Enayat Ali Nazar Ali Bhori Vs The State of Maharashtra

Court: Bombay High Court

Date of Decision: Dec. 17, 1975

Acts Referred: Evidence Act, 1872 â€" Section 114
Prevention of Food Adulteration Act, 1954 â€" Section 10, 11, 13, 16, 2

Citation: (1976) 78 BOMLR 293 : (1976) MhLj 667

Hon'ble Judges: Sapre, J; Chandurkar, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Chandurkar, J.
This revision application filed by the accused challenging his conviction u/s 7(i), (ii) and (v) read with Section 16(1)(a)(i) of

the Prevention of Food Adulteration Act, 1954, has come before this Bench on a reference by Hajarnavis J. who found that there were conflicting

decisions, one by Apte J. in Laxmichand Govindji v. The State of Maharashtra (1975) Criminal Appeal No. 1327 of 1973, decided by Apte, J.

on March 4, 1975 (Unrep.) and the other by Gandhi, J reported in Laxmandas Sarvottamdas v. The State (1974) 77 Bom. L.R. 408 regarding

the construction of Rule 18 of the Prevention of Food Adulteration Rules, 1955.

2. It is not now in dispute that on April 11, 1973 P.W. 1 Musale, who is the food inspector working in the office of the Food and Drugs

Administration, Satara, purchased at about 12-30 p.m. 600 grams of ice candy from the petitioner, who is the proprietor of Messrs. Blue Star

Cold Drink House situated at 98 A/94/95, Sadashiv Peth, Satara. The ice candy so purchased by the food inspector was put into throe clean and

dry glass bottles in three equal parts, and after the bottles were closed with stoppers and caps and labels were pasted in the prescribed form, each

of the bottles was wrapped in a brown paper and sealed in the presence of the panchas. Exhibit 12 is the receipt passed by the petitioner for

having received the sample bottle and the purchase price. The sample was forwarded to the public analyst, Poona, on April 13, 1973 through a

special messenger along with a memo in Form No. VII of the Rules. It is also not disputed that the specimen seal impressions were also sent in a

separate cover with the same messenger. The report of the public analyst revealed that the sample was found to contain Rhoda mine B which was

a non-permitted coal tar dye and the sample was, therefore, found to be adulterated u/s 2(i)(j) of the Prevention of Food Adulteration Act, 1954

(hereinafter referred to as ""the Act""). The food inspector after obtaining the consent of the Commissioner, Food and Drugs Administration, lodged

a complaint in the Court of the Judicial Magistrate, First Class, Satara. A charge against the accused that he had manufactured for sale and stored

for sale and cold ice candy which was found to be adulterated u/s 2(i)(j) of the Act, which was an offence u/s 7(i), (ii) and (v) punishable u/s 16(1)

(a)(i) of the Act, was framed. The petitioner denied his guilt and his defence was that he had stopped manufacture of ice candy about four or five

years ago and he was only manufacturing ice cubes which were sold not for human consumption but merely for preservation of fish. He also

contended that he had sold to the food inspector not ice candy but ice cubes.

3. Before the trial Court, the prosecution examined the food inspector P.W. 1 Gajanan Rajaram Musale, the public analyst P.W. 2 A.G. Lakhani,

P.W. 4 Uttam Kanase, the peon who took the sample to the office of the public analyst, and the two panchas P.W. 5 Gulab and P.W. 6 Mohan in

whose presence the samples were purchased. Both the panchas, however, turned hostile. The trying Magistrate held on the basis of the report of

the public analyst that the accused had manufactured for sale and stored for sale and sold adulterated food article like an ice candy and had

committed an offence u/s 7(i), (ii) and (v) read with Section 16(2)(a)(i) of the Act. The trying Magistrate negatived the contention raised before him

on behalf of the accused that since no preservative was added, there was non-compliance with Rule 20 of the Prevention of Food Adulteration

Rules, 1955 (hereinafter referred to as ""the Rules""). The trying Magistrate also negatived the contention that the accused had not sold ice candies

but had sold ice cubes. The accused thus having been found guilty, he was sentenced to undergo rigorous imprisonment for six months and to pay

a fine of Rs. 1,000 or in default to suffer simple imprisonment for one month.

4. The accused filed an appeal challenging his conviction which was decided by the Sessions Judge, Satara. Several contentions were raised

before the learned Sessions Judge. The learned Sessions Judge held that the accused had sold ice candies and not ice cubes, that there was no

breach of Rule 16(c) of the Rules and that the failure to add a preservative was not fatal to the prosecution case. The other main contentions raised

before the learned Sessions Judge were that since the sample and another copy of the memorandum with the impression of the same wore sent

wit''S the same peon, they cannot be said to have been sent separately as provided for by Rule 18 of the Rules and since the provisions of Rule 18

wore mandatory, the conviction of the accused was vitiated for breach of the mandatory provisions of Rule 18. This contention was not accepted

by the learned Sessions Judge. The other important contention raised before the learned Sessions, Judge was that the accused had been deprived

of his right u/s 13(2) of the Act and, therefore also, the conviction of the accused was vitiated. This contention was founded on the fact that at the

stage of arguments, the learned Magistrate opened the seal of the bottle which contained a sample with the food inspector in order to find out

whether the contents of the bottle supported the contention of the accused that what he had sold was not ice candy but ice cubes, and he had

found that there was pink coloured water having some flavour in the bottle. This act on the part of the learned Magistrate, it was contended, had

deprived the accused of the right under Section18(2) of the Act inasmuch as ho could not have made an application for the sample to be sent to

the Central Food Laboratory. The learned Sessions Judge took the view that the sample had not decomposed or decayed and the accused had

still an opportunity to make the necessary application for sending the sample to the Director of the Central Food Laboratory. Having rejected the

contentions raised before him, the learned Sessions Judge confirmed the conviction and he declined to interfere with the sentence passed by the

trying Magistrate. This revision application is now filed by the accused challenging his conviction.

5. Apart from some other contentions raised by Mr. M.V. Paranjape appearing on behalf of the accused, two main contentions which have been

vehemently canvassed before us are based on the construction of Rule 18 of the Rules and Section 13(2) of the Act. Since the matter has been

referred to the Division Bench, in view of the conflict in two decisions of this Court on the scope and the construction of Rule 18 of the Rules, we

take up that contention first.

6. At this stage it is worthwhile referring to the evidence of the food inspector on which the whole argument that there was a breach of Rule 18 has

been founded. The food inspector has deposed that on April 13, 1973 he sent one of the bottles with him to the public analyst for analysis and the

said bottle and the memo in Form VII was packed in a box which was also sealed by him. He further deposed that he also sent a duplicate of

Form VII with a specimen soul over it in a separate cover and both the articles, that is, the sample box and the sealed cover were carried by the

peon personally to the public analyst at one and the same, time. He produced the duplicate of form VII with specimen seal over it. The two

relevant rules for the purpose of deciding the contention raised by the learned Counsel for the accused are it. 17 and 18 of the Rules. They read as

follows :

17. Containers of samples how to be sent to the public analyst.-The container of sample for analysis shall be sent to the public analyst by registered

post or railway parcel or air freight, or by hand or by any other suitable means of transport available in a sealed packet, enclosed together with a

memorandum in Form VII in an outer cover addressed to the public analyst :

Provided that in the case of a sample of food which has been taken from Agmark sealed container, the label in Form VII shall bear the following

additional information :-

(i) Grade.

(ii) Agmark label No./Batch No.

(iii) Name of packing station.

18. Memorandum and impression of seal to be sent separately. -A copy of the memorandum and a specimen impression of the seal used to seal

the packet shall be sent to the Public Analyst separately by registered post or delivered to him or to any person authorised by him.

Form VII is the form of a memorandum to be sent to the public analyst. The memorandum states :

The sample described below is sent herewith for analysis under Clause (b) of Sub-section (1) of Section 10 and/or Clause (c)(ii) of Sub-section

(1) of Section 11 of the Prevention of Food Adulteration Act, 1934.

1. Serial No. of the sample ; STR-B-25113

2. Name of the vendor : Shri Enayat Ali Nazar Ali Bhori

3. Date and place of collection : 11-4-73. Satara

4. Nature of article submitted for analysis : Ice candy

5. Nature and quantity of preservative if any,

added to the sample : Nil

2. A copy of this memo, and a specimen impression of the seal used to seal the packet of sample is being sent separately by hand.

Rule 17 requires that the food inspector should along with the sample send a memorandum giving the details of the sample, the name of the vendor,

date and place of collection, nature of article submitted for analysis and nature and quantity of preservative, if any, added to the article. Paragraph

2 of the memorandum states that a copy of the memorandum and specimen impression of the seal used to seal the packet of sample is being sent

separately by post/hand. Rule 18 which, is reproduced above provides for separately sending of the memorandum and the impression of the seal.

7. It will be proper at this stage to refer to Rule 7 of the Rules which lays down the duties of the public analyst. Under Sub-rule (1) of Rule 7 it is

obligatory on the public analyst or on the officer authorised by him, when a package containing sample for analysis is received from a food

inspector or any other person, to compare the seals on the container and the outer cover with specimen impression received separately and he has

to note the condition of the seals thereon. Under Sub-rule (2) it is provided that the public analyst shall cause to be analysed sub. samples of

articles of food as may be sent to him by food inspector or by any other person under the Act and under Sub-rule (3), the public analyst has to

send to the person concerned two copies of the report of the result of the analysis after the analysis has been completed in Form III within a period

of forty-five days of the receipt of the sample. It may be noted that originally this period was sixty days, but it was reduced to forty-five days by an

amendment dated February 13, 1974. Rules 7, 17 and 18 highlight the manner in which the rule making authority wanted the sample to be carefully

dealt with from the stage at which it is packed to the stage of its reaching the public analyst. The public analyst after he receives the sample cannot

proceed to analyse the sample unless he assures himself that the seals on the container and the outer cover are the same as the specimen

impression received by him and which is required to be sent separately under Rule 18. In other words, the public analyst has to satisfy himself that

the right sample has been received by him and the memorandum with the specimen impression of the seal which is required to be sent under Rule

18 is intended to provide the public analyst with a counter check so far as the identity of the sample is concerned. The object of providing in Rule

18 for the copy of the memorandum and the specimen impression of the seal which is used to seal the packet being sent separately to the public

analyst thus becomes clear and it helps to ensure that the correct sample has been received by the public analyst. If this scheme, of Rules 7, 17 and

18 is taken into account, the purpose behind framing two different rules, one relating to the despatch of the sample in the sealed packet and the

other relating to the sending of the memorandum and the specimen impression separately becomes very clear. If Rules 17 and 18 are read

together, they will show that while Rule 17 refers to a container of sample for analysis to be sent in a sealed packet enclosed together with a

memorandum in Form VII in an outer cover, Rule 18 provides for the memorandum and specimen impression of the seal to be sent separately to

the public analyst. The words of Rule 17 show that two things are permitted to be sent in one outer cover, one is the sealed packet containing the

sample to be analysed and the other is a memorandum in Form. VII. The rule makes it very clear that the sample in the sealed packet and the

memorandum in Form VII are to be enclosed together in an outer cover. It is the use of the words ""enclosed together"" which are to be found in

Rule 17 which will highlight the use of the word "separately" in Rule 18. Once the sealed packet of the sample to be analysed is enclosed together

with the memorandum in Form VII in an outer cover and the outer cover is sealed, then so far as those articles are concerned, they are ready for

being despatched to the public analyst. Rule 18, therefore, provides that a copy of the memorandum and specimen impression of the seal has to be

sent separately. Since Rules 17 and 18 together form a scheme along with Rule 7, the moaning to be given to the word "separately" in Rule 18

appears to be very clear. The word "separately" is in contradistinction to the words ""enclosed together"" in Rule 17. In other words, the

memorandum of impression of the seal which is to be sent under Rule 18 is not to be sent together with the sample in the sealed packet which is

already enclosed together with a copy of the same form in the outer cover. The use of the word "separately" was, therefore, intended to highlight

the fact that the memorandum in Form VII which as sent together with the sealed packet has to be independently sent and the other copy of the

memorandum has also to be independently sent and when both these reach the public analyst, he has to compare both these seals under Rule 7

before ho proceeds to analyse the sample.

8. Now, what is contended by the learned Counsel appearing on behalf of the petitioner is that when Rule 18 uses the word "separately", it is not

restricted to the despatch of the memorandum in a separate sealed cover, but even in point of time, it is contended, the sealed packet under Rule

18 must be sent later. In other words, it is contended that even if the sealed packet of the sample together with the memorandum in Form VII is

enclosed in an outer cover, which is also sealed, and if this outer cover is handed over to a peon to be delivered to the public analyst, then the

same peon at the same time cannot be permitted to carry the copy of the memorandum and the specimen impression of the seal under Rule 18. If

this is permitted to be done, the learned Counsel contends, there is infringement of Rule 18. It is further urged that Rule 18 is of a mandatory

character and if there is a violation of the provisions of a mandatory rule, the conviction itself will be vitiated. In support of this proposition, the

learned Counsel has heavily relied on the decision of Gandhi J. in Laxmandas Sarvottamdas v. The State.

9. Now, so far as the question as to whether the provisions of Rule 18 are mandatory or directory in nature, there does not appear to be much

dispute. Rule 18 can be split up in two parts. In the first part, it requires that the copy of the copy of the memorandum and specimen impression of

the seal used to seal the packets shall be sent to the public analyst separately. The latter part provides for the manner in which the said copy of the

memorandum and the specimen impression of the seal should be sent. The specimen copy of the memorandum could be sent by registered post or

it could be delivered to the public analyst or to any person authorised by him. The provisions of Rule 38 in so far as they provide for the manner of

delivery, that is to say, by registered post or in any other manner so that the contents would be delivered to the public analyst or to any person

authorised by him cannot be said to be mandatory. But so far as the first part is concerned, which relates to the sending of the memorandum

separately, there can be no doubt that it is of a mandatory character. There was, however, much debate at the bar as to the scope of the word

''separately'' and it was, therefore, contended that since on the evidence in this case the food inspector had admitted that both the sample box and

the sealed cover were carried by the peon personally to the public analyst at one and the same time, the copy of the memorandum and the

specimen of the seal cannot be said to have been sent separately. We- are unable to accept the contention that where the cover containing the

sealed packet of the sample for analysis enclosed together with a memorandum in Form VII is sent along with another packet containing the copy

of the memorandum and specimen impression of the seal with the same peon, there will be any infraction of Rule 18 of the Rules. The meaning of

the word ''separate'' in the Webster''s third New International Dictionary is given as ""to set or to keep apart"". It is also given as ""not shared with

another"". The meaning of the word ''separately'' in the same dictionary is given as ""in a separate manner; individually, independently"". We have

already pointed out that while Rule 17 refers to the sealed packet of the sample together with a memorandum, Rule 18 provides for a copy of the

memorandum to be sent separately. In the light of these two Rules, it is clear to us that the word ''separately'' used in Rule 18 was intended to

convey the sense that the specimen of the memorandum and the impression of the seal was to be sent independently of the articles that were

required to be sent under Rule 17. In our view, as long as the copy of the memorandum that is required to be sent under Rule 18 is not sent

together, in the sense that all the articles are not to be in the same packet or same cover as the articles referred to in Rule 17 and the memorandum

which is required to be sent under Rule 18 is sent independently in a different cover, notwithstanding the fact that both are taken to the analyst by

the same peon, they must be said to have been sent independently of each other. The mere fact that the two packets are carried by the same peon

will not mean that the material articles namely, the sample and the memorandum on the one hand and the copy of the memorandum on the other

are sent together. Sending of the packets together will not amount to sending the articles inside the packets together, because the object of Rule 18

is to furnish an independent means of cross-checking the identity of the seal on the sealed packet of the sample to be analysed.

10. The learned Counsel has taken us extensively through the decision of Gandhi J. in Laxmandas''s case. Having carefully gone through that

decision, we are unable to read that decision as an authority for the proposition that where the packets prepared under Rule 17 or 18 are sent with

the same peon, there will b& an infraction of the mandatory part of Rule 18. Since the decision in Laxmandas''s case was heavily pressed upon us,

it is necessary to deal with that decision in some detail.

11. The facts in that case were that Tur Dal which was purchased from the accused was found to contain extraneous coal tar dye tartrazine and on

analysis it was found that the sample did not conform to Rule 29 of the Rules. The accused was convicted for the offence u/s 16(1)(a)(i) of the

Act. In the revision application filed on behalf of the accused, it was contended by Mr. Paranjape, who also appeared in that case for the accused,

that the prosecution had not led evidence to show that as required under Rule 18, the sample with Form VII and the facsimile of the seal with copy

of Form VII were sent separately and the prosecution had also not examined the person who had taken these two things which are required under

Rule 18 to be sent separately. Reference was made to the admission of the food inspector in that case which read as follows :

At one and the same time the sample bottle of Tur Dal along with the memorandum copy and another copy of the Memorandum with the

impression of seal were sent through a peon. of my office.

On behalf of the defence it was contended before Gandhi J. that on this specific admission by the food inspector, it could not be said that the two

things were sent separately and the prosecution had not even produced two separate receipts for having sent two different parcels and in view of

this admission, on the part of the food inspector, the requirements of Rule 18 were not observed and the benefit should automatically go to the

accused. We shall refer to the several cases relied upon by the learned Judge a little later, but it appears to us that it was essentially on the facts

disclosed in the evidence in that case that the learned Judge took the view that the requirements of Rule 18 were not complied with. After posing

the question, ""What is the meaning to be attached to the word ''separately'' V the learned Judge wont on to refer to the meaning given in the

Oxford English Dictionary which was as follows : ""in a separate manner, singly, severally apart"" and the learned Judge pointed out that the word

''separately'' was in contrast with the word ''together''. The following question was posed by the learned Judge for consideration before him. He

observed (p. 421):

...How in the light of the evidence discussed above, can the Court hold that in this particular case what was required to be sent under Rule 17 and

what was required to be sent under Rule 18, were sent separately.

(Italics supplied).

The learned Judge after having observed that the rules are for the protection and for the benefit of the accused and that if the rules were

mandatory, the non-observance of those rules was bound to affect the result of the trial, further observed as follows (p. 421) :

...As observed before, (on p. 12 ori. evidence and typed p. 90), the Food Inspector has unequivocally admitted that at one and the same time with

the same peon he had sent both the sample of Tur Dal for analysis with form No. VII and the copy of the memorandum with specimen impression

of the seal used to seal the packet together. This admission on the part of the Inspector clearly shows that they were not sent separately. More so,

the prosecution has not examined the peon nor have they produced any separate receipts for separately sending the two articles, required under

Rules 17 and 18.... The prosecution has not examined the peon. No other evidence has been led and there is a positive admission on the part of

the Food Inspector that both the things required to be sent separately were sent together; there is a violation of the observance of Rules 17 and 18.

Once I come to the conclusion that the rule has not been observed as required to be observed and holding that the Rules are mandatory, the

natural effect thereof is that it cannot be said that the sample which was examined by the Public Analyst and who has submitted Ids report exh. 80

was the very sample which was taken charge of from the shop of the accused person. In this view of the case, the accused are entitled to get the

benefit of the Rules not having been observed and the conviction cannot be said to be proper.

(Italics supplied).

The observations which we have reproduced above clearly indicate, in our view, that the learned Judge on the facts disclosed before him in the

evidence came to the conclusion that the mandatory provisions of Rule 18 were not complied with and, therefore, the accused was entitled to an

acquittal. The observations which we have reproduced above in our view, clearly show that the view taken by the learned Judge must be restricted

to facts of the case before him. It also appears from the contention raised before the learned Judge and the observations made by him that

probably a different view might have been taken if the prosecution had examined the peon or if they had produced two separate receipts ""for

separately sending the two articles"", as the learned Judge has himself observed. In our view, the decision, therefore, clearly turned on the facts that

it was not proved on evidence that the two articles, namely, the one covered by Rule 17 and the other covered by Rule 18 were sent as two

separate packages. We are, therefore, unable to read the decision in Laxmandas''s case as an authority for the proposition that in a case whore the

articles"" required to be sent under Rule 17 and a copy of the memorandum required to be sent under Rule 18 are sent as independent articles in

two separate packages at the same time along with the same been or with the same carrier, there will be a violation of Rule 18 of the Rules. As

long as the articles covered by Rules 17 and 18 are kept independent of each other and as long as they are kept in two different packets or

packages, a grievance of non-compliance with the requirements of Rule 18 in spite of the fact that both these packages are sent at the same time or

with the same messenger cannot be validly made.

12. Mr. Paranjape on behalf of the petitioner has also referred us to the decisions which are relied upon by Gandhi J. in Laxmandas''s case. We

are, however, unable to find anything in these decisions in support of the view that is canvassed before us that the two packets cannot be sent with

the same messenger or at the same time. The decisions referred to by Gandhi J. are (1) Mary Lazrado v. The State AIR [1966] Mys. 244, (2)

Belgaum Borough Municipality v. S. Shankar AIR [1968] Mys. 196 , (3) Daitari Mahto Vs. State, and (4) The Administrator Silliguri Municipality

Vs. Hiralal Goala, All these four decisions, no doubt, take the view that the provisions of Rule 18 are mandatory, a view which is also not

challenged before us on behalf of the State. But in each one of these cases, on facts it was found that there was non-compliance with the provisions

of Rule 18. As a matter of fact it appears from the judgment of Gandhi J. that these cases were cited before the learned Judge primarily in support

of the argument that the provisions of Rule 18 were mandatory and further in support of the proposition whether the prosecution can merely rely on

the report of the public analyst and call upon the Court to raise the necessary presumption u/s 114(G) of the Evidence Act because the public

analyst''s report is in Form III and which has printed clauses to indicate that various rules have been observed. That this was the purpose for which

the decisions were cited before Gandhi J. is clear from the following observations (p. 421) :

These are all the oases cited before me for the purpose of consideration, whether the Rules under the Prevention of Food Adulteration Act arc

mandatory or not and secondly in the absence of specific evidence that they were complied with as required under Rule 15 is the prosecution

vitiated or not or, in other words, without establishing the compliance of the Rules, can the prosecution merely on the report of the Public Analyst

call upon the Court to raise the necessary presumption u/s 114(g) because the Public Analyst''s report is in form No. III, which has the printed

clauses to indicate that various rules had been observed.

None of these cases were, however, concerned with the question as to whether Rule 18 can be said to be violated if the sealed sample together

with the memorandum and another packet containing the memorandum with the specimen impression are sent with the same messenger at the same

time. In Mary Lazrado''s case, Tukol J. held that Rules 7 and 18 of the Prevention of Food Adulteration Rules are mandatory and hence non-

compliance with them affects the evidentiary value of the report of the public analyst and the conviction solely based upon it cannot be sustained.

This decision was further followed by the Division Bench of the Mysore High Court in Belgaum Borough Municipality''s case. On facts the Division

Bench found that the food inspector who had purchased sample of oil from the accused had not stated anywhere in his evidence that he sent a

copy of the memorandum and a specific impression of the seal used to seal the packet to the public analyst separately. On these facts the Division

Bench went on to consider the question as to whether Rule 18 was mandatory and whether non-observance of the same vitiates the entire trial and

the order of acquittal in the circumstances was justified? Proceeding to decide this question, the Division Bench held that the Rules 7 and 18 were

mandatory in character and non-compliance of those Rules affects the evidentiary value of the certificate and in the absence of extraneous

evidence, the conviction was sure to be vitiated.

13. In the third case of Daitari Mahto also, the learned Judge of the Patna High Court found on facts that the evidence made it clear that the

specimen impression of the seal was not sent separately and by registered post and the registration receipt granted by the Postal Department had

not been filed nor had the acknowledgement receipt been brought on record. The learned Judge of the Patna High Court agreed with the Division

Bench decision of the Mysore High Court referred to above and held that Rules 7 and 18 were mandatory in nature and non-compliance with the

same made the conviction illegal.

14. Even in the Calcutta case in Administrator, Siliguri Municipality v. Hiralal, it was found on evidence that though it was said that the specimen

impression of the seal was sent under a certificate of posting, the person who is said to have posted that was not examined to say that the cover

containing the specimen impression of the seal was handed over by him to the postal clerk and that the certificate of posting (exh. 12 in that case)

was given to him for that purpose by the said postal clerk. In view of this evidence, it was found on facts that it could not be said for certain that

the food inspector sent the specimen impression of the seal used to seal the packet to the analyst for analysis as enjoined by Rule 18. The learned

Judge of the Calcutta High Court held that the food inspector did not send a specimen impression of the seal and thus made it impossible for the

analyst to ensure himself that the sample sent to him was the sample seized from the accused.

15. Thus the decisions which were cited before Gandhi J. and to which to attention was invited were really of no assistance to decide the question

which arose in the present case.

16. We may at this stage refer to a decision of Apte J. in Laxmichand Govindji v. The, State of Maharashtra reliance on which was placed by the

learned public prosecutor for the State. That was an appeal filed by the accused who was convicted of the offence u/s 16(1) read with Section 7(i)

read with Section 2(i)(j) of the Prevention of Food Adulteration Act. The article sent for analysis was chilly powder. Challenging the conviction, it

was contended that the copy of the memorandum and the specimen impression of the seal used to seal the packet should have been separately

sent to the public analyst and not along with the sealed packet containing the sample and the memorandum in Form VII. It was found in that case

that both the sealed sample together with the memorandum and a copy of the memorandum and the specimen impression of the seal used for

sealing the packet were together handed over to the clerk in the office of the public analyst who was authorised to receive the same. The learned

Judge negatived the contentions of the accused with these observations :

It is true that Rule 18 provides that copy of the memorandum and a specimen impression of the seal should not be mixed up with the sealed packet

containing the sample and the memorandum in Form No. VII but that they should be separately sent to the Public Analyst. But in my view,

''separately'' does not mean ''at different times'' or after some interval, but what it means is that the sample and the memorandum in Form No. VII

must be kept separately from the copy of the memorandum and the specimen impression of the seal, and it is immaterial if both the packets are

handed over or sent to the Public Analyst at one and the same time. To lake a different view would lead to very ridiculous result. For example,

Rule 17 also provides for the sealed packet containing the sample and the memorandum in Form VII to be sent by registered post. Similarly Rule

18 also provides for sending copy of the memorandum and the specimen impression of the seal separately by a registered post to the public

analyst. It is conceivable that the Food Inspector may enclose sealed packet containing sample together with the memorandum in Form VII in one

packet and copy of the memorandum in Form VII and the specimen impression of the seal used to seal the packet in another packet and both the

packets would be taken by him to the Post Office at one and the same time and he may hand them over to the postal authorities one after the

other. In such a case, it would be illogical to hold that this procedure followed would contravene the provisions of Rule 18 of the said Rules.

In our judgment, the view taken by Apte J. appears to us to be the correct view.

17. The learned Counsel for the petitioner has referred us to a decision of Vimadalal J. in The State of Maharashtra v. Shamlal Tilumal (1975)

Criminal Appeal No. 1212 of 1973, decided by Vimadalal, J. on February 11, 1975 (Unrep.). The question which arises in the instant case did

not fall for consideration in that case. The accused in that case were prosecuted for selling biscuits which were coloured by a non-permissible coal

tar dye and which did not conform to the standards of food laid down under the Rules. They were convicted by the trying Magistrate but were

acquitted by the learned additional sessions Judge, Aurangabad, and the State had tiled an appeal challenging the acquittal. The appeal was

disposed of on the short ground that there was no evidence that the copy of the memorandum was forwarded to the public analyst and the learned

Judge on facts found that there was no evidence to prove compliance with Rule 18. It was observed by the learned Judge in para. 3:

...Suffice it to say that the admitted position on record is that then; is no evidence to show that a specimen impression of the seal which had been

used to seal the samples sent to the Public Analyst was forwarded to the Public Analyst separately as required by Rule 18 of the Prevention of

Food Adulteration Rules, 1955.... Somebody has to come into the witness-box to make a statement to that effect. In my opinion, there is no

evidence to prove compliance with Rule 18 and on that ground alone this appeal must fail and be dismissed.

18. A reference was made to a decision of Naik J. in Chilu Kashiram Wani v. Motiram Savlaram Kapde (1974) Criminal Revision Application

No. 207 of 1974, decided by Naik J., on September 10, 1974, (Unrep.). In that case also, on facts it was found that there was a clear non-

compliance of it. 7 and 18 of the Rules because it appeared from the evidence of the food inspector that he had sent the sample and memorandum

and the seal together.

19. We may in passing also refer to the case of Premji Velji Shah v. The State (1975) Criminal Appeal No. 357 of 1974, decided by Sapre J., on

November 21, 1975 (Unrep.) in which Gandhi J."s decision was considered and the decision in Laxmandas"s case was held not to lay down any

absolute proposition of law that where two sets of articles were sent at one and the same time, there was non-compliance with Rule 18. The food

inspector in that case had stated that the sample was sent to the public analyst along with the memorandum in Form VII and the copy of the

memorandum and the specimen seal impression were separately sent to the public analyst on the same day. It was contended on the basis of the

statement that this was non-compliance with Rule 18 of the Rules and reliance was placed on the decision of Gandhi J. in Laxmandas"s case. After

referring to the finding given by Gandhi J. in that case that there was no proper compliance with Rule 18 inasmuch as the copy of the memorandum

and the specimen impression of the seal were not separately sent in the sense that they were sent at one and the same time together with one and

the same peon, it was observed as follows :

...It is this construction of the word "separately" in Rule 18 made by the learned Judge that has been mainly relied upon by Mr. Yennemadi.

It is difficult, to see whether the learned Judge wanted to lay down as an absolute proposition of law that no matter if the memorandum and the

sample contemplated by Rule 17 and the copy of the memorandum and the specimen impression of the seal contemplated by Rule 18 were sent in

two separate packets and separately sealed, it cannot be said that the copy of the memorandum and the specimen impression of the seal were sent

"separately" within the meaning of Rule 18 so long as these were sent at the same time and together with the memorandum in Form VII and the

sample as required by Rule 17. In that case, it was an admitted position that the memorandum and the sample and the copy of the memorandum

and the specimen impression of the seal were sent at one and the same time together with one and the same peon. It would not have, therefore,

improved the matter even if the peon was examined, because it was an admitted position in that case that he had taken Both the things at one and

the same time together. Even then the learned Judge has observed in his judgment that the prosecution has not examined the peon nor had they

produced any separate receipts for separately sending the two articles required under Rules 17 and 18. It is difficult to say what exactly was in the

mind of the learned Judge when he made these observations. If what was in his mind was that if the prosecution had examined the peon and

separate receipts for sending the two articles had been produced and the peon were to say in his evidence that the two articles were in two

separate packets, both of which were sealed, that would have satisfied the requirement of Rule 18, then the learned Judge cannot be said to have

laid down an absolute proposition of law that once it is shown that the two sets of articles are sent at one and the same time, that did not amount to

the articles mentioned in Rule 18 being sent "separately" within the meaning of that Rule.

We have already pointed out earlier that the decision in Laxmandas"s case appears to be a decision on the facts of that case.

20. In view of the legal position set out above, we are, therefore, not inclined to accept the submission made on behalf of the accused that there

was any non-compliance with the mandatory part of Rule 18. In our view, since the food inspector had sent in a separate cover the sample box

and the memorandum and in yet another cover he had sent the copy of the memorandum with the impression of the specimen seal along with the

peon, there was no non-compliance with the provisions of Rule 18 and we must, therefore, reject the contention that the conviction of the accused

stands vitiated because of any non-compliance with the mandatory part of Rule 18.

21. That then takes us to the next point which was vehemently canvassed. It was urged that in the instant case at the stage of arguments, the

learned trying Magistrate having opened the sample bottle in order to find out whether the contents of the sample bottle were helpful in deciding

whether the accused had sold ice cubes or ice candy, the accused was deprived of his valuable right u/s 13(2) of the Act and the accused was,

therefore, entitled to an acquittal.

22. There is no doubt that the trying Magistrate had opened the bottle containing the sample which was produced by the food inspector and he

found the bottle to contain a pink coloured liquid. It appears that he opened this ""bottle in order to test the truth of the contention raised before him

that be had sold only ice cubes to the complainant and not the ice candy and since he found that the bottle contained a pink coloured liquid with a

flavour which would not have been the case if only ice cubes wore sold, the learned trying Magistrate used this fact to buttress the finding that what

was sold was ice candy. Now, what is contended before us is that Section 13(2) of the Act gives a very valuable right to an accused to have the

sample analysed from the Director of the Central Food Laboratory and if that right is lost, even as a result of an act on the part of the presiding

officer of the Court, acquittal must follow as a matter of course, because, according to the learned Counsel, the right has become incapable of

being exorcised as the sample required to be sent does not exist in the form in which it is required to be sent to the Director of Central Food

Laboratory.

23. Section 18(2) of the Act reads as follows:

After the institution of a prosecution under this Act the accused vendor or the complainant may, on payment of the prescribed fee, make an

application to the court for sending the part of the sample mentioned in Sub-clause (i) or Sub-clause (ii) of Clause (d) of Sub-section (1) of Section

11 to the Director of the Central Food Laboratory for a certificate; and on receipt of the application the court shall first ascertain that the mark and

seal or fastening as provided in Clause (b) of Sub-section (J) of Section 11 are intact and may then despatch the part of the sample under its own

seal to the Director of the Central Food Laboratory who shall thereupon send a certificate to the court in the prescribed form within one month

from the date of receipt of sample, specifying the result of his analysis.

Relying on Section 13(2) of the Act the argument advanced on behalf of the petitioner is that Section 13(2) requires the Court to ascertain the

mark and seal or fastening as provided in Clause (b) of Sub-section (1) of Section 11 are intact before the sample is despatched under its own seal

to the Director of Central Food Laboratory. Section 11(1)(6) provides for sealing of the sample by the food inspector. Now what is contended is

that when the trying Magistrate opened the seals and tried to find out what wore the contents of the bottle, the seals put up u/s 11(1)(6) would no

longer be there and, therefore, the requirement of Section 13(2) could not have been complied with making it impossible for the trying Magistrate,

in case an application was made to send the sample to the Central Food Laboratory for analysis, to ascertain that the mark and seal are intact.

24. Now, Section 13(2) of the Act has been the subject-matter of three decisions of the Supreme Court in (1) Municipal Corporation of Delhi Vs.

Ghisa Ram, , (2) Babu Lal Hargovindas Vs. The State of Gujarat, and (3) Ajitprasad v. State of Maharashtra A.I.R.[1972] S.C. 1931.

25. In Ghisa Ram''s case, he Supreme Court held that a valuable right is conferred by Section 13(2) of the Act and it was expected of the

prosecution that it would proceed in such a manner that the right would not be denied to them. It was hold that the right has been given to the

vendor in order that for his satisfaction and proper defence, he should be able to have the sample kept in his charge analysed by a greater expert,

whose certificate is to be accepted by the Court as conclusive evidence, and where there is a denial of this right on account of the deliberate

conduct of the prosecution, for example, delay in prosecution as a result of which the sample is highly decomposed and cannot be analysed, the

vendor in his trial is so seriously prejudiced that it will not be proper to uphold the conviction on the basis of the report of the public analyst even

though that report continues to be evidence in the case of the facts mentioned therein. The facts of that case show that a sample of curd of cow''s

milk was taken from the accused, but because of the long delay that occurred in sending the sample to the Director, the sample could not be

analysed because it had decomposed. The sample was taken on September 20, 1961 and the complaint was filed before the Magistrate on May

23, 1962 and the application u/s 13(2) of the Act was made by the accused on October 4, 1063. The Director reported that the sample of curd

had become highly decomposed and no analysis was possible. The Supreme Court on these facts found that in a case where there is denial of the

right u/s 13(2) on account of the deliberate conduct of the prosecution, the vendor was so seriously prejudiced that it would not be proper to

uphold his conviction on the basis of the report of the public analyst even though that report continued to be evidence in the case of the facts

contained therein.

26. Section 13(2) was later again considered in the case of Babulal. That was a case of a sample of cow''s milk which was found to be

adulterated. The sample was taken on December 2, 1965 and the complaint was filed on April 6, 1966. The accused was convicted by the city

Magistrate, Ahmedabad, of the offence u/s 16(1)(a)(i) read with Section 7 of the Act and the conviction was upheld by the High Court, Gujarat. In

the Supreme Court, it was contended that over four months had elapsed from the time the samples were taken to the time the complaint was filed

and consequently, the sample had deteriorated and could not be analysed. This contention was rejected by the Supreme Court with the following

observations (p. 1280) :

There is also in our view no justification for holding that the accused laid no opportunity for sending the sample in Jus custody to the Director,

Central Food Laboratory u/s 13(2) because he made no application to the Court for sending it. It docs not avail him tit this stage to say that over

four months had elapsed from the time the samples were taken to the time when the complaint was filed and consequently the sample had

deteriorated and could not be analysed.

Ghisa Barn"s case was distinguished by the Supreme Court on the ground that in that case, the Director had reported that the sample had become

highly decomposed and the food inspector in that case had not taken the precaution of adding the preservative. In our view Babulal"s case is thus

clearly an authority for the proposition that unless an application u/s 13(2) of the Act is made, it is not open to the accused to challenge the

conviction on the ground that he has been deprived of an opportunity u/s 13(2) even though he had not made the application.

27. In Ajitprasad"s case cited supra, the position was further made clear and it was observed that in the absence of any application by the accused

u/s 13(2) for getting the sample analysed by the Director, the accused could not complain that he was deprived of his right to have the sample

analysed by the Director, and mere delay and latches on the part of the complainant in getting the summons served was not, in the absence of

evidence to show that the sample had deteriorated when the summons was served, sufficient to hold that the accused was prejudiced by reason of

deprivation of the right u/s 13(2) of the Act. Incidentally, it may be pointed out that the observations of the Supreme Court in Ajitprasad"s case

show that the relevant point of time for finding whether the sample had deteriorated or not so as not to be available for being dealt with u/s 13(2) of

the Act was- the time when the summons was served on the accused.

28. Now, admittedly in the instant case, the accused had at no stage made any application u/s 13(2) of the Act. What is argued before us is that

Section 13(2) does not prescribe the outer limit for the accused to make an application for sending the sample to the Director of the Central Food

Laboratory.

29. Now, it is no doubt true that Section 13(2) of the Act does not prescribe any outer limit for making an application under that provision. But

there is indication in the section itself that the accused, if ho wants to have the sample analysed by the Central Food Laboratory, must bo diligent

enough so as to sea that after the prosecution has started such time is not allowed to pass as will result in a deterioration of the sample.

30. The learned Counsel has referred to a decision of the Madras High Court in V. Jayavelu and Another Vs. Food Inspector, Corporation of

Madras, in support of the contention that an application u/s 13(2) can be made at any stage of the proceeding till the delivery of the judgment. In

Jayavelu"s case, a learned single Judge of that Court has taken the view that it is not always necessary that immediately after the prosecution is

instituted, the accused should take stops for sending the sample to the Director of the Central Food Laboratory and it is left to the accused to wait

till the examination of the public analyst in Court and if the evidence of the public analyst is not unfavourable to him, he may even decide not to

exercise the right conferred on him. It was further held that no time limit can be prescribed for the accused to exercise his right save that he should

exercise such a right before the close of the trial.

31. Now, it is no doubt true that no time limit is prescribed u/s 13(2) of the Act, but it is also equally true that so far as the certificate of the public

analyst is concerned, it can be made evidence of the contents and the facts stated therein in any proceeding under the Act. An express provision to

this effect is to be found in Section 13(5) of the Act which provides :

Any document purporting to be a report signed by a public analyst, unless it has been superseded under Sub-section (3), or any document

purporting to be a certificate signed by the Director of the Central Food Laboratory, may be used as evidence of the facts stated therein in any

proceeding under this Act or under sections 372 to 276 of the Indian Penal Code (Act XLV of 1860):

Provided that any document purporting to be a certificate signed by the Director of the Central Food Laboratory shall be final and conclusive

evidence of the facts stated therein.

In view of the express provisions in Section 13(5) of the Act it is not necessary for the prosecution in all cases to examine the public analyst. It will,

therefore, not be correct to say that in each case, the accused can continue to wait to exercise his right u/s 18(2) till the public analyst is, examined.

If the prosecution can rely on the contents of the certificate of the public analyst, then if that evidence has to be rebutted, the rebuttal can come only

in The form of a certificate of the Central Food Laboratory which u/s 13(3) supersedes the report of the public analyst. The accused, therefore,

has to be diligent and ho cannot, therefore, wait till the end of the proceedings in the vain hope that the sample will get deteriorated by the time and

he can make a grievance of the deprivation of the right u/s 13(2) of the Act and urge for an acquittal on that ground. If the accused in the instant

case has not even up to the stage of the arguments made an application u/s 13(2) of the Act, we are unable to hold that there was any deprivation

of the right u/s 13(2) of the Act.

32. There is another ground on which, in our view, the contention that the accused has been deprived of his right u/s 18(2) must be rejected. u/s

11, after preparing three parts of the sample, the food inspector has to deliver one of the parts to the person from whom the sample has been

taken, another part he has to send to the public analyst for analysis and the third part has to be retained by him for production in case any legal

proceedings are taken or for analysis by the Director of the Central Food Laboratory under Sub-section (2) of is. 13, as the case may be. Section

13(2) makes it very clear that either the sample which is with the vendor or the sample which is produced by the food inspector could be sent to

the Central Food Laboratory. It was no doubt true that the choice is given to the accused, but the choice contemplates that both the samples are

intact. However in a case like the instant one, whore the sample produced by the food inspector was opened and the accused had doubt about the

condition of the sample, nothing prevented him from producing his own sample and have it sent to the Central Food Laboratory. In our view, it is

not open to the accused to keep his own sample, not offer it for being sent to the Central Food Laboratory and at the same time urge that since the

presiding officer of the Court had opened the sample, ho was deprived of his right u/s 13(2) of the Act. Reliance was placed again on the decision

of Gandhi J. where the learned Judge has observed that in a case where the sample has in fact been found to be deteriorated and was in a

decomposed and decayed condition, the mere fact that the redundant application was not made by the accused did not mean that the accused was

in default and ho could not, therefore, be deprived of his right u/s 13(2) of the Act. Here again, the decision must be regarded as on the facts in

that case, because it was in fact found in that case that the sample was in a decomposed and decayed condition. There is, however, no finding in

the instant ease that the sample was in any way decomposed and the decision in Laxmandas''s case cannot, therefore, be of assistance to the

accused.

33. Another point which was argued by the learned Counsel for the petitioner was that the food inspector does not speak in his evidence about

addition of any preservative and, therefore, the requirements of Rule 20 of the Rules have not been complied with and the conviction was thereby

vitiated.

34. Rule 20 refers to the addition of formalin as a preservative in the case of several articles referred to in that rule and ice candy is one of them.

The food inspector has not spoken to any addition of formalin. However, the public analyst has found the sample fit for analysis. A Division Bench

of this Court has taken the view that the provisions of Rule 20 are not mandatory. (See City of Nagpur Corpn. v. Sukhanandan [1971] Mah. L.J.

783, 74 Bom. L.R. 383 S.C.). When this decision was brought to the notice of the learned Counsel, he fairly conceded that since Rule 20 has

been held to be of a directory nature, non-compliance with that rule would not vitiate the conviction.

35. It was faintly argued that the samples were not packed or sealed in accordance with Rule 16(c) of the Rules. Rule 16 provides for the manner

in which all samples of food sent for analysis shall be packed, fastened and sealed. Clause (c) of this Rule provides :

The paper cover shall be further secured by moans of strong twine or thread both above and across the bottle, jar or other container, and the

twine or thread shall then be fastened on the paper cover by means of sealing wax on which there shall be at least four distinct and clear

impressions of the seal of the sender, of which one shall be at the top of the packet, one at the bottom and the other two on the body of the

packet. The knots of the twine or thread shall be covered by means of sealing wax bearing the impression of the seal of the sender.

Now, it is clear that the question whether the samples were packed and sealed in accordance with the manner prescribed in Rule 16(c) of the

Rules is a question of fact. It does not appear from the judgment of the trying Magistrate that any contention before him was raised about non-

compliance with Clause (c) of Rule 16 of the Rules. It would not, therefore, be permissible at the revisional stage to allow the learned Counsel for

the petitioner to raise such a challenge at this stage.

36. The last contention is with regard to compliance with Rule 22. Rule 22 deals with the quantity of sample to be sent to the public analyst. That

Rule specifies the quantity in respect of the articles of food enumerated in that Rule which should be sent to the public analyst. There is a residuary

item No. 87 under the name ""Food (not specified)"" and the quantity to be sent is specified to be 200 grams. Now, what is contended on behalf of

the petitioner is that when the food inspector purchased the ice candies, he purchased them with sticks and when he wanted to divide the ice

candies into three equal parts, he removed the sticks and reduced the candies to small pieces. Thereafter, ho says, ho divided the ice candies

purchased by him into three equal parts. The argument is that when 600 grams of ice candy wore purchased, the sample included the weight of

sticks also and, therefore, when the ice candies, after the removal of the sticks, were divided into three parts, each part is bound to be less than

200 grams and there will, therefore, be a non-compliance with the provisions of Rule 22. The decision of the Supreme Court in Rajaldas

Gurunamal Pamanani Vs. The State of Maharashtra, , was called in aid and especially the observations of the Supreme Court in para. 17 of the

judgment. That was a case in which in the case of compounded asafoetida, the prescribed quantity to be sent was approximately 200 grams, while

only 100 grams were sent. The Supreme Court dealing with the contention that adequate quantity was not sent to the public analyst observed as

follows (p. 191) :

The appellant also contended that samples were not taken in accordance with the provisions of the Act and the rules thereunder. Rule 22 stales

that in the case of asafoetida the approximate quantity to be supplied for analysis is 100 grams and in the case of compounded asafoetida 300

grams. The Public Analyst did not have the quantities mentioned in the Rules for analysis. The appellant rightly contends that non-compliance with

the quantity to be supplied caused not only infraction of the provisions but also injustice. The quantities mentioned are required for correct analysis.

Shortage in quantity for analysis is not permitted by the statute.

37. Now, it is well-known that a stick which is attached to an ice candy is merely utilised for holding the candy together and we are entitled to take

judicial notice of the fact that the weight of such a stick is extremely negligible a& compared with the weight of the ice candy. Therefore,

notwithstanding the fact that the sticks had to be taken out before the samples could be put in the bottle, we must hold that the quantity put in the

bottles must have been negligibly less than 200 grams and the shortage in quantity cannot be said to be such as to be not in compliance with the

prescribed quantity of approximately 200 grams. We are not, therefore, inclined to accept the contention that there was any breach of Rule 22 of

the Rules.

38. Lastly, it was urged that the accused Is a small fry in the business of ice candies and he was prepared to give up the business and some

leniency should, therefore, be shown in tho matter of sentence. Now, it is a known fact that the normal consumers of articles like ice candy arc

school-going children whose health is bound to be adversely effected by consumption of prohibited colours put in the ice candy to make it

attractive to the children as such. The offence of the accused is therefore an offence of which a serious note has to be taken and we are, not,

therefore, inclined to interfere with the discretion exercised by the trying Magistrate so far as the sentence awarded to the accused is concerned.

39. In the result, the revision application is rejected. The accused to surrender to his bail.