FULL BENCH

Before S. S. Sandhawalia C.J., C. S. Tiwana and S. S. Dewan, JJ.

KASHMIRI LAL,—*Petitioner.*

versus

STATE OF HARYANA,—*Respondent.*

Criminal Revision No. 189 *of* 1979.

April 21, 1981.

Prevention of Food Adulteration Act (XXXVII of 1954)—Sec*tions* 13 *and* 16(1) (*a*) (*i*)—*Prevention of Food Adulteration Rules,* 1955—*Rule* 9(j)—*Report of the public analyst not supplied to the accused within the prescribed time—Such non-compliance with the provisions of rule* 9(*j*)—*Whether vitiates the entire proceedings—Provisions of rule* 9(*j*)—*Whether mandatory.*

Held, that from the legislative history of section 13 of the Prevention of Food Adulteration Act, 1954 it would be manifest that after the enforcement of the Act in 1955 there was no requirement even remotely analogous to rule 9(j) in the statute book. Even when the same was first prescribed in July, 1968, it laid down no time limit within which a copy of the report was supplied to the accused right up to the year 1973. It was only thereafter that this time limit was introduced by way of amendment in rule 9(j) and remained on the statute book for hardly three to four years before it was omitted. All this is plainly indicative of the fact that the prescription of this time limit cannot necessarily be considered as basic or integral in the statutory provisions. The legislature having earlier provided no such time limit and later having reverted to the previous state of law makes plain its intent of attaching little significance thereto. Even while examining section 13 and the relevant statutory rules in the larger perspective it appears that the core of the matter herein is the conferring of a valuable safeguard on the accused persons to have one of the samples analysed afresh by the Central Food Laboratory. The report of the Director in this context has been made conclusive and supersedes the other reports. The essence of these provisions, therefore, is the grant of this right. Some of the remaining provisions of section 13 and the rules are in essence procedural to protect and safeguard this privilege so long as the same is not infringed or violated. A marginal variation of the procedural provisions cannot be necessarily called fatal. It is significant that rule 9(j) is only one of the ten duties which were laid on the Food Inspector by rule 9. It cannot

be easily said that every marginal variation of each and every aspect of these ten duties would have the necessary result of vitiating the whole proceeding and even though the word 'shall' has been employed in the opening part of rule 9, it does not necessarily follow that the use of this word by itself is decisive. It is now well settled that a statutory provision even though couched in mandatory terms may in essence be directory. On principle, therefore, it cannot be held that the time limit mentioned in rule 9(j) is so strict, rigid and inflexible that the very non-compliance thereof must entail a vitiation of the whole proceedings. However, it is for the accused to establish material prejudice by such an infringement and if he does so it would be open to the Court to consider its effect on the prosecution launched against him. (Paras 7, 8 and 15).

Bhola Nath Nayak vs. *State and another*, 1977 Crl. L. J. 154.
DISSENTED FROM.

Nathi Ram vs. *State of Haryana* 1978 P.L.R. 122.

State of Haryana vs. *Jagtar Singh*, 1979 P.L.R. 553.

OVERRULED.

Case referred by Hon'ble Mr. Justice C. S. Tiwana on 21st January, 1981 to a Larger Bench for decision of an important question of law involved in the case. The Division Bench consisting of Hon'ble the Chief Justice Mr. S. S. Sandhawalia and Hon'ble Mr. Justice C. S. Tiwana, again referred the case to Larger Bench on 26th February, 1981. The Full Bench consisting of Hon'ble the Chief Justice Mr. S. S. Sandhawalia, Hon'ble Mr. Justice C. S. Tiwana and Hon'ble Mr. Justice S. S. Dewan finally decided the case on 21st April, 1981.

Petition under section 401 of the Criminal Procedure Code for revision of the order of the Court of Shri Shiv Dass Tyagi, Sessions Judge, Rohtak, dated the 8th February, 1978, modifying that of Shri Kewal Singh Chief Judicial Magistrate, Rohtak, dated the 30th November, 1978, convicting and sentencing the appellant/petitioner.

R. S. Mittal, Advocate, *for the Petitioners.*

H. S. Gill, A.A.G. (Haryana). *for the Respondent.*

S. S. Sandhawalia, C.J.—

(1) Whether rule 9(j) of the Prevention of Food Adulteration Rules, 1955 (now repealed and replaced by rule 9-A with effect from 4th January, 1977) though couched in terms mandatory is yet

in substance directory is the meaningful question which had necessitated this reference to the Full Bench.

(2) The matrix of facts giving rise to the aforesaid issue lie in a narrow compass. In accordance with the Prevention of Food Adulteration Act and the Rules framed therein, the Food Inspector obtained a sample of curd from the petitioner on October 11, 1974. It was forwarded to the Public Analyst with reasonable despatch and he completed the analysis thereof on October 23, 1974, and submitted his report with regard thereto on November 4, 1974. This indicated that the milk fat therein was merely 0.3 per cent and milk-solids not fat were 8.1 per cent. On this basis, milk-fat was found to be 95 per cent deficient and milk-solids not fat 10 per cent less than the minimum prescribed standard. The Food Inspector later filed the complaint against the petitioner in Court on January 23, 1975 and having been duly served, the petitioner made his appearance on February 24, 1975. The petitioner then chose to abscond during course of the trial on September 3, 1975 and did not reappear till March 2, 1978. Thereafter he remained blissfully silent till the case reached the stage of arguments and it was thereafter that he, for the first time preferred an application on August 31, 1978 for sending the sample bottle retained in the office of the Deputy Chief Medical Officer, for analysis by the Central Food Laboratory, Ghaziabad. As would be inevitable after four years of taking the sample, the Director, Central Food Laboratory, sent his report dated October, 24, 1978 to the effect that although the sample was found to be intact and properly sealed yet the contents thereof had decomposed and was not considered fit for analysis. The petitioner was convicted by the Chief Judicial Magistrate, Rohtak, under Section 16(1)(a)(i) of the Prevention of Food Adulteration Act (hereinafter called the Act), and sentenced to 1½ years' rigorous imprisonment and a fine of Rs. 1,000. On appeal, the learned Sessions Judge, Rohtak, upheld the conviction of the petitioner but reduced the sentence to nine months' rigorous imprisonment whilst manitaining the fine. The petitioner then preferred the present revision petition which first came up for hearing before my learned brother C. S. Tiwana, J. sitting singly. Noticing a conflict of precedent within this Court as also in the other High Courts, on the point, and further because of the meaningful issue involved, the following question was formulated for decision by a Larger Bench:—

"Whether rule 9(j) of the Prevention of Food Adulteration Rules 1955, which has now been substituted by rule 9-A

has to be strictly applied so as to hold that non-compliance of any direction would necessarily imply a prejudice to the accused whose benefit must go to him so as to end in his acquittal"

(3) When the matter came up before the Division Bench, the respondent-State strenuously challenged the correctness of the view enunciated by the Division Bench in *State of Haryana* v. *Jagtar Singh*, (1) which, in turn, has necessitated this reference to the Full Bench and that is how the matter is before us now.

4. Ere we proceed to construe the language of rule 9(j) itself it is instructive to refer to the history of this provision because it tends to provide a clear pointer to that legislative intent. The Prevention of Food Adulteration Act was promulgated on the 1st of June, 1955, and the Prevention of Food Adulteration Rules 1955 thereunder were enforced on different dates in 1956. For well-high thirteen years there was no section of the Act or any rule which required the Food Inspector to supply a copy of the report of the Public Analyst to the accused. It was only on 18th July, 1968, that rule 9(j) was inserted in the following form:—

> "9(j) to send by hand or registered post, a copy of the report received in Form III from the public analyst to the person from whom the sample was taken, in case it is found to be not conforming to the Act or Rules made thereunder, as soon as the case is filed in the Court."

It would be evident that at that stage it merely provided that the Food Inspector should send a copy of the said report (in case it was adverse) by hand or registered post to the person from whom the sample was taken as soon as the case was filed in Court. Manifestly it did not lay down any time within which the copy of the report of the Public Analyst was required to be supplied by the Food Inspector to the accused. It was only in 1974 when sub-rule (j) was first amended that it provided for a copy of the report being given to the accused by the Food Inspector within 10 days of its receipt from the Public Analyst. The rule was amended on the 13th of February, 1974, and was in force on the material date of

(1) 1979 P.L.R. 553.

11th of October, 1974, when the sample from the petitioner was taken. It reads as follows:—

> "9(j) to send by registered post, a copy of the report received in Form III from the Public Analyst to the person from whom the sample was taken within ten days of the receipt of the said report. However, in case the sample conforms to the provisions of the Act or Rules made thereunder, then the person may be informed of the same and report need not be sent."

(5) However, the subsequent legal history of this provision appears to be equally relevant. What calls for pointed notice herein is that on the 4th of January, 1977, rule 9(j) aforesaid was altogether omitted and a new provision of rule 9-A was inserted. The relevant part thereof may be noticed in extenso—

> "9-A. The Local (Health) Authority shall immediately after the institution of prosecution forward a copy of the report of the result of analysis in Form III delivered to him under sub-rule (3) of rule 7, by registered post or by hand, as may be appropriate, to the person from whom the sample of the article was taken by the Food Inspector, and simultaneously also to the person, if any, whose name, address and other particulars have been disclosed, under section 14-A of the Act:
>
> Provided that * * * * * * * * * *"

Now it would be plain from the above that the requirement as to the time limit within which on the receipt of the report of Public Analyst, a copy thereof was to be given or supplied to the accused, has been wholly deleted. Instead it has been provided that only after the institution of the prosecution a copy of the report has to be forwarded to the accused immediately.

6. In this context reference to section 13 of the Act is again inevitable as it provides for a second and conclusive analysis of the sample, if so required, by the Director of the Central Food Laboratory which supersedes the report given by the Public Analyst.

It deserves notice that substantial amendments in section 13 of the Act were made by Act No. 34 of 1976 whereby apart from the amendments in sub-sections (1) and (2) thereof sub-sections (2-A) to (2-E) were inserted therein. These now inter alia provide that on the receipt of the report of the result of analysis to the effect that the article of food is adulterated, a copy of the report of the Public Analyst shall be forwarded to the accused person or persons informing them that all or any of them, if they so desire, may make an application to the Court within a period of ten days from the receipt of the copy of the report to get the sample of the article of food kept by the Local (Health) Authority analysed by the Central Food Laboratory. It would thus appear that now the legislature has on the other hand sought to prescribe certain time limit within which the accused persons can exercise their valuable right of having the sample finally analysed by the Director of the Central Food Laboratory.

(7) It would thus be manifest from the legislative history of the aforesaid provision that for well-nigh 13 years after the enforcement of the Act in 1955 (whilst ignoring the predecessor statute of the Pure Food Act) there was no requirement even remotely analogous to rule 9(j) in the statute book. Even when the same was first prescribed in July, 1968, it laid down no time limit within which a copy of the report was supplied to the accused right up to the year 1973. It was only thereafter that this time limit was introduced by way of amendment in rule 9(j) and remained on the statute book for hardly three to four years before it was omitted on the 4th of January, 1977. All this is plainly indicative of the fact that the prescription of this time limit cannot necessarily be considered as basic or integral in the statutory provisions. The legislature having earlier provided no such time limit and later having reverted to the previous state of law makes plain its intent of attaching little significance thereto.

8. Now examining the provision of section 13 and the relevant statutory rules in the larger perspective it appears that the core of the matter herein is the conferring of a valuable safeguard on the accused persons to have one of the samples analysed afresh by the Central Food Laboratory. The report of the Director in this context has been made conclusive and supersedes the other reports. The essence of these provisions, therefore, is the grant of this right.

Some of the remaining provisions of section 13 and the rules are in essence procedural to protect and safeguard this privilege so long as the same is not infringed or violated. A marginal variation of the procedural provisions cannot be necessarily called fatal. It is significant that rule 9(j) is only one of the ten duties which were laid on the Food Inspector by rule 9. It cannot be easily said that every marginal variation of each and every aspect of these ten duties would have the necessary results of vitiating the whole proceedings. Even though the word 'shall' has been employed in the opening part of rule 9 it cannot be said that the use of this word by itself is decisive. It is now well-settled that a statutory provision even though couched in mandatory terms may in essence be directory. I am unable to see how the exceeding of time limit by a day or two or a few days would necessarily or gravely prejudice an accused person in his defence during the course of the trial. On principle, therefore, it seems difficult to hold that the time limit mentioned in rule 9(j) is as strict, rigid and inflexible that the very non-compliance thereof must entail a vitiation of the whole proceedings.

(9) What I have said on principle in the light of the statutory provisions, appears to be equally well-buttressed by the weight of precedent. Pride of place in this context must be given to the observations of the Constitution Bench in *State of Kerala etc.* v. *Alasserry Mohammed etc.* (2). Therein also their Lordships were construing a provision of the Prevention of Food Adulteration Rules 1955, namely, rule 22 with regard to the quantity of the sample of food to be sent to the Public Analyst or Director for analysis. Equally the word 'shall' had also been used in the said rule. Nevertheless it was observed as follows whilst unanimously reversing an earlier decision of the Supreme Court:—

> "* * * *. But it is well-known that the mere use of the word 'shall' does not invariably lead to this result. The whole purpose and the context of the provision has to be kept in view for deciding the issue. The object of the Act is to obtain the conviction of a person dealing in adulterated food."

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(2) AIR 1978 S.C. 933.

However, the case that directly governs the issue virtually on all fours is the Full Bench judgment of the Gujarat High Court reported as *M. M. Pandya etc. Bhagwandas Chiranji Lal and another* (3), After an exhaustive discussion and the examination of the case law on the point it was concluded therein as follows:—

> "We are, therefore, of the opinion that the infringement of the time limit of 10 days laid down in R. 9(j) of the Prevention of Food Adulteration Rules does not necessarily vitiate the prosecution nor does it affect in any manner the validity of admissibility of the report of the Public Analyst. However, it is open to the accused to prove prejudice caused to him by such infringement and if an accused proves it, it is open to the Court to consider its effect on the prosecution launched against him. We answer accordingly the question referred to us."

We are in respectful and total agreement with the aforesaid enunciation of the law and would not wish to traverse the same ground over again which has been admirably covered by that exhaustive and lucid judgment. It suffices to mention that the aforesaid view is in consonance with *Shakoor* v. *State of Rajasthan,* (4), *The Public Prosecutor* v. *Pyare Ali* (5) *and Immadi Ramachandram* v. *State of Andhra Pradesh,* (6).

10. In the light of the aforesaid reasons I would respectfully record my dissent from the contrary view expressed in *Bhola Nath Nayak* v. *The State and another,* (7).

11. Adverting now to the judgments of this Court which indeed had necessitated this reference to the larger Bench, a reference may first be made to the Single Bench judgment reported as *Nathi Ram* v. *The State of Haryana,* (8). Therein the learned Judge placing basic reliance on *Bhola Nath Nayak's* case (supra)

(3) 1979 Cr. L.J. 1449.
(4) 1977 Cr. L.J. 238.
(5) (1976)2 Food Adultration cases 51.
(6) 1976 Cr. L.J. 1832.
(7) 1977 Cr. L. J. 154.
(8) 1978 P.L.R. 122.

took the strict view that the mere infraction of rule 9(j) irrespective of prejudice would vitiate the proceedings. For the reasons already recorded this view can no longer hold water and with respect the judgment is hereby overruled. However, for clarity sake it may be mentioned that reference was made in the aforesaid judgment to the observations of Dhillon, J. in *Labh Singh* v. *Union Territory, Chandigarh* (9), for taking the aforesaid view. However, a close perusal of *Labh Singh's* case would indicate that the same is no warrant for the proposition that rule 9(j) is either mandatory or that the mere non-compliance thereof would necessarily vitiate the whole proceedings. The learned Judge in the said case had in a passing reference noticed that the petitioner was not served with a copy of the report of the Public Analyst and this along with a host of other factors was found to have caused material prejudice to the accused insofar he was deprived of the valuable right to get the sample of milk analysed from the Director of Central Food Laboratory, Calcutta. It was for the said reason that his conviction was set aside.

12. My learned brother C. S. Tiwana, J., in *Mahipal* v. *State of Haryana* (10) had rightly distinguished the aforesaid case of *Labh Singh* and following the Full Bench view in *M. M. Pandya's* case (supra) had taken the view that rule 9(j) was not mandatory and non compliance thereof would not *ipso facto* be fatal unless material prejudice could be shown. We would unreservedly affirm that view.

13. It remains to advert to the Division Bench judgment of this Court in *State of Haryana* v. *Jagtar Singh,* (11). Therein also 9(j) fell for construction and even whilst holding that *Nathi Ram's* case was wrongly decided and further opining that the accused must show material prejudice because of its non-compliance to secure any benefit it was nevertheless observed as follows :—

> "...... Whilst interpreting the provisions in this manner, I should not be misunderstood to hold that rule 9(j) is not mandatory and is absolutely directory so that its non-compliance may be treated lightly by the authorities concerned."

(9) 1973 Ch. L. R. 134.
(10) 1980 Cr. L.J. 772.
(11) 1979 P.L.R. 553.

Further in the operative part of the order, the learned Judges declined to interfere with the acquittal even though the factual finding indicated that no grave or material prejudice had been caused to the respondent in that case. In this context it was observed as follows :—

> "* * * Authority has been expressly enjoined the duty to supply a copy of the report of the Public Analyst to the accused within a specified time. The prosecution cannot get out of the rigour of these provisions only on the plea that the accused was likely to have knowledge of the averse report of the Public Analyst."

With great respect to the learned Judges it appears to us that in view of the considered observations in the earlier part of the present judgment the aforesaid view is untenable. In legal terminology it is broadly well-settled that the infraction of a mandatory provision necessarily raises an inference of prejudice. Violation of a mandatory rule inevitably brings in its wake the stigma of vitiation. Therefore the passing observations of the Division Bench that despite the earlier observations they would still take the view that rule 9(j) is mandatory would in effect be misleading. We would, therefore, overrule this view and hold that the provision is directory though obviously the Food Inspector upon whom the duty is enjoined is obliged to follow the same. Equally the view expressed by the Division Bench that despite the fact that the right to have the sample analysed was not in any way frustrated even then the accused should derive and maintain the benefit of acquittal from the mere non-service of the copy of the report on him within a specified time, is untenable. Such a view would again in practical effect make sub-rule (j) mandatory and inflexible in its rigour. We, therefore, feel compelled to overrule these observations of the Division Bench as well in the interest of clarity of precedent.

14. To conclude we take the view that rule 9(j) even though framed in mandatory terms is in substance directory. Whilst so holding, we must recall and reiterate the following observations in *Alasserty Mohammed's* case (supra) in a virtually identical context :—

> "* * *. We may add that the decisions of the Courts holding that the Rule is merely directory and if the quantity

> sent by the Food Inspector is sufficient for the purpose of analysis, the report of the Public Analyst should not be thrown out merely on the ground of the breach of the Rule, are not meant to give a charter or a licence to the Food Inspectors for violating the Rule. They must remember that even directory Rules are meant to be observed and substantially complied with. A Food Inspector committing a breach of the Rule may be departmentally answerable to the higher authorities. He should, therefore, always be cautious in complying with the Rules as far as possible and should not send a lesser quantity of sample than prescribed to the Public Analyst unless there be a sufficient reason for doing so."

15. We would, therefore, render the answer to the question formulated in the end of paragraph 2 in the negative. However, it is for the accused to establish material prejudice by such an infringement and if he does so it would be open to the Court to consider its effect on the prosecution launched against him.

16. Now applying the afore-enunciated rule it is plain that the petitioner indeed is far from having established any prejudice to him by the non-compliance of rule 9(j) in the present case. In fact it does not seem to be in doubt that he had the knowledge of the accusation against him sufficiently in advance so as to enable him to get the second sample of curd examined by the Director of the Central Food Laboratory. The material contents of the report of the Public Analyst had been reproduced in the complaint whose copy had been served on him well in time. There is also positive evidence on the point that the report of the Public Analyst had been sent to him after the filing of the case. Consequently there was nothing to debar him from making an application to the Court for a fresh analysis of the sample soon after he made his appearance on the 24th of February, 1975. Instead of doing so he seems to have attempted to thwart the prosecution by first absconding and later biding his time till after the passage of nearly four years of the taking of the sample. He made an application for its analysis after the stage of arguments in the case had been reached. Inevitably by this time, the sample would decompose and, therefore, the petitioner cannot derive any benefit from the report of

the Director of Control Food Laboratory dated the 24th of October, 1978, to this effect. No other argument having been raised, the conviction has to be affirmed.

17. Inevitably prayer for reduction in the sentence was made on his behalf. However, taking into consideration that the milk fat was so materially adulterated as to be 95 per cent deficient of the required standard we are unable to find any undue severity in the sentence imposed by the appellate court in its discretion. The same is, therefore, also upheld. The revision petition is dismissed.

S. S. Dewan, J.—I agree.

N. K. S.

FULL BENCH

Before S. S. Sandhawalia, C.J., K. S. Tiwana and S. S. Dewan, JJ.

BOHAR SINGH,—*Petitioner*

versus

STATE OF PUNJAB and another—*Respondents*

Criminal Writ Petition No. 45 *of* 1980.

May 5, 1981.

Constitution of India 1950—Articles 21 and 226—East Punjab Children Act (XXXIX of 1949)—Section 27—Accused convicted and sentenced to life imprisonment by a Court of Sessions—High Court dismissing the appeal and its judgment becoming final—Convict thereafter filing a writ of habeas corpus *challenging his detention on the ground that he was a 'child' on the date of commission of the crime and his detention was thus in violation of section 27 of the Act—Such writ petition—Whether maintainable.*

Held, that if a court of competent jurisdiction makes an order in a proceeding before it and the order is *inter parties*, its validity cannot be challenged by invoking the writ jurisdiction even though the said order may affect the aggrieved party's fundamental rights. Since no writ would lie against the judicial process established by