sub-Section 3 of Section 337 relates to an approver who has accepted pardon, and enjoins "such person", unless he is already on bail, shall be detained in custody until the termination of the trial." The Division Bench of the Lahore High Court in the case of (3) AIR 1931 353 (Lahore) had to consider Section 337 Sub-Section 3 of the Code of Criminal Procedure. At column 2 of page 356 of the report, the Court observed:

As shown above the nature of the custody contemplated by law in the case of an accused person during the enquiry or trial is judicial custody or confinement in a ''prison'' and an approver must be detained in similar custody.

Judicial custody, therefore, relates to an accused who is a "criminal prisoner" within Section 3, Sub-section (2) of the Prisons Act, 1894. In Chapter XXIV of the Code of Criminal Procedure referred to above, we find Section 351 Sub-section (1) in which the following provisions appear -

(1) Any person attending a criminal Court, although not under arrest or upon a summons, maybe detained by such Court for the purpose of inquiry into or trial of any offence of which such Court can take cognizance and which, from the evidence, may appear to have been committed, and may be proceeded against as though he had been arrested or summoned.

25. During enquiry or trial a criminal Court may detain a person attending the Court under such situation as envisaged by Sub-section (1) of Section 251 of the Code of Criminal Procedure. We notice the words ''detained by the Court". This, detention does not mean within Court''s precincts or in the Court room. This detention contemplates detention in jail of such person, considered as a "criminal prisoner" u/s 3, Sub-section (2) of the Prisons Act, 1894. So, a person attending a criminal Court, even if not under arrest, or upon summons may be detained by such Court for either of the two purposes - (i) for the purpose of enquiry into, or (ii) trial of any offence relating to such person of which such Court can take cognizance. Section 352 of the Code under Chapter XXIV reads as follows:

352. The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to open Court, to which the public generally may have access, so far as the same can conveniently contain them . . . .

26. This Section clearly says that the place in which any criminal Court is held for either of the two purposes - (i) inquiring into, or (ii) trying any offence shall be an open Court. So a "criminal Court" is a place for the purpose of inquiring into or trying an offence. After a person has been found guilty at the conclusion of a trial for an offence and has been awarded a punishment prescribed by law, say of

imprisonment either simple or rigorous, the trial is at an end. With the end of the trial, the place where the offender was tried, convicted and sentenced ceases in regard to such offender to be "a Court" i.e. a place for the purpose of enquiring into or trying for the offence of which he had already been tried, convicted and sentenced by the Court. Sub-Section 2 of Section 351 of the Code of Criminal Procedure refers also to the detention of any person attending a criminal Court in course of an enquiry under Chapter XVII of the Code which speaks of enquiry into cases triable by the Court of sessions or the High Court. So, the detention by criminal Court during enquiry or trial as Section 351, Sub-sections (1), and (2) of the Code of Criminal Procedure contemplate, does not mean "within the court-room or in Court precincts". "Custody of the Court" does not mean within the precincts of the Court house or else the definition of a "criminal prisoner" in Section 3(2) of the Prisons Act shall have no practical significance in law. It is clear from Section 252 of the Code that the place in which any criminal Court is held for the purpose of enquiry into or trying any offence shall be an open Court but the Section does not say that after a person has been tried, convicted and sentenced for an offence by any criminal Court, the place where such person was tried shall be, in regard to such person, an "open Court" for the purpose of his custody by such Court for execution of the sentence. So soon as a criminal Court finishes an enquiry, or a trial, of an offender, in regard to such person, the location of such Court premises ceases to be an ''open Court'' within the meaning of Section 252 of the Code of Criminal Procedure. Such person, if required to be kept in custody confined under the provisions of any law by the order of the Court, must be lodged at a place as Section 541, Sub-section (1) of the Code enjoins in the terms as "unless otherwise provided by any law for the time being in force, the State Government may direct in what place any person liable to be imprisoned, or committed to custody under this Code shall be confined." This provisions is to be read and considered with several other provisions in the Code of Criminal Procedure ., 1898 as well as with the relevant provisions of the Prisons Act and the rules framed thereunder in West Bengal by the State Government. We shall now discuss such relevant provisions of the Code of Criminal Procedure, 1898, Prisons Act, 1894 and the rules framed by the State of West Bengal in order to decide whether the punishment reading as "sentenced to T.R.C." or "sentenced to detention till the rising of the Court" or ''sentenced to imprisonment till rising of the Court.'' is a sentence valid under the law, and if valid, can legally be executed. We may here and now say that having regard to the provisions of Section 53 (fourthly) and Section 60 of the Indian Penal Code and Section 32 of the Code of Criminal Procedure a punishment reading as ''sentenced till rising of the Court'' or a punishment reading as ''sentenced to T.R.C.'' or a punishment reading as ''sentenced to imprisonment till rising of the Court'' cannot be a punishment according to the provisions of law as laid down in the Sections quoted above. There is no punishment in Section 53 of the Indian Penal Code reading as ''sentenced till rising of the Court'' or ''sentenced to T.R.C. Imprisonment, if awarded as a punishment must be either simple'' or rigorous and such character

of imprisonment must appear in the order of the Criminal Court sentencing an offender to any punishment of imprisonment. So, a punishment reading as ''sentenced to imprisonment till rising of the Court'' cannot be read as that the imprisonment is either simple or rigorous. So, such a sentence also would clearly violate the provisions of Section 53, (fourthly) and Section 60 of the Indian Penal Code, and also Section 32 of the Code of Criminal Procedure which empowers a Magistrate to award punishment of such imprisonment as a sentence as is authorized by law. So, a punishment of imprisonment as authorized by law can only be awarded by the Magistrate, but not a punishment reading as ''sentenced to T.R.C.'' or ''sentenced till rising of the Court'', nor ''sentenced to imprisonment till rising of the Court'', since neither of such punishments can be found in Section 53 (fourthly) and any order by the criminal Court as well as of a Magistrate imposing any of such punishments by way of a sentence would be in clear violation of Section 60 of the Indian Penal Code, as also of Section 32 of the Code of Criminal Procedure in particular in regard to a Magistrate. We shall now point out that neither of the three punishments discussed above, if imagined to be a punishment of imprisonment, can be executed according to law within the precincts of the Court or in the Court-room.

27. Section 245, Sub-section (20 of the Code of Criminal Procedure reads as follows:

Where the Magistrate does not proceed in accordance with the provisions of Section 349 or Section 562, he shall, if he finds the accused guilty, pass sentence upon him according to law.

Section 258, Sub-Section 2 of the Code enjoins "where in any case under this Chapter (Ch. XXI) the Magistrate does not proceed in accordance with the provisions of Section 349 or Section 562, he shall, if he finds the accused guilty, pass sentence upon him according to law." Chapter XXIV, under the heading ''General provisions as to inquires and trials'' in Section 337 (3), relating to an approver who has accepted pardon provides "such person, unless he is already on bail, shall be detained in custody until the termination of the trial." In order to explain the expression ''shall be detained in custody until the termination of the trial'' in Sub-Section 3 of Section 337 of the Code. Mr. Ghosh, the learned Advocate representing the State of West Bengal drew our attention to the decision of the Division Bench of the Lahore High Court in the case of (3) Kundanlal and Ors., reported in AIR 31 Lah 353 already referred to. In column 1 at page 357 of the report the Division Bench of the Lahore High Court observed: "Moreover, ample provision under the Prisons Act has been made and exists in Lahore for the confinement of persons liable to be imprisoned or committed to custody . . . ." There the approver was lodged in the police custody. Section 541, Sub-Section 1 of the Code of Criminal Procedure opens with the expression "unless when otherwise provided by any law for the time being in force, the State Government may direct in what place any person liable to be imprisoned or committed to custody under this Code, shall be confined. The Sub-Section 1 of

Section 541 of the Code of Criminal Procedure therefore to be read with Sections 3(1), 3(2) and 3(3) of the Prisons Act, 1894 (Section 3, Sub-Sections 1, 2 and 3 of the Prisons Act 1894 already quoted).

28. In the Lahore case, the Government had already declared "prisons" under the Prisons Act, but the approver, by the order of the Punjab Government, as it then was, was directed to be confined in a portion of the Lahore Fort which was then in occupation of the police. Under Clause (a) as Section 3, Sub-Section 1 of the Prisons Act, that place was not included within the definition of a prison. So, the confinement by the order of the Court in custody, of the approver, other than in Lahore Jail, was held contrary to the provisions of Section 541, Sub-Section 1 of the Code of Criminal Procedure read with Section 3, Sub-Sections 1 and 2 of the Prisons Act, and as such illegal. An approver was held in the Lahore case to be a criminal prisoner'' and as such the Court ordering his custody not in jail but in the Lahore Fort in occupation of the police even under the authority of the State Government''s notification appointing such place for confinement of the approver was also held contrary to law, since, u/s 541, Sub-Section 1 of the Code of Criminal Procedure, the State Government has already declared a place to be a jail in Lahore under Sub-Section 1 of Section 3 of the Prisons Act where a ''criminal prisoner'' such as an approver, could be or could have been confined in custody by the order of the Court, we have already quoted the provision of Sub-section (2) of Sections 245 and 258 of the Code of Criminal Procedure, Sub-section (2) of Section 367 of the Code under Chapter XXVI of the Code of Criminal Procedure . . . . judgment . . . . reads as follows: -
Section 367(2) - "It shall specify the offence if any, for which and the Section of the Indian Penal of which or other law under which the accused is convicted and the punishment which he is sentenced."

29. We have already observed that the punishment of imprisonment is of two classes as in Section 53 fourthly on the I.P.C. Section 60 of the Indian Penal Code and the Sub-Section 2 of Sections 245, 258 and 367 of the Code of Criminal Procedure make it abundantly clear that when a criminal Court punishes an offender to imprisonment it shall besides other things, specify the class of imprisonment to which the offender is punished by the Court. Sub-section (2) of Section 366 of the Code of Criminal Procedure amongst other things says:

The accused shall, if in custody be brought up or if not in custody, required by Court to attend . . . . pleader.

30. We have pointed out that Section 337(3) of the Code of Criminal Procedure there is the expression "shall be detained in custody under termination of the trial." Section 366(2) also contains the expression custody". So, the expression ''in custody'' in Sub-section (3) of Section 337 and in Sub-section (2) of Section 366 of Code of Criminal Procedure must *** the judicial custody i.e. the jail custody in relation to a

''criminal prisoner'' as already explained by us. Sub-section (2) of Sections 245, 258 and 367 of the Code of Criminal Procedure not warrant that while award punishment to an offender a criminal Court shall direct in the judgment the sentence shall be executed. The punishment to which an offender sentenced by a criminal Court read as either ''sentenced to T.R.C.'' or sentenced till rising of the Court'' or ''imprisonment till rising of the Court'' clearly indicate that not an illegal punishment has been awarded but also its mode of illegal execution has been prescribed by the Court. After Chapter XXVI of the Code of Criminal Procedure Re. Judgment . . . .come the relevant chapter XXVIII - of Execution under the Code of Criminal Procedure. Then chapter begins with Section 381. A criminal Court, after the conclusion of the trial which culminates in awarding of, punishment by way of a sentence to the offender, shall have to follow the procedure, in case of a punishment by way of imprisonment, the provisions of Sections 383, 384 and 400 red with Section 555, Schedule V, Form XXIX. The Form XXIX in Schedule v. of the Code of Criminal Procedure has been prescribed under Sections 245 and 258 of the Code of Criminal Procedure. Sections 383, 384, 385, 400 and Section 555, Schedule V, Form No. XXIX read as follows:
Section 383: Where the accused is sentenced to (imprisonment for life) or imprisonment in cases other than those provided for by Section 381 the Court passing the sentence shall forthwith forward a warrant to the jail in which he is, or is to be confined, and, unless the accused is already confined in such jail, shall forward him to such jail with the warrant.

Section 384: Every warrant for the execution of a sentence of imprisonment shall be directed to the officer-in-charge of the jail or other place in which the prisoner is,, or is to be, confined.

Section 385: When the prisoner is to be confined in a jail, the warrant shall be lodged with the jailor.

Section 400: When a sentence has been fully executed the officer executing it shall return the warrant to the Court from which it issued with an endorsement under his hand certifying the manner in which the sentence has been executed."

"Section 555: Subject to the power conferred by Section 554 and by Article 227 of the Constitution, the Forms set forth in the fifth schedule, with such variation as the circumstances of each case require, may be used for the respective purposes therein mentioned, and if used shall be sufficient.

"Form XXIX - Warrant of commitment on a sentence of imprisonment or fine if passed by a Magistrate (Sections 245, 258).

To the Superintendent (or keeper) of the jail at . . . .

Whereas on the day of - 18 - (name of prisoner) the 1st, 2nd, 3rd as the case may be) prisoner in case No. - of the Calendar for 18 -, was convicted before me (name and

official designation) of the offence of (mention the offence or offences concisely) u/s (or Sections) - of the Indian Penal Code (or of Act) and was sentenced to (state the punishment fully and distinctly):

This is to authorize and require you, the said Superintendent (or keeper) to receive the said (prisoner''s name) into your custody in the said jail, together with this warrant, and there carry the aforesaid sentence into execution according to law.

Given under my hand and the seal of the Court.

This day of , 18

Signature

31. We have already quoted Sub-section (1) of the Section 541 of the Code of Criminal Procedure where it has been clearly laid down that unless when otherwise provided by law for the time being in force, the State Government may direct in what place any person liable to be imprisoned or committed to custody under this Code shall be confined. We have already observed that under ''the Prisons Act jails have been set up and maintained as a place where a person liable to be imprisoned or committed to custody under the Code of Criminal Procedure shall be confined. So, a jail or a prison set up and maintained under the Prisons Act is the only place where any person liable to be imprisoned or committed to custody under the Code of Criminal Procedure shall be confined, but no other place. Under the special laws, as we shall discuss hereunder, by way of illustration, the State Government may set up places where any person, particularly a juvenile offender liable to be imprisoned or committed to custody under the Code of Criminal Procedure shall be confined. Sub-section (2) of Sections 245, 258 and 367 are to be read with Sections 383, 384, 385, 400 and 541(1) and Section 555 of the Code of Criminal Procedure and Form No. XXIX of schedule v. of the Code of Criminal Procedure, keeping in view that u/s 541(1) of the Code of Criminal Procedure jails have been set up and are being maintained in West Bengal, under the provisions of the Prisons Act, as already quoted and discussed, by the State Government. After a criminal court by its judgment convicts an offender and sentences him to the punishment of imprisonment of either description as authorized by law, the Court shall have to issue custody warrant to the keeper of the jail in the form prescribed as in Schedule v. of the Code of Criminal Procedure referred to above. "The custody warrant" in the prescribed form quoted above stems out of an order of the Court following the order of conviction and sentence awarded at the conclusion of the trial by a criminal Court. The warrant mentioned in Section 383 of the Code shall be in the form referred to above to be issued by the order of the Court, addressed to the jailor or execution of the sentence of imprisonment. Therefore, Section 383 of the Code controls Sections 345(2), 258(2) and 367(2) of the Code when punishment is of imprisonment. In the case of (4) K. P. Iswarmurty v. Emperor reported in 48 CWN 477, the Privy Council at page 478 of the report while discussing the legal concept,

scope and content of Form II, warrant of arrest, prescribed u/s 75 of the Code of Criminal Procedure, in Schedule v. of the Code interpreted such form in the following way after quoting the form:

The form prescribed for such a warrant is set out in schedule v. of the Code . . . . A warrant or order of this character is a public document.

32. A warrant in the Form II of schedule v. as well as warrant in Form XXIX in Schedule v. of the Code of Criminal Procedure is an order of the Court in the terms as set forth in the prescribed forms . . . . former u/s 75 and the latter u/s 245(2), 258(2) and 367(2) of the Code of Criminal Procedure, 1898. So, following upon the judgment of a criminal Court convicting and sentencing an offender to the punishment of imprisonment, the Court shall pass an order issuing the warrant i.e. custody warrant, in the Form prescribed addressed to the keeper of the jail, for confining a ''convicted criminal prisoner to undergo the sentence of imprisonment in the jail. The warrant shall be lodged with jailor who after execution of the sentence of imprisonment shall send the warrant back to the issuing Court certifying the execution of the sentence of imprisonment in terms of the warrant. So, the combined effect of the provisions of law in the Sections and the form just referred to, and discussed above, is that at the conclusion of the trial when a criminal Court sentence an offender to a punishment of imprisonment which should be indicated in the judgment, being either simple or rigorous or partly simple or partly rigorous, the Court shall have to record an order issuing custody warrant to the jailor for confinement of the offender, sentenced to the punishment of imprisonment for undergoing such sentence in the jail which has been set up and maintained by the State Government under the provisions of the Prisons Act referred to above read with the provisions of Section 541(1) of the Code of Criminal Procedure. The expression "other place" in Section 384 of the Code of Criminal Procedure may refer to places such as Reformatory Schools, Bengal Borstal School and Industrial Schools and Reception Home set up and maintained by the State Government under the Reformatory Schools Act, 1897, Bengal Brostal Schools Act, 1928 and West Bengal Children Act, 1959, specially in regard to certain classes of juvenile offenders within certain specified areas in West Bengal. Mr. Ghosh for the State, however, submitted that "other place" in Section 384 of the Code might refer to a Court precincts. We could not accept his submission as sound in law. Section 384 of the Code requires a warrant of imprisonment to be directed to the Officer-in-Charge of the Jail or to the Officer-in-Charge of the ''other place'' in which the person is or is to be confined. The Presiding Judge of a Court or a Magistrate of a criminal Court can neither be the Officer-in-Charge of the jail nor an Officer-in-Charge of ''other place'' where the person is or is to be confined under the Code of Criminal Procedure. ''Other place'' in Section 384 of the Code may include such places as set up and maintained by the State Government by any law, other than the Prisons Act, for confinement of person liable to imprisonment or committed to custody under the Code of Criminal Procedure. ''Other place'' in

Section 384 of the Code may also include a place where no law prescribes a place, to be set up and maintained by the order of the State Government, for confinement of any person, liable to be imprisoned or committed to custody, under the Code of Criminal Procedure, but so set up and maintained by the State Government, under an executive order, as enjoined by Section 541(1) of the Code of Criminal Procedure. Under no law in force in West Bengal, a court-house has been declared a place for confinement of a person liable to be imprisoned or committed to custody under the Code of Criminal Procedure. We have not been referred to any executive order of the State Government by which it has declared the court-house of any criminal Court to be the place for confinement of any person liable to be imprisoned or committed to custody under the Code of Criminal Procedure. No executive order of the State Government can declare a Court house to be a place for confinement of any person liable to be imprisoned or committed to custody under the Code of Criminal Procedure when the State Government have already, under the provisions of the Prisons Act read with Sub-Section 1 of Section 541 of the Code of Criminal Procedure, 1898 discussed above, set up and have been maintaining jails in West Bengal for confinement of any person liable to be imprisoned or committed to custody under the Code of Criminal Procedure. The State Government, by an executive order can set up and maintain a place for confinement of any person liable to be imprisoned or committed to custody under the Code of Criminal Procedure in view of the Provisions of Section 541(1) of the Code when under the provisions of any law in force such place has not already been established and maintained by the State Government. So, by, no stretch of imagination ''other place'' in Section 384 of the Code can include the Court-house when the State Government have already set up and have been maintaining jails in West Bengal for confinement of any person liable to be imprisoned or committed to custody under the Code of Criminal Procedure. Accordingly, "other place" in Section 384, and ''in what place'' in the context of Sub-section (1) of Section 541 of the Code cannot mean and include a Court-room or a court''s precincts as a place for confinement of a convicted criminal prisoner ''punished with a sentence of imprisonment of either description for whatsoever term it may be'', or ''criminal prisoner'' committed to custody for confinement under the Code of Criminal Procedure, when in West Bengal, the State Government under the provisions of the Prisons Act, have already established and have been maintaining prisons or jails. A juvenile offender under the West Bengal Children Act, 1959, if and when sentenced to imprisonment under extreme circumstances, is not required under the law to be confined to any jail, and in such a case, the Magistrate sentencing a juvenile offender to imprisonment is to detain the juvenile delinquent in such custody as it may think fit, and is required to report to the State Government for fixing of a place where the juvenile offender may be detained in custody as proviso to Sub-Section 2 of Section 24, and Sub-section (3) of Section 24 of the West Bengal Children Act, 1959 read as follows: -

Section 24, Proviso to Sub-section (2):

Provided that where the Court is satisfied that the offence committed by the juvenile delinquent is of so serious a nature or that he is so unruly or of so depraved a character that he is not a fit person to be sent to a reformatory or borstal school, the Court may sentence him to imprisonment for a period not exceeding the maximum period of imprisonment to which he could have been sentenced for the offence committed, and the Court shall report the case to the State Government and direct the juvenile delinquent to be detained in such custody as it may think fit; and

(3) on receipt of a report from the Court under Clause (2), the State Government may make such arrangement in respect of such juvenile delinquent as it deems proper and may at any time order him to be released from custody on such conditions, if any, as the State Government may think fit to impose.

In such custody a sit (sic) may think fit ''in the proviso to Sub-section (2) of Section 24 of the West Bengal Children Act, 1959 may well include the prison since in Section 541(1) of the Code of Criminal Procedure, the State Government has already set up and has been maintaining jails for any person to be confined on imprisonment or otherwise than on imprisonment in custody under the Code of Criminal Procedure but cannot include a place in the Court-house of the Magistrate. It may also include the Reception Home set up and maintained under the West Bengal Children Act, 1959. Ad interim custody as provided for in the proviso to Sub-section (2) of Section 24 of the West Bengal Children Act, 1959 cannot, therefore, include a place in the Court-house. The State Government may, however, as Sub-Section 3 of Section 24 of the West Bengal Children Act, 1959 provides, by an executive order, set up and maintained under the provisions of the Prisons Act for confinement of a juvenile offender sentenced to imprisonment by a Magistrate in the circumstances discussed above under the provisions of Sub-section (1) of Section 541 of the Code of Criminal Procedure.

33. When by a judgment of a criminal Court, as we have already noticed in relation to Sub-section (2) of Sections 245, 258 and 367 of the Criminal Procedure Code, an offender is sentenced to imprisonment, such sentence punishing the offender under the law, in force, shall be, as Sections 53 and 60 of the Indian Penal Code direct, either simple or rigorous or partly simple or partly rigorous, and specification of the class of sentence shall appear in the judgment of a criminal Court since the courts of Magistrate as Section 32 of the Code of Criminal Procedure enjoins may sentence an offender to imprisonment as authorized by law. But, Sub-section (2) of Sections 245, 258 and 367 of the Code of Criminal Procedure do not provide that a criminal Court sentence an offender to imprisonment may direct that the imprisonment either simple or rigorous shall be executed at a place, such as at the Court room, other than at the jail set up and maintained by and under the provision of Section 541, Sub-section (1) of the Code of Criminal Procedure read with Sub-Sections 1 and 3 of Section 3 of the Prisons Act, 1894 and in a manner contrary to the provisions of Section 383, 384, 385 and 400 read with Section 555, form No.

XXI, Schedule V, framed under Sections 245 and 258 of the Criminal Procedure Code. So, a judgment or order of the Criminal Court, specifying the execution of a sentence reading as "sentenced to detention till rising of the Court" or "sentenced to T.R.C." or "sentenced to imprisonment till rising of the Court" neither of which can be considered as a sentence of imprisonment authorized by law, as discussed above, would make the judgment illegal as also the detention of the offender in Court in execution of such illegal sentence. As regards the form referred to above, it is needless to say that it is as such a part of the Code of Criminal Procedure as any other portion of the Code and is most useful in throwing light on the meaning of the provisions in law in connection with which the Form has been prescribed under the law and is to be used. The form referred to above, does not override the provisions of Sections 245(2), 258(2), 267(2), 383, 384, 385 and 400 and Sub-section (i) of Section 541 of the Code of Criminal Procedure read with Sub-sections (1), (2) and (3) of Section 3 of the Prisons Act, 1894. We have noticed that the Division Bench of the Madras Court in the case reported in (2) In Re: Muthu Nadar, referred to earlier in this judgment did not consider the provisions of law in the several Sections of the Indian Penal Code, Code of Criminal Procedure and the Prisons Act, which we have in this judgment referred to and considered in the context of the present case to find the illegality and impropriety of a punishment and its execution in the Court precincts in a case where a criminal Court sentences an offender to "T.R.C." or to detention till rising of the Court," or "to imprisonment till rising of the Court". Therefore, on a careful consideration of the law, as we have discussed, we respectfully disagree with the views of the Division Bench of the Madras High Court in the case report in (2) AIR 1945 Mad, 313. In our view, the punishment by a sentence, awarded by a criminal Court reading as ''imprisonment till rising of the Court'' is illegal, so also the punishment sentencing an offender to detention till rising of the Court'', or sentencing an offender "till rising of the Court", and a criminal Court has no jurisdiction to deprive the liberty of an offender sentencing him to an illegal punishment and to detain him in execution of such illegal punishment in Court contrary to the provisions established both by the substantive and procedural laws we have discussed and considered.

34. Mr. Ghosh, the learned Advocate appearing on behalf of the State drew our attention to a decision of the Division Bench of this Court in the case (5) 53 CWN 106 in order to support the legality of a punishment awarded by a criminal Court sentencing an offender to a detention till rising of the Court, and to another offender to rigorous imprisonment for one day, who suffered the sentence without being lodged in the jail. The Petitioners before the High Court were father and son. The father was sentenced to rigorous imprisonment for one day and to pay a fine of Rs. 100/-, the son was sentenced to be detained till the rising of the Court. The relevant portion of the judgment is as follows:

"We should here point out that the learned Magistrate apparently was under the impression that rigorous imprisonment for one day and detention till the rising of

the Court were different punishments and there has been some trouble in the lower Court because the learned Magistrate wished to insist on sending the accused to jail. We should point out that in the case of imprisonment for one day as the day on which the sentence is passed, counts as one day, the accused could not be detained in jail on a warrant issued for such a period. In other words, there should be no further trouble on this point. The accused must be taken to have suffered this imprisonment."

35. Their Lordships found the sentence of rigorous imprisonment for one day to be a valid sentence under the law. We respectfully agree with this view. As regards the sentence "to be detained till rising of the Court," their Lordships did not make any observation as to whether such a sentence was a sentence of imprisonment, authorized by law, capable of execution by detaining the offender in the Court room till the rising of the Court. As that decision of the Division Bench of this Court did not make any observation to indicate whether such a punishment unthinkable in law was a sentence of imprisonment authorized by law and capable of execution by detaining the offender in the Court-room till rising of the Court, the question remains open for our decision in the present case. The Rules in Calcutta Gazette, extraordinary, dated Wednesday, June 8, 1966, Notification No. nvvvvvvvvvvn1325 H.J. dated 8th June, 1966 framed u/s 59 of the Prisons Act, called the West Bengal Jail Code appearing at pages 1962 to 2102 of Part (1) of that Gazette, were complied in the Jail Code, Vol. I, 1967 Edition, published by the State of West Bengal. Corresponding to para 524 of the West Bengal Jail Code, Vol. I 1967 Education. Is Rule 231 of the Jail Code Rules, referred to above. The Rules, called Jail Code Rules, have been in force in West Bengal in suppression of all the rules on the subject except those mentioned in the Notification. Rule 231 at page 2012 of the Gazette under the heading "method of calculating duration of prisoner''s sentence", provides amongst other things as follows:
A prisoner sentence to one day''s imprisonment must be released on the same day, but if he is sentenced to imprisonment for 24 hours he shall be kept in confinement for that period. In such a case however, the committing Court should be required to specify the hour from which the sentence should begin. If the month from which the sentence should expire has no date corresponding to the date of sentence, then the last day of the said month must be taken to be the date of expiration of sentence.

36. So, according to the Rule 231 of the Jail Code a prisoner sentenced to imprisonment for a day, if lodged in jail in course of that day, must be released before the sunset of that day, Jail Code Vol. I, 1967 Education. Paragraph 573 is to be read with Rule 22, Chapter I, para a(A) of the Criminal Rules and Orders Vol. (I) of the Calcutta High Court. The para 573 of the Jail Code, as it appears at page 160, Vol. I of the Jail Code, contains in the relevant provisions, all those that are mentioned in Rule 22 of the High Court Criminal Rules and Orders, Vol. I which reads as follows:

Rule 22 - As Rule 573, Bengal Jail Code, prohibits the release of prisoners after lock up, warrant for release shall not be dispatched by a court after sun-set, or if so dispatched, shall be endorsed with the instruction for release as early as possible next morning."

37. So, for undergoing rigorous imprisonment for a day, the "Criminal convicted prisoner shall be confined in jail under a custody warrant" to be issued by the Court to the jailor under the relevant provisions of the CPC as we have already discussed earlier in this judgment. The warrant of release from jail custody in case of such prisoner must be sent to the jailor before sun-set of the day and sent to the jailor at a time when sun has already set, there should appear in the warrant an order of the Court for release of such prisoner on the following morning. Therefore, execution of a day''s simple or rigorous imprisonment by confinement in a jail may not ordinarily create any legal or factual difficulty. The Calcutta High Court framed Rule 22 keeping in view the rule similar to the current Rule 231 of the Jail Code Rules then in force, and also the provisions in paragraph 573 of the Jail Code, Vol. I, 1967. The relevant provisions of paragraph 573 of the West Bengal Jail Code, Vol. (I) 1967 Edition, page 106 contain mattes similar as in Rule 22 of the High Court Rules and something more which reads as follows:

No prisoner shall on any account be released after lock-up. Warrants for release should not be dispatched by a Court after sunset, or, if so dispatched should be endorsed with instructions for release as early as possible next morning. Ordinarily prisoners shall be released after they have partaken of their morning meal, and as soon after sunrise as possible (see Rule 78)".

38. Before their Lordships ((5) 53 CWN 106) the only question that was decided was whether the sentence of rigorous imprisonment for a day could be executed under the law by confining the convicted criminal prisoner in jail for the day. Their Lordships observed:

We should point out that in the case of imprisonment for one day, as the day on which the sentence is passed, counts as one day, the accused could not be detained in jail on a warrant issued for such a period.

We have quoted the Rule 231 of the Jail Code now in force and paragraph 573 of the Jail Code, 1967 Education. Vol. (1) and Rule 22 of the High Court Criminal Rules and Orders, Vol. (I), 1950. Now, therefore, there would be no difficulty for confining in jail an offender for a day to undergo rigorous imprisonment for a day in jail. Such a sentence is perfectly legal in our view and such a sentence should be executed in jail. Their Lordships in their observation noted that there would be difficulty in sending the warrant to the jail for execution of a sentence of rigorous imprisonment for a day. Their Lordships, however, did not make any pronouncement regarding the legality of the sentence reading as "detained till rising of the Court." Before their Lordships, the sentence was not like the one as in the present Revision Case No.

803/67 reading as "sentenced to T.R.C." In the sentence there is no word ''imprisonment'' nor the word ''detention''. The punishment reading as "sentenced to T.R.C." as awarded to the Petitioner in the Revision Case No. 803/67 was not a sentence according to law and execution of such an illegal sentence by detention of the Petitioner in Court for a day had also been illegal and without jurisdiction. We made it also clear that a punishment reading as "detained till rising of the Court" is not a sentence known to law and detention in execution of such an illegal sentence in Court would be illegal and ultra vires the jurisdiction of the Court awarding such punishment and executing such punishment in Court. Even a punishment reading as "sentenced to imprisonment till rising of the Court" would be no sentence according to law and execution of such illegal sentence by detaining the "convicted criminal prisoner" in Court till rising of the Court would be illegal and ultra vires the jurisdiction of the Court. The punishment of imprisonment of either description for a day is legal and can in West Bengal be executed under the law as we have already discussed.

39. Mr. Ray drew our attention to the relevant provision of paragraph 3 of Cement (Quality Control) Order 1962:

3. Prohibition of manufacture sale etc. of cement which is not of the prescribed standard: No person shall himself or by any person on his behalf manufacture or store for sale, sell or distribute any cement which is not of the prescribed standard.

40. It is clear from the provision of paragraph 3 that a person shall not himself or any person on his behalf do any of these acts as specified therein. So, the liability for infringement of paragraph 3 is on the person who either himself or by any person on his behalf does any of the prohibited acts as specified in paragraph 3 of the order. Mr. Ray, the learned Advocate for the accused Petitioner, however, submitted that the person doing any of the prohibited acts as in paragraph 3 of the order, not on his own account but on behalf of another, has not been made liable. So, Mr. Ray contended that if the accused Petitioner Sheo Sankar as the alleged Manager of Agya Ram sold the offended cement to the complaint, he did it on behalf of the owner of the shop i.e. Agya Ram and it was only Agya Ram who could be charged for an offence punishable u/s 7, Sub-section (1) (a) (ii) read with paragraph 3 of the Cement (Quality and Control) Order, 1962 but not the accused Petitioner Sheo Sankar. We appreciate the argument of Mr. Ray but we would not at this stage express our views on the point since we are making both the rules absolute with a direction for framing a charge against both Agya Ram and Sheo Sankar for such offence or offences as would appear from the materials that would be considered by the learned Magistrate before framing charge against both of those accused persons and for their re-trial on the charges to be framed. We would; however, like to draw the attention of the learned Magistrate in the Court below to a decision of the Supreme Court in the case of (6) Sarjoo Prasad Vs. The State of Uttar Pradesh, , that was a case of sale of adulterated articles of foodstuff by a servant of the owner.

There, Sections 7, 16 and 19 of the Prevention of Food Adulteration Act, 1954 had been considered by their Lordships of the Supreme Court. Section 7 of the said Act in material portion provides:

No person shall himself or by any person on his behalf sell . . . . (i) any adulterated food.

The material part of Section 16(1) provides:

If any person whether by himself or by any person on his behalf sells . . . any article of food in contravention of the provisions of this Act . . . . or . . . . he shall . . . . be punishable.

41. In the prevention of Food Adulteration Act, 1954 the word "person" has not been defined. In the Essential Commodities Act, 1955 the word ''person'' has also not been defined. The terms of Section 7 of that Act beginning with ''no person shall himself or by any person on his behalf . . . sell . . . ." have already been quoted. We have already quoted paragraph 3 of the Cement (Quality and Control) Order, 1962 wherein it has been laid down that "No person shall himself or by any person on his behalf . . . sell . . . any cement which is not of the prescribed standard. "Section 7(1) of the Essential Commodities Act, 1955 commences with the following words: "If any person contravenes any order made u/s 3 (a), he shall be punishable . . . . Clause (i) . . . . and Clause (ii) in the case of any other order, with imprisonment for a term which may extend to three years and shall also be liable to fine; provided that, if the Court is of opinion that a sentence of fine only will meet the ends of justice, it may, for reasons to be recorded, refrain from imposing a sentence of imprisonment; "We have already quoted the material part of Section 16(1) of the Prevention of Food Adulteration Act, 1964. It is clear from the provisions of Section 7 and Section 16(1) of the Prevention of Food Adulteration Act, 1954 and Section 7(1)(a)(ii) of the Essential Commodities Act, 1955 and paragraph 3 of the Cement (Quality and Control) Order, 1962 that there are certain common expressions in the provisions of the Sections of the two Acts quoted above such as "no person shall himself or by any person on his behalf . . . . sell . . . . common to Section 7 of the Prevention of Food Adulteration Act, 1954 and paragraph 3 of the Cement (Quality and Control) Order, 1962. In Section 16(1) of the Prevention of Food Adulteration Act, we get "if any person whether by himself or by any person on his behalf . . . . . sells . . . . . ." but in Section 7(1) of the Essential Commodities Act, we do not find the expression "whether by himself or by any person on his behalf", but we find the expression "one person shall himself or by any person on his behalf . . . . sell" in paragraph 3 of the Cement (Quality and Control) Order, 1962. That paragraph 3 of the said order shall have to be read with Section 7(1)(a)(ii) of the Essential Commodities Act, 1955 because an alleged contravention of the prohibition in paragraph 3 of the Cement (Quality and Control) Order, 1962, being an order u/s 3 of the Essential Commodities Act, 1955 has been made punishable if any person contravenes any order. So, the combined effect of the material part of Section 7 and

Section 16(1) of the Prevention of Food Adulteration Act, 1954 is the same as the combined effect of Section 7(1)(a)(ii) read with paragraph 3 of the Cement (Quality and Control) Order, 1962. Keeping in the background what we have just observed, the Supreme Court in the case referred to above, (6) (Sarjoo Prasad Vs. The State of Uttar Pradesh, at page 632 of the report) observed:

The expression ''person'' has not been denied in the Act and in the context in which that expression occurs, it prima facie, includes every one who sells adulterated food. By the collocation of the expression "no person shall himself or by any person on his behalf . . . . ." the employer alone is not prohibited. The intention of the legislature is plain. Every person, be he an employer or an agent, is prohibited from selling adulterated food and infringement of the prohibition is by Section 16 penalised . . . . Prohibition of sale of adulterated food is evidently imposed for the larger interest of the maintenance of public health. The prohibition applies to all persons who sell adulterated food and for contravention of the prohibition all such persons are penalized. Because the legislature has sought to penalize a person who sells adulterated food by his agent it cannot be assumed that it was intended to penalize only those who may act through their agents. If the owner of a shop in which adulterated food is sold is without proof of ''mens rea'' liable to be punished for sale of adulterated food we fail to appreciate why an agent or servant of the owner is not liable to be punished for the contravention of the same prohibition unless he is shown to have guilty knowledge.

42. The pronouncement by the Supreme Court laying down a very subtle principle of law should be very carefully appreciated and considered by the learned Magistrate while framing charge for the alleged contravention of Paragraph 3 of the Cement (Quality and Control) Order, 1962 alleged by the two accused persons or either them punishable u/s 7(1)(a)(ii) of the Essential Commodities Act, 1955.

43. Mr. Banerjee appearing for Agya Ram submitted in the Revision Case No. 804/67 referring to the decision in the case of (7) Nathulal Vs. State of Madhya Pradesh, that "mens rea" should constitute an integral part of an offence under the Essential Commodities Act and the order made thereunder, and that, a person could commit an offence u/s 7 of the Act if and when he ''intentionally or knowingly'' contravened any order made u/s 3 of the Act. In that context, he drew our attention to paragraph 3 of the Cement (Quality and Control) Order, 1962, as well as to Section 7(1)(a)(ii) of the Essential Commodities Act, 1955 and submitted that neither in paragraph 3 of the Order nor in Section 7(1) of the Essential Commodities Act, the word ''intentionally'' or ''knowingly'' indicates mens rea in the offence appeared and that by necessary implication guilty mind i.e. mens rea, would be excluded from the provisions of Section 7(1)(a)(ii) of the Essential Commodities Act read with paragraph 3 of the Cement (Quality and Control) Order, 1962. Accordingly, it has been submitted that there could be no framing of charge against Agya Ram as well as against Sheo Sankar for alleged violation of paragraph 3 of the Cement (Quality and

Control) Order, 1962 read with Section 7(1)(a)(ii) of the Essential Commodities Act. We could not accept Mr. Banerjee''s contention to be sound in law. In (7) Nathulal Vs. State of Madhya Pradesh, , their Lordships of the Supreme Court very succinctly expressed themselves at page 43 of the report. What the Supreme Court held was not that as the words ''intentionally'' and ''knowingly'' had not been set forth either in the order infringed or in Section 7 of the Essential Commodities Act, there could be no offence for violation of the order punishable u/s 7 of the Essential Commodities Act. Taking the provisions of law as in the Order and in the Section that came for consideration before the Supreme Court, the Supreme Court at page 45 of the report amongst other things, observed: -

The nature of the mens rea that would be implied in a statute creating an offence, depends on the object of the Act and the provisions thereof.

44. The observation of the Supreme Court quoted above the indicates that in Section 7 of the Essential Commodities Act and in the Order considered by the Supreme Court in the reported case, the mens rea, was implied in the alleged contravention of the order punishable u/s 7 of the Essential Commodities Act. Their Lordships then discussed the facts of the case: The Appellant was a dealer in food grains. u/s 3 of the Order no person shall carry on business as a dealer except under and in accordance with the terms of a licence issued in this behalf by the licencing authority. Under Sub-section (2) of Section 3 of the Order, if a person stores any food grains in a quantity of 100 mds. or more at any one time, shall, unless the contrary is proved, be deemed to store foodgrains for the purpose of sale. Mathulal, the Appellant, in pursuanjce of that order made an application for a licence on 30th September, 1960 to the Licensing authority in the prescribed form and deposited requisite licence fee. There was no intimation to him that his application was rejected. He was purchasing foodgrains from time to time and sending returns to the Licensing authority showing the grains purchased by him. He did not sell any grains purchased by him. On December 2, 1961 when the Inspector of Food and Supplies checked the godown of Mathulal he stored 885 mds. 2 srs. of wheat for sale. The said storage of the foodgrains would be valid if he had a licence. In that context at page 43 of the report, their Lordships observed:
It follows, that the accused stored the grains under the bona fide impression that the licence in regard to which he had made an application was issued to him. The fact that the licensing authority did not communicate to him the rejection of his application confirmed the accused''s belief. On that belief he proceeded to store the food grains by sending the relevant returns to the authority concerned. It was, therefore, a storage of foodgrains within the prescribed limits under a bona fide belief that he could legally do so. He did not, therefore, intentionally contravene the provisions of Section 7 of the Act or those of the Order made u/s 3 of the Act.

45. On the facts of the case their Lordships of the Supreme Court laid down that in the act complained of for the violation of a particular order passed u/s 3 of the

Essential Commodities Act, punishable u/s 7 of the said Act, the offender''s mens rea in the act being either intentional or with knowledge is not excluded but implied. In Nathulal''s case their Lordships observed that the act complained of against Nathulal in the circumstances of the case was not intentional, and had bee committed on a bona fide belief that he was a licence holder though in fact he was not. Even though there is neither the word ''intention'' or ''knowledge'' interest he act prohibited under paragraph 3 of the Cement (Quality and Control) Order, 1962 or u/s 7 of the Essential Commodities Act, punishing the contravention of the provisions of paragraph 3 of the Cement (Quality and Control) Order, 1962, the prosecution is required to establish upon cogent evidence whether the contravention of paragraph 3 of the Cement (Quality and Control) Order, 1962 punishable u/s 7 of the Essential Commodities Act was either intentional or with knowledge implied in the act prohibited under paragraph 3 of the Cement (Quality and Control) Order, 1962 and punishable u/s 7 (1)(a)(ii) of the Essential Commodities Act respectively. As we understood the Supreme Court decision in Nathulal''s case is that it is not the law that for the absence of the word ''intentional'' or ''with knowledge'' either in Section 7 of the Essential Commodities Act or in any order passed u/s 3 of the Essential Commodities Act for the contravention of which the offender is punishable u/s 7 of the Act, the offender would not be liable to be charged and punished as provided for by the law. In the Act, the contravention of which is prohibited by an order such as the Cement (Quality and Control) Order, 1962 passed u/s 3 of the Essential Commodities Act and made punishable u/s 7(1)(a)(ii) of the Act, there is in the Act prohibited and made punishable the implied mens rea either in the intention in doing the act or in the knowledge in doing the act prohibited by the order in question. So, in a charge framed for contravention of paragraph 3 of the Cement (Quality and Control) Order, 1962, punishable u/s 7(1)(a)(ii) of the Essential Commodities Act knowledge of the offender in the prohibited act complained of should be read as implied and to find proof of such act done with knowledge contravening the order punishable u/s 7(1)(a)(ii) of the act, the learned Magistrate shall have to consider upon the totality of the evidence whether the offence alleged i.e. the prohibited act had been knowingly committed by either or both the accused charged. On the charge as framed, in Nathulal''s case, their Lordships of the Supreme Court after assaying the facts of the case proved held that Nathulal contravened the Foodgrains Control Order punishable u/s 7 of the Essential Commodities Act ''not intentionally'' but upon a bona fide belief that he was a licence-holder though, in fact, he was not, in the peculiar circumstances of the case. Accordingly the submission of Mr. Banerjee, as we held, would be against the tenor of law established by the Supreme Court decision in Nathulal''s case. Therefore, the absence of the word ''intention'' or ''knowledge'' either in Section 7 of the Essential Commodities Act or in paragraph 3 of the Cement (Quality and Control) Order, 1962 would not affect the legality of the charge if framed against both the accused or either of them upon materials to be considered by the learned Magistrate. At the trial of the charge however u/s 7(1)(a)(ii) of the Essential

Commodities Act read with paragraph 3 of the Cement (Quality and Control) Order, 1962 against either or both the accused, the learned Magistrate shall have to consider on the totality of the facts proved whether the act complained of and charged was done with the knowledge establishing mens rea in the offence charged. In the explanation in paragraph 2 of the Cement (Quality and Control) Order, 1968 we find the following terms:

Cement shall not be deemed to be of prescribed standard if it is not of the nature, substance or quality which it purports or it represents to be.

46. The combined effect of paragraph 3 of the Cement (Quality and Control) Order, 1962 already quoted and the explanation in paragraph 2 of that Order read with Section 7(1)(a)(ii) of the Essential Commodities Act, would be that when a person purports to sell cement to be of prescribed standard or sells cement representing it to be of prescribed standard, but such cement is not of the nature, substance and quality of the prescribed standard which was purported to be so when sold, or represented to be so when sold, the offender would be punishable u/s 7(1)(a)(ii) of the Essential Commodities Act. Therefore, the question will arise whether while purporting to sell the cement of prescribed standard the seller knew that he was selling cement which was not of the nature, substance or quality of the prescribed standard as defined in paragraph 2(b)(i) of the Order, or whether the seller at the time of selling the cement representing it to be of prescribed standard as defined in the paragraph mentioned above, knew that the cement was not of the nature, substance or quality of the "prescribed standard". So, after framing the charge against both or either of the accused as the learned Magistrate would think proper, for an offence punishable u/s 7 (1) (a) (ii) of the Essential Commodities Act read with paragraph 3 of the Cement (Quality and Control) Order, 1962 he shall have to consider and find upon evidence adduced by the prosecution whether the offence complained of and charged was knowingly committed by the offender or offenders within the scope of paragraph 3 of the Order punishable u/s 7(1)(a)(ii) of the Essential Commodities Act in the manner just explained above. If the implied mens rea in the offence charged according to the learned Magistrate''s appreciation of the evidence is not proved beyond reasonable doubt as against the offender or offenders charged, the learned Magistrate shall pass necessary orders acquitting the offender or offenders concerned. We cannot, therefore, for the reasons recorded uphold the contention of Mr. Banerjee, the learned Advocate for Agya Ram in the manner he has put forward before us. The order discharging Agya Ram in the Revision Case No. 804/67 passed by the learned Magistrate on 23.3.66, has been wholly illegal and without jurisdiction and must be and hereby set aside. In the Revision Case No. 803/66, the trial held and the conviction and sentence recorded and passed have been illegal without jurisdiction and must be and are hereby set aside. Both Agya Ram and Sheo Sankar should be re-arrested and enlarged on bail to the satisfaction of the learned Magistrate if and when applied for before him. The learned Magistrate shall, before framing the charge for an offence either u/s

7(1)(a)(ii) of the Essential Commodities Act read with paragraph 3 of the Cement (Quality and Control) Order, 1962 or u/s 420 of the Indian Penal Code or under both, call upon the prosecution to produce the laboratory sheets containing the data relating to the analysis of the allegedly offending cement by the Chemical Examiner. If and when such laboratory sheets are produced before the learned Magistrate, he shall consider such laboratory sheets along with the Chemical Examiner''s report and shall decide whether or not on the materials so placed before him, a charge u/s 7(1)(a)(ii) of the Essential Commodities Act for the alleged contravention of the paragraph 3 of the Cement (Quality and Control) Order, 1962 and/or for an offence punishable u/s 420 of the Indian Penal Code could be legally framed against both Agya Ram and Sheo Sankar or against either of them, bearing in mind particularly the relevant portions of our directions hereinbefore given in this judgment relating to the frame and contents of the charge for the alleged contravention of the Order by both or either of the accused persons punishable u/s 7(1)(a)(ii) of the Essential Commodities Act read with paragraph 3 of the Cement (Quality and Control) Order, 1962. If the learned Magistrate considers on material placed before him that a charge against both or either of the accused for offence or offences as disclosed in the materials placed before him can legally be framed he would frame such charge or charges against both or either of the offenders and shall proceed to trial. If, on the materials placed before the learned Magistrate no charge can legally be framed under either of those two Sections against both or either of the accused the learned Magistrate shall then pass orders according to law. The record of the case be dispatched as expeditiously as possible, to the learned District Magistrate, Howrah for nominating a competent Magistrate for disposal of the case according to law in the light of the directions given in this judgment. The Rule in case No. 803/67 for enhancement of sentence is consequently discharged.

Amaresh Roy, J.

47. I agree that the Rule in Criminal Revision Case No. 803 of 1967 should be made absolute by setting aside the conviction and sentence passed against Sheo Sankar and the case should be sent back for retrial. I also agree that the Rule for enhancement of sentence issued against Sheo Sankar should be discharged for the reason that the case is being sent back for retrial.

48. I also agree that the order discharging Agya Ram u/s 252(2) Code of Criminal Procedure is wholly erroneous and improper and should be set aside for the reason that the Magistrate has not performed his duty enjoined by Sub-sections (2) and (3) of Section 251A Code of Criminal Procedure properly and legally. For that reason the Rule in Criminal Revision Case No. 804 of 1967 issued suo moto against Agya Ram Garg to show cause why the order of discharge dated 23rd March, 1966, passed by the learned Magistrate should not be set aside and such other or further order passed as the Court deems fit should be made absolute and the said Agya Ram Garg should also be tried in the same case with Sheo Sankar from the stage directed in

the judgment just delivered by my Lord.

49. These three Rules arose from an Order passed by a 1st Class Magistrate at Howrah, Shri M. Rahman in C.S.G.R. case No. 30 of 1964 which was a case of alleged offences u/s 7 of Act X of 1955 and Section 420 of the Indian Penal Code. Charge sheet was submitted before the learned Magistrate on 3rd of June, 1965.

50. Prosecution allegation was that Sm. Latika Banerjee (P.W. 1) had purchased 40 bags of cement on 17th January, 1964, from Agya Ram Garg, a licensed cement dealer by paying the price of Rs. 315.46 P. That cement was not of the standard prescribed by law as was represented to the said purchaser Sm. Latika Banerjee, and it was adulterated. She sent a letter of complaint to the Superintendent of Police Enforcement Branch, West Bengal, on 31st of January, 1964. A First Information Report, was recorded on 1st of February, 1964, and upon investigation a charge-sheet alleging offences u/s 7 of Act X of 1955 and u/s 420 of the Indian Penal Code, against both Agya Ram Garg and Sheo Sankar was submitted on 3rd of June, 1965. On that date Sheo Sankar was on police bail and Agya Ram Garg was reported to be absconding. On 11th June, 1965, Sheo Sankar appeared before the Magistrate and was released on bail. Agya Ram Garg appeared before the Magistrate on 13.8.65 and was released on bail. On 3rd March, 1966, the learned Magistrate Shri M. Rahman, to whom the case had been transferred for disposal, explained to the accused in a Summary Procedure "Charge u/s 7(ii) Act X/55" to which accused pleaded not guilty and claimed to be tried. In that Order the learned Magistrate then observed "There is no element to consider any charge u/s 420 I.P.C. against the accused which has also been admitted by the C.S.I. Elements against accused Agya Ram Garg is also wanting and he is discharged u/s 251A(2) Code of Criminal Procedure

51. The learned Magistrate adopted a summary procedure obviously following the provision in Section 12A of Act X of 1955, but he has not said, either in the order-sheet, or in the judgment that he has been specially authorized under that Section.

52. At the trial prosecution examined witnesses and produced evidence to prove that the Firm from which cement had been purchased by Sm. Latika Banerjee was a licensed dealer and that 40 bags of cement were purchased under a permit (Ext. 4) by paying cash price of Rs. 315.46 P. Prosecution also produced in evidence the Chemical Examiner''s Report which said that the cement seized from P.W. 2 who purchased on behalf of Sm. Latika Banerjee was found to be adulterated after due analysis in the laboratory of the samples which were sent to the Chemical Examiner during investigation.

53. Defence of Sheo Sankar at the trial was that the Firm had purchased the cement from some retail dealer and he had no knowledge that the cement was adulterated. It was also contended that the Chemical Examiner''s Report did not show that the

sample examined was not in conformity with the prescribed standard as defined in Section 2(b) of Cement (Quality and Control) Order, 1962.

54. The learned Magistrate accepted the truth of the prosecution evidence on the points that the accused Firm was a licensed dealer in cement and the 40 bags of Cement seized during investigation was sold from the shop. He also found that the cement in question was mixed up with some foreign article in the firm of the accused before the same was delivered to the complainant, although other stocks found in the godown of the accused were found to be in conformity with the prescribed quality sold in the market. He recorded a finding in these terms:

I am thus convinced that some fine processed earth which almost resemble ordinary cement, popularly known as "Ganga Mati" must have been mixed up with the original cement in the godown of the accused before the same was delivered to P.W. 2 and the other stock was kept intact for fear of being detected by the lawful authority".

55. The learned Magistrate over ruled the point raised on behalf of the defence that the mason who first doubted the quality of the cement was not examined by prosecution and a presumption should be raised for non-production of the mason, and then recorded his finding in these words:

To my mind circumstances are so strong that there is no difficulty in arriving at the irresistible conclusion that the accused has committed an offence under Cement (Quality and Control) Order by violating Clause 3 of the Order and should be held guilty u/s 7(ii)/X/55.

On that finding Sheo Sankar was convicted. In awarding the sentence the learned Magistrate said:

Accused Sheo Sankar Singh is convicted u/s 7 (ii) X/55 and considering the serious nature of offence committed by him, he is sentenced to T.R.C. and also to pay a fine of Rs. 2,000/- (Two thousand) in default to R.I. for two months u/s 251A(12) Code of Criminal Procedure Fine if realized Rs. 500/- (five hundred) should be paid P.W. 1 or her husband P.W. 2 as compensation.

Alamats are to be destroyed.

56. Against that order of conviction and sentence Sheo Sankar Singh moved this Court for Revision. On that application Rule was issued upon the District Magistrate, Howrah, to show cause why the order complained of should not be set aside. That gave rise to Criminal Revision No. 803 of 1967. A Rule for enhancement of sentence passed against Sheo Sankar was also issued and that Rule was heard along with Criminal Revision No. 803 of 1967.

57. Another Rule was issued upon the District Magistrate, Howrah, and Agya Ram Garg to show cause why the Order dated 23rd March, 1966 discharging Agya Ram

Garg should not be set aside. That Rule gave rise to Criminal Revision No. 804 of 1967. All the three Rules arising from the same trial have been heard together.

58. Regarding two Rules that concern Sheo Sankar Singh four points have arisen. First, whether the framing of a charge for an offence u/s 7 of Act X of 1966 and also non-framing of the charge u/s 420 I.P.C. was properly and legally made. The second is whether Sheo Sankar who acted only as an agent of Agya Ram Garg could be fixed with any ''mens rea'' and convicted of an offence u/s 7 of Act X of 1955. The third is whether the evidence provided by Chemical Examiner''s Report in this case saying that cement was adulterated was sufficient evidence for holding that the cement was not of prescribed standard as defined in Section 2(b) of the Cement (Quality and Control) Order, 1962, for constituting an offence of violation of Section 3 of that O.

59. The other point which is the subject-matter of the Rule for enhancement of sentence is whether detention till rising of the Court is a legal sentence and imprisonment which is a compulsory sentence for an offence u/s 7 of Act X of 1955.

60. Only point in Criminal Revisional No. 804 of 1967 in which Agya Ram Garg is concerned, is whether the Order discharging Agya Ram Garg has been a proper and legal order. This point, as I have said above, also concerns Sheo Sankar in so far as by the same Order dated 23rd March, 1966 the learned Magistrate did not frame a charge for an offence u/s 420 I.P.C. against Sheo Sankar and in respect of that alleged offence he has been pro tanto discharged.

61. This last point has been dealt with by my Lord in his elaborate judgment. I agree that the Order made on 23rd March, 1966, though made on a concession made by the officer who conducted the prosecution before the learned Magistrate was not a proper and correct Order at all. The allegations made and the materials before the learned Magistrate at that stage were sufficient to establish a prima facie case and provided ground for presuming that both Agya Ram Garg and Sheo Sankar Singh had committed offences u/s 7 of Act X of 1955 by violation of Section 3 of Cement (Quality and Control) Order, 1962, and also u/s 420 of Indian Penal Code which were offences triable as warrant case under Chapter XXI Code of Criminal Procedure and the learned Magistrate who was a First Class Magistrate was competent to try it. The learned Magistrate has failed to apply his mind to the materials that fell for consideration at that stage and has been misled to fall into an error by the improper concession made by the police officer conducting the prosecution. The materials being enough for an opinion that there is ground for presuming that the accused persons have committed those offences, it was the legal duty of the learned Magistrate to frame proper charges under Sub-section (3) of Section 251A Code of Criminal Procedure Though it was a Warrant Case, if the Magistrate was specially empowered u/s 12A of Essential Commodities Act, 1955, he need have to try the Case by following Summary Procedure.

62. Looking to the particular manner in which the order dated 23.3.66 has been passed by the learned Magistrate and also the peculiarities that loudly appear on the Original Order Sheet, a question may arise if in a Summary Trial the stage of Sub-sections (1) and (2) of Section 251A had been passed in the case when the accusation regarding the offences against both accused persons then before the Magistrate were explained and the State of Sub-section (3) of Section 251A was reached tantamounting to framing of the charges against both the accused persons. If so order of discharge after that stage was not only illegal but also without jurisdiction.

63. I do not express any opinion on that question because in the present case I do not feel the necessity to decide on that fine question of law. The order discharging Agya Ram under Sub-section (2) of Section 251A Code of Criminal Procedure is loudly improper and illegal for the reason that the learned Magistrate has not devoted any consideration to the material that were before him at that stage, but he acted on a concession made on behalf of prosecution for which we do not find any reason or jurisdiction at all.

64. The Original Order Sheet of the Magistrate shows alterations, about which it is unnecessary for me to enter into an elaborate discussion because I agree generally with the reasons that my Lord has discussed threadbare in his judgment just now pronounced. It need however be pointed out that in framing the charge against Sheo Sankar the learned Magistrate contented himself by saying in that Order dated 23rd March, 1966 and also in the summary sheet and also in the judgment of conviction that the offence was "u/s 7(ii)/X/5".

65. The contents of Section 7 of Act X of 1955 make meticulous distinction in the matters of punishment regarding different categories of offences. The distinction is not only between Clauses (i) and (ii) of Section 7(i) (a) but also appears very loudly between other clauses in Sub-section (i) and Sub-section (2) of Section 7.

66. An order framing a charge in a criminal trial and also in the Records of the trial the judgment and order of conviction at the conclusion of the trial are very formal documents of great importance which form parts of the Court Records. Abbreviations in such formal business of the Court are improper always, more so when the extent of the abbreviation leaves unsaid the particularly on which relevant law provides emphasis. Omissions brought in by such abbreviations lead to ambiguity and conclusion on points which are essentially required to be stated for proper and legal performance of duties by the Magistrate in the matter of quantum of sentence. The charge on which Sheo Sankar was tried was obviously a charge for an offence u/s 7(1)(a)(ii) of Act X of 1955. the learned Magistrate by his craze for abbreviation has left out Sub-Section 1(a). That was utterly improper for him to do.

67. For an offence u/s 7(1)(a)(ii) punishment provided is one of imprisonment which may extend to three years'' rigorous imprisonment and also a fine. The learned

Presidency Magistrate has not awarded any imprisonment upon conviction on an offence under that Section. But he has awarded a sentence which he has put as "T.R.C." and also to pay a fine of Rs. 2,000/- (Two thousand) in default to R.I. for two months."

68. That raises a new point for our decision and it is important one. Question arises whether a sentence of detention till rising of the Court is a sentence of imprisonment or a legal sentence at all. My Lord in his elaborate judgment has given reasons upon consideration of all aspects for holding that -

(1) detention till rising of the Court is unknown in law;

(2) it is not a sentence of imprisonment.

(3) by making an Order awarding such a sentence the learned Magistrate violated distinct provisions in Criminal Procedure Code, Indian Penal Code and Prisons Act and also Rules made in Jail Code under the provisions of Prisons Act.

69. I fully agree with that view and I need not repeat what has fallen from my Lord, except pointing out that Section 53 and Section 60 of the Indian Penal Code clearly lay down that a sentence of imprisonment is of two descriptions:

(1) rigorous, that is with hard labour, and

(2) Simple, and it may be wholly rigorous or wholly simple or rigorous in any part and the rest simple.

Section 32 of the Code of Criminal Procedure authorities Courts of Magistrates to pass the following sentences:

(a) Courts of Presidency Magistrate and of Imprisonment for a term not exceeding two

Magistrates of the first class years, including such solitary confinement

as is authorized by law. Fine not exceeding

two thousand rupees.

(b) Courts of Magistrates of the Imprisonment for a term not exceeding six

second class months, including such solitary confinement

as is authorized by law.

Fine not exceeding five hundred rupees.

(c) Courts of Magistrates of the Imprisonment for a term not exceeding one

third class month. Fine not exceeding one hundred

rupees.

(2) The Court of any Magistrate may pass any lawful sentence, combining any of the sentences which it is authorized by law to pass.

70. Magistrates are authorized to pass only those sentences and no other. No Magistrate can create a new kind of punishment unknown to law. Detention till the rising of the Court does not come within and cannot fit with any of these well known provisions of law. The operational difficulties in obeying the mandatory provisions of Sections 383 and 384 Code of Criminal Procedure obvious if an order of detention till rising of the Court is take to be a sentence of imprisonment. Section 541 Code of Criminal Procedure lays down the place where a person imprisoned shall be confined. Relevant part of that Section is in these terms:

Section 541

(1) Unless when otherwise provided by any law for time being in force, the State Government may direct in what place any person liable to be imprisoned or committed to custody under this Code shall be signified.

(2) If any person liable to be imprisoned or committed to custody under this Code is in confinement in a civil jail, the Court or Magistrate ordering the imprisonment or committal may direct that the person be removed to criminal jail.

Prisons Act, 1894 defines prison in these terms:

(1) ''prison'' means any jail or place used permanently or temporarily under the general or special orders of a State Government for the detention of prisons, and includes all lands and buildings, appurtenant thereto, but not include

(a) any place for the confinement of prisoners who are exclusively in the custody of the police;

(b) any place specially appointed by the State Government u/s 541 of the Code of Criminal Procedure, 1882 (10 of 1882) or

(c) any place which has been declared by the State Government by general or special order, to be a subsidiary jail;

71. Court of Magistrates like any other Court must be an open Court and such Court premises or Court rooms are not prisons and have not been appointed by the State Government u/s 541 Code of Criminal Procedure as Criminal Jail where a person ordered to be imprisoned can be confined. We shall not encourage that now or in future. The view we have taken is supported by a decision of the Lahore High Court reported in AIR 1931 476 (Lahore) . Recently the same view has been taken in a decision taken by the Andhra High Court in the case of (1) Boddepalli Lakshminarayana Vs. Suvvari Sanyasi Appa Rao and Others, . In that judgment Sanjeva Rao Naidu, J. has observed:

Apart from the fact that the sentence is unjustifiably lenient sentence of imprisonment till the rising of the Court is unknown to law for sentence of imprisonment involves suffering of it outside the custody of the Court . . . . . Sentence of imprisonment till the rising of the Court is incapable of execution as provided by the Section of the Code of Criminal Procedure and does not therefore amount to suffering of imprisonment within the meaning of the Code.

In the Madras High Court in earlier decisions - one reported in (8) (Assan Musaliarakath) Kunhi Bava Vs. Emperor, - also supported the same view. But in a later decision of that High Court reported in (2) In Re: Muthu Nadar, . . . a contrary view has been taken. In that case a Division Bench of Madras High Court disagreeing with the earlier Single Bench decision, I have mentioned above, observed:

72. "The validity of sentence of imprisonment till the rising of the Court" is recognised in Criminal Rules and Practice framed by this Court Paragraph 1 of Rule 102 says:

The Government consider the awarding of short term imprisonment as undesirable and Magistrate, before passing such sentences, should consider whether imprisonments till the rising of the Court allowed by law could not appropriately be passed instead, or the provision of Section 562 Code of Criminal Procedure applied in favour of accused persons.

That statement contained in paragraph 1 of Rule 102 of the Criminal Rules of the Madras High Court appears to be the only reason for the view that detention till rising of the Court is recognised by law. It does not appear that the Sections of Code of Criminal Procedure and of the Indian Penal Code to which I have made reference above were considered by Their Lordships of the Madras High Court. There is no provision in the Criminal Rules and Orders framed by this High Court to provide us any reason analogous to the reason that prevailed in the judgment of the Madras High Court reported in (2) AIR 1945 Mad 313. So I am unable to accept either the reason or the correctness of that view at the teeth of the provisions in law I have mentioned above.

73. In our High Court in a decision reported in (5) 53 CWN 106 , a Division Bench (Roxburgh and Blank, JJ. observed:

We should here point out that the learned Magistrate apparently was under the impression that rigorous imprisonment for one day and detention till the rising of the Court were different punishments and there has been some trouble in the lower Court because the learned Magistrate wished to insist on sending the accused to jail. We should point out that in the case of imprisonment for one day, as the day on which the sentence is passed, counts as one day, the accused could not be detained in jail on a warrant issued for such a period. In other words, there should be no further trouble on this point. The accused must be taken to have suffered this

imprisonment.

74. That passage dos not lay down that detention till rising of the Court is same as rigorous imprisonment for one day, but only resolved a difficulty that arose in that particular case. That difficulty was obviously arising from Sections 383 and 384, Code of Criminal Procedure it was resolved by directing that the accused in that case be taken to have suffered imprisonment. In doing so the learned Judges pointed out the difficulty that would arise in the matter of warrant of custody that need be issued under Sections 383 and 384 Code of Criminal Procedure Their Lordships considered those provisions of law only to point out the difficulty that arose in that case. Neither the other provisions to which I have made reference were considered by their Lordships in that case nor was the point of law decided provisions of law in Section 510 I.P.C. that directly contemplates imprisonment for 24 hours and the Rule in the Jail Code that applies in such a case were not placed before Their Lordships in that case. That Division Bench judgment is, therefore, not an authority on the point we are now considering, though one aspect of it was very much in the minds of the learned Judges. Had it been so, we would have felt compelled to make a reference to the Full Bench for a decision on this important question of law. I am firmly of the view that law in India does not authorize any Court to detain a person in Court by way of punishment upon conviction for any criminal offence and detention till rising of the Court is unknown to our law. It is not a sentence of imprisonment at all and is not within the jurisdiction of the Magistrate to order.
75. For that reason I hold that the sentence awarded by the learned Magistrate on Sheo Sankar in this case is an illegal sentence and has violated the clear provisions of Section 7 (1) (a) (ii) of Act X of 1955. That order must therefore be set aside.

76. There is another matter in that Order to which our attention has been drawn. It is the order awarding compensation out of the fine imposed. The learned Magistrate has directed that Rs. 500/- (five hundred) out of the fine if realized, should be paid to P.W. 1 or to her husband (P.W. 2) as compensation. In that alternative form the Order is a loud impropriety and illegality also. We have noticed in many other cases such compensations were awarded by Magistrate in indefinite terms to be paid to "heirs of the deceased person". That is not authorized by Section 545 Code of Criminal Procedure for the reasons that my Lord has discussed in his judgment. We wish to impress upon all the subordinate courts including Appellate Courts where such indefinite orders passed by Magistrates are often affirmed, that such indefiniteness in the matter of awarding compensation not only violates law but also opens a wide door for malpractices consciously or unconsciously. Whatever that may be, this practice must cease. Any further instance that may be brought to our notice should be most sternly dealt with because it bespeaks of not only callousness in the judicial function of the Magistrate, but also reflects on his efficiency. That is also a reason for setting aside the order that has been made by the learned Magistrate convicting the accused Sheo Sankar awarding an illegal

sentence and making an illegal order of compensation.

77. As we are sending the case back to the Court of the Magistrate for retrial, I do not express any opinion on the question whether ''mens rea'' is an element necessary to establish for bringing home the charge that may be framed in the case or whether materials in evidence will show ''mens rea'' for the alleged learned discourses on that point which were addressed to us by Mr. Nalin Chandra Banerjee who appeared for Agya Ram and by Mr. Chintaharan Roy who appeared for Sheo Sankar.

78. It will be the onus of the prosecution to bring materials before the Court and to adduce evidence for establishing all necessary elements of offence or offences that may be charged against the accused persons. It will be the duty of the Magistrate to consider all the evidence that may be produced before him to arrive at his own decision whether elements of offences have been established against either or both of the accused beyond reasonable doubt.

79. For the reasons above mentioned, I agree that the Rule in Rev. Case No. 803 of 1967 should be made absolute by setting aside the order of conviction and sentence passed against Sheo Sankar and sending the case back to the Magistrate''s Court for framing charges and trying the case according to law in the light of the observations made and directions given by my Lord in his judgment. The Rule for enhancement of sentence passed against Sheo Sankar is consequently discharged.

80. I also agree that the order dated 23.3.66 discharging Agya Ram Garg should be set aside and the Rule in Rev. Case No. 804 of 1967 made absolute. The case against Agya Ram also shall be proceeded with in the same trial with the other accused Sheo Sankar for framing charges and trying the case according to law in the light of observations made and directions given by my Lord in his judgment.

81. It should be clearly understood that the Magistrate who will deal with the proceedings shall not be influenced or bound by any observation on facts that we may have made for discussing the points of law decided in the case and nothing in our judgment shall curtail or hamper the Magistrate in exercising his discretion and arriving at findings on merits of the case.