

E.V. Kunhamu Vs. Food Inspector, Cannanore Municipality

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Court : Kerala

Decided On : Mar-17-1989

Reported in : 1989CriLJ2340

Judge : U.L. Bhat and; T.V. Ramakrishnan, JJ.

Appellant : E.V. Kunhamu

Respondent : Food Inspector, Cannanore Municipality

Judgement :

U.L. Bhat, J.

1. Food Inspector, Cannanore Municipality (P.W. 1) filed a complaint against the revision petitioner (owner of shop by name 'Anukul Mini Departmental Store' in Door No. KL 200(q) of Cannanore Municipality) as the second accused and his salesman as the first accused alleging that on 29-12-1981 at about 11 a.m. he visited the shop and after fulfilling all the legal formalities purchased 450 grams of cow's ghee for analysis from the first accused and sent it for analysis to the Public Analyst and the sample was found adulterated. Complaint was filed and other legal formalities complied with. First accused absconded. The case was proceeded against the second accused, who denied the incriminating evidence and stated that the sample was not taken from his shop. The trial Court and the appellate Court concurrently found in favour of the prosecution case and convicted the second accused under Section 16(1)(a)(i) of the Prevention of Food

Adulteration Act (for short 'the Act') and sent him to undergo simple imprisonment for six months and to pay fine of Rs. 1,000/- and in default to undergo imprisonment for two months. Sankaran Nair, J. before whom the revision petition came up for hearing, adjourned the case to be heard by a Division Bench as it involved question of importance, namely, whether Rule 17(1)(b) of the Prevention of Food Adulteration Rules (for short 'the Rules') is mandatory.

2. The two Courts below have concurrently accepted the prosecution case. There is no dispute before us that going by the report of the Public Analyst, which was not challenged by requesting the Court to send one of the remaining parts of the sample to the Director of Central Food Laboratory for analysis, the sample did not conform to the standards prescribed for ghee and also contained 87% hydrogenated vegetable oil, that is vanaspati, and non-permitted colouring matter.

3. Learned Counsel for the revision petitioner urged the following contentions before us:

(i) Sub-rules (a) and (b) of Rule 17 of the Rules are mandatory and since there is no evidence to show that these mandatory provisions have been strictly complied with, the result of the analysis cannot be accepted.

(ii) Revision petitioner is only a licensee and hence not liable to be prosecuted.

(iii) Though the report of the Public Analyst shows that the articles sold is actually hydrogenated oil, that is vanaspati, it may be case of misbranding and not adulteration.

(iv) That the sentence imposed is excessive.

4. It would be useful to have a bird's-eye view of the relevant provisions of the Act and the Rules. Section 10 of the Act prescribes powers of the Food Inspectors. Food Inspectors shall have power to take samples of any article of food from the person indicated in the provision and to send such sample for analysis to the Public Analyst for the local area within which such sample has been taken. Where the Food Inspector takes such action, he shall call one or more persons to be

present at the time when such action is taken and take his or their signatures. Section 11 prescribes the broad procedure to be followed by the Food Inspectors. He shall give notice in writing then and there of his intention to have the sample so analysed from the person from whom he has taken the sample and to the person, if any, whose name, address and other particulars have been disclosed under Section 14A and except in special cases provided by the Rules, divide the sample then and there into three parts and mark and seal or fasten up each part in such a manner as its nature permits and take the signature or thumb impression of the person from whom the sample has been taken in such place and in such manner as may be prescribed, send one of the parts for analysis to the Public Analyst under intimation to the local health authority and send the remaining two parts to the local health authority for the purpose of sub-ss. (2), (2-A) and (2-E) of Section 13. Sub-section (1) of Section 13 requires the Public Analyst to deliver in such form as may be prescribed, report to the local health authority of the result of the analysis of any article of food submitted to him for analysis. Sub-section (2) requires that on receipt of the report indicating that the article of food is adulterated, the local health authority shall, after institution of the prosecution, forward in the prescribed manner a copy of the report informing the accused that if it is so desired he may make an application to the Court within a period of ten days from the date of 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. The other sub-sections contain provisions indicating the procedure to be adopted by the local health authority and the Court respectively in order to send the sample to the Central Food Laboratory.

5. Rules have been framed in order to effectuate the above provisions of the Act. Rule 12 indicates the manner in which the notice in writing contemplated in Section 11(1)(a) is to be given. Rules 14 to 16 and 19 to 22A contain provisions laying down the procedure to be adopted in taking the sample as indicated in Section 11(1)(b) of the Act. Rules 17 and 18 deal with the manner of despatching the samples and related papers to the Public Analyst and the local health authority as contemplated in Section 11(1)(c) of the Act. Rule 7 lays down what the Public Analyst has to do when he receives the package containing the sample for analysis from the Food Inspector. Rule 9-A requires the local health authority to

send a copy of the report and intimation to the person concerned as contemplated in Section 13(2) of the Act. The form of the report of the Public Analyst is prescribed in Form No. 3. There are no rules framed dealing with the manner in which sample is to be sent to the Central Food Laboratory.

6. The correct approach of the Court in understanding and interpreting the provisions of the Act has been explained in various decisions. A Full Bench of this Court in *Food Inspector v. Prabhakaran* 1982 Ker LT 809 : 1983 Cri LJ 81 observed (at P. 92 of Cri LJ):

It is no doubt true that the Act envisages absolute offences in the sense that even without mens rea a person may fall within the penal net of the Act. But this is not the only consideration that should weigh with a Court in applying the provisions of the Act to prosecution thereunder. The Act is intended to serve a social purpose, to punish offenders who indulge in a crime of great consequence to the health and life of the people. No provision in an enactment of the nature of the Prevention of Food Adulteration Act should be read in such a way as to search for and find a purely technical reason for dropping the penal proceedings. Prosecution against a person who has committed a very serious offence under the Act ought not to fail merely on account of some time, not unreasonable, taken by the local (health) authority.... A different approach is to be set with very evil consequences as it may open the door for corrupt practices and render the enactment which in its performance is already weak, weaker still.

One of us, (Bhat, J.) observed in *Food Inspector v. Pirayiri Co-operative Milk Supply Society Ltd.* 1979-85 KUC (KLT Suppl) 473 : 1984 Cri LJ 225 (at P. 231 of Cri LJ) as follows:

There could be no two opinions on the view that adulteration of food articles has become all pervasive and has attained menacing proportions. The malpractice is being indulged on a vast scale. It is to prevent adulteration of food articles that the statute has been enacted; that object is sought to be achieved by ensuring purity and quality of food articles supplied to consumers. The food trade is sought to be regulated from the point of view of quality and purity of food articles. This object is sought to be achieved through Food Inspectors empowered to inspect food

articles, take samples, get the samples analysed by the Public Analysts and launch prosecution against offenders.... Hence control is sought to be made operational by providing stringent measures such as dispensing the requirement of mens rea, broad-basing the definition of sale, conferring requisite legal status to Public Analysts' reports, providing minimum sentence etc. At the same time, the Act and the Rules contain several provisions to safeguard innocent vendors and the like. Offenders can be punished only through a fair trial, with opportunity being given to challenge the action of the Food Inspector and report of the Public Analyst. However, one should not lose sight of the danger of the object of the statute being frustrated by obligating Food Inspectors through malpractices or negligent acts.

In *Murlidhar Meghraj Loya v. State of Maharashtra* : 1976 CriLJ1527 the Supreme Court observed (at P. 1529 of Cri LJ):

It is trite that the social mission of Food Laws should inform the interpretative process so that the legal blow may fall on every adulterator. Any narrow and pedantic, literal and lexical construction likely to leave loopholes for this dangerous criminal tribe to sneak out of the meshes of the law should be discouraged. For the new criminal jurisprudence must depart from the old canons, which make indulgent presumptions and favoured constructions benefiting accused persons and defeating criminal statutes calculated to protect the public health and the nation's wealth.

The following observations of the Supreme Court in *Dalchand v. Municipal Corporation, Bhopal* : 1983 CriLJ448 are instructive (Para 1):

The broad purpose of the statute is important. The object of the particular provision must be considered. The link between the two is most important. The weighing of the consequence of holding a provision to be mandatory or directory is vital, and more often than not, determinative of the very question whether the provision is mandatory or directory. Where the design of the statute is the avoidance or prevention of public mischief, but the enforcement of a particular provision literally to its letter will tend to defeat that design, the provision must be held to be directory, so that proof of prejudice in addition to non-compliance of the

provision is necessary to invalidate the act complained of. It is well to remember that quite often many rules, though couched in language which appears to be imperative, are no more than mere instructions to those entrusted with the task of discharging statutory duties for public benefit. The negligence of those to whom public duties are entrusted cannot by statutory interpretation be allowed to promote public mischief and cause public inconvenience and defeat the main object of the statute.

7. The provision of the Act and the Rules referred to earlier have a specific design and object and that is to ensure punishment to those responsible for endangering public health. Such persons have to be ferreted out through the instrumentality of the Food Inspectors. Whether articles of food intended for commercial purpose are adulterated or misbranded has to be detected by analysis by Public Analyst. Where articles of food are found to be adulterated or misbranded the person responsible must be tried before Courts of law. The trial has to be fair to the State and the accused. There cannot be any fool-proof guarantee in enacting law on any matter. Law can provide only reasonable guarantees of fairness and propriety. The provisions which require the Food Inspector to give notice in writing, to call one or more witnesses, to divide the articles of food into three parts, to use clean containers for the parts of the sample and mark and seal them in the manner contemplated and the provisions which require the Public Analyst (or the Court as the case may be) to verify and satisfy himself that the sample received is not tampered by anyone or by any means, the provisions enabling the local health authority to be the custodian of the other two parts of the sample, the provision enabling the accused to have one of the other two samples to be analysed at the Central Food Laboratory are all intended to achieve this design, object and purpose. No Court can presume that any particular provision is mandatory in the sense that failure of strict observance of the same will per se vitiate the sampling, render the report of the Analyst unreliable. It appears to us that generally speaking, considering the object, design and purpose of the provisions of the Act and Rules referred to earlier, substantial and fair compliance with the provisions would be sufficient.

8. All these provisions are mandatory in the general sense and Food Inspectors are required to obey the dictates of these provisions honestly and fairly and not refrain from observing the formalities at their own will and pleasure. This does not mean that whenever Food Inspector fails to observe a particular formality either wholly or strictly it must necessarily result in the presumption of prejudice to the accused. Whether on account of the non-observance of a particular formality prejudice has actually resulted to the accused is a question to be decided in the particular fact-situation and cannot be a matter for presumption.

9. The Supreme Court and this Court had occasion to consider whether some of these provisions are mandatory in the above sense or not. As early as in 1967, dealing with Section 10(7) of the Act, a Division Bench of this Court in Food Inspector, Calicut Corporation v. Padmanabhan Nair 1967 Ker LT 825 : 1968 Cri LJ 683 observed (at p. 686 of Cri LJ):

All laws are mandatory in the sense that they impose a duty on those who come within their express purview but it does not follow that every departure therefrom would taint the whole proceedings with a fatal blemish. There is nothing inconsistent in saying that the legislative aim was that one or more independent persons must be present at the time of the action of the Food Inspector at and yet this proceeding relating to the purchase and sampling might be valid, even if no independent person or persons were present, provided there is evidence worthy of acceptance by the Court that the action of the Food Inspector is in accordance with law.

(emphasis supplied)

The provision cannot be held to be mandatory in the sense that absence of a witness would vitiate the entire action of the Food Inspector. This Court sought support for this position from the decision of the Supreme Court in State of Rajasthan v. Rehman : 1960 CriLJ286 . We notice that a Full Bench of this Court in Prabhakaran's case, 1982 Ker LT 809 ; (1983 Cri LJ 81) accepted this position after reviewing several decisions of this Court.

10. Regarding service of notice in Form No. VI provided in Section 11 of the Act and Rule 12, this Court has held that substantial compliance is sufficient. See *Sundaresan v. Viswanathan Pillai* (1988) 2 Ker LT 113.

11. Regarding intimation to be sent under Section 13(2) of the Act, this Court has indicated that substantial compliance is sufficient and the prosecution can fail only if prejudice is shown to have been caused to the accused. See *Prabhakaran's case*, 1982 Ker LT 809 : 1983 Cri LJ 81 (FB), *Food Inspector v. Karingarapully Co-op. Milk Supply Society Ltd.* 1986 Ker LT 174 : 1986 Cri LJ 719, *Food Inspector v. Varghese* 1986 Ker LT 852 and *Food Inspector v. Velayudhan* (1987) 1 Ker LT 722 : 1987 Cri LJ 1137.

12. The Supreme Court in *Dalchand v. Municipal Corporation, Bhopal* : 1983 CriLJ448 held that the period of ten days mentioned in old Rule 9(j) of the Rules was only directory. The Rule required Food Inspector to send by registered post copy of the Public Analyst's report to the person concerned within ten days of the receipt of the report. The Court held that the period of ten days is not a period of limitation and was prescribed merely with a view to expedition and with the object of giving him sufficient time to make arrangements to challenge the report of the Public Analyst by making request to send the other sample to the Central Food Laboratory. The Court also observed that where the effect of non-compliance with the Rule was such as to wholly deprive the right of the person to challenge the Public Analyst's report by obtaining the report of the Director of the Central Food Laboratory, there might be just cause for complaint, as prejudice would then be writ large. Where no prejudice was caused there could be no cause for complaint.

13. A Full Bench of this Court in *Prabhakaran's case*, 1982 Ker LT 809 : (1983 Cri LJ 81) took the same view with reference to the expression 'immediately' occurring in Rule 9A of the Rules. See also *Tulsiram v. State of M.P.* : 1984 CriLJ1731 , *Food Inspector v. Karingarappully Coop. Milk Supply Society Ltd.* 1986 Ker LT 174 : 1986 Cri LJ 719 and *Food Inspector v. Beerankoya* 1986 Ker LT 1104 : 1987 Cri LJ 521.

14. The same view has been taken in regard to Rule 19 of the Rules [See *Food Inspector v. Alikunju* 1970 Ker LT 987, *Food Inspector v. Secretary Ksheera*

Vyavasaya, Co-operative Society 1977 Ker LT 370 : 1978 Cri LJ 532].

15. A similar view has been taken regarding Rule 201 Food Inspector v. Secretary Ksheera Vyavasaya Co-operative Society 1977 Ker LT 370 : 1978 Cri LJ 532, Food Inspector v. T. Karunakaran 1973 Ker LT 595].

16. The same view has been taken regarding Rule 221 State of Kerala v. Alasserry Mohammed : 1978 CriLJ925 , Ramdas Bhikaji Chaudhari v. Sadanand : 1980 CriLJ111 .

17. A similar view has been taken regarding Rule 22A [Food Inspector v. Cyriac 1984 Ker LT 231 : 1984 Cri LJ 1487].

18. It is in this background we propose to analyse Rules 7, 17 and 18. These Rules are inter-connected. Sub-r. (1) of Rule 7 states that on receipt of a package containing a sample for analysis, Public Analyst or an officer authorised by him, shall compare the seals on the container and the outer cover with specimen impression received separately and shall note the condition of the seals thereon. Sub-rule (2) requires the Public Analyst to cause the sample to be analysed. Sub-rule (3) requires him within a period of forty days from the date of receipt of any sample for analysis to deliver to the local health authority report of the result of such analysis in Form No. III. Where the sample does not conform to the provisions of the Act or the Rules, he shall deliver to the Local Health Authority four copies of such report. Rule 16 deals with the manner of packing and sealing the sample. All the samples of food for analysis shall be packed, fastened and sealed so as to prevent leakage. Container shall then be completely wrapped in fairly strong thick paper with the ends of the paper neatly folded in and affixed by means of adhesive. A paper slip bearing the signature and code and serial number of the Local Health Authority shall be passed on the wrapper (so as to go round completely from the bottom to the top of the container) and the signature or thumb impression of the person from whom the sample has been taken being affixed in such a manner that the paper slip and the wrapper both carry a part of the signature or thumb impression. If he refuses to affix signature or thumb impression, that of the witness shall be taken in the same manner. The paper cover shall be further secured by means of strong twine or thread both above and

across the bottle and 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 shall then be covered by means of sealing wax bearing the impression of the seal of the sender. Rule 17 deals with the manner of despatching containers of samples. According to sub-r. (a) sealed container of one part of the sample for analysis and a memorandum in Form No. VII shall be sent in a sealed packet to the Public Analyst immediately but not later than the succeeding working day by any suitable means. According to sub-r. (b), sealed containers of the remaining two parts of the sample and two copies of the memorandum in Form No. VII shall be sent in a sealed packet to the Local Health Authority immediately but not later than the succeeding working day by any suitable means. Rule 18 requires that a copy of the memorandum and specimen impression of the seal used to seal the packet shall be sent in a sealed packet separately to the Public Analyst by any suitable means immediately but not later than the succeeding working day.

19. When the sealed packet containing the sealed container of one part of the sample and a copy of Form VII memorandum as well as separate sealed packet containing a copy of the memorandum and specimen impression of the seal are received by the Public Analyst he has to compare the seal on the container and the outer cover with the specimen impression received separately and note the condition of the seals. If the seals are intact and are identical the sample can be treated as genuine and untampered. If the seals are not intact or do not tally naturally it may call for further and close examination. If the seal is not intact it need not be presumed that the sample is tampered with. That is because even if the seal is not intact, the paper slip ensures against any tampering, since it goes round the container completely and bears the signature and code and serial number of the Local Health Authority. We are told that no duplicate of the paper seal would be available with the Food Inspector.

20. In this connection, it will be instructive to examine the procedure prescribed in sub-sees. (2-A) and (2-B) of Section 13 of the Act when one of the other two samples has to be sent to the Central Food Laboratory. When an application is

made to court under Section 13(2) to send one of the parts of the sample to the Central Food Laboratory, the court shall require the Local Health Authority to forward the part or parts of the sample kept with the Local Health Authority and upon such requisition being made, the said authority shall forward the part or parts of the sample to the court within a period of five days from the date of receipt of such requisition. It is significant to note that Sub-section (2-A) does not require the Local Health Authority to forward to the court the sealed packet containing the two containers and referred to in Rule 18. Local Health Authority is required to forward part or parts of the sample and not the sealed packet as such. Sub-section (2-B) of Section 13 states that on receipt of the part or parts of the sample from the Local Health Authority, the court shall first ascertain that the mark and seal or fastening as provided in Section 11(1)(b) are intact and the signature or impression as the case may be, is not tampered with and despatch the part or one of the parts under its own seal to the Director of Central Food Laboratory who shall thereupon send a certificate to the court in the prescribed form. The Local Health Authority is not required to send to the court specimen impression of . the seal received by the Local Health Authority from the Food Inspector separately under Rule 18; nor is the court required to compare the seal on the container with the specimen of such impression of the seal. The consequence is that when it comes to sending one of the samples at the instance of the accused to the Central Food Laboratory, the sealed packet need not be sent to court and the specimen impression of the seal used to seal the packet or the specimen of the seal used to seal the part of the sample need not be sent to court and the court would have no opportunity to see the sealed packet or compare the seal on the sealed packet or container with the specimen impressions of the seals. Nevertheless, the report of the Central Food Laboratory is final by virtue of the proviso to Sub-section (5) of Section 13 of the Act. Obviously the provision in Rule 17 for a sealed packet is made only by way of abundant caution. Therefore, the mere failure to put the sealed container in a sealed packet by itself is not a vitiating factor and cannot result in the report of the Public Analyst being held unreliable without anything more and cannot result in acquittal unless prejudice is shown. Bearing in mind the well established criteria for deciding whether a provision is mandatory or directory, we are inclined to hold that though the provision in Rule 17 is mandatory in the sense that the Food

Inspector is required to observe the same it is not mandatory in the strict sense of the expression in that the failure to observe R.-17 of the Rules cannot lead to acquittal without the accused showing that such failure has resulted in prejudice to him. It is unnecessary for us to go into the nature of Rule 18 for the purpose of this case, though we notice that Kader J. in *Food Inspector v. Govindan* 1979 Ker LT 625 took the view that Rule 18 is only directory and required only substantial compliance.

21. We have been referred to a number of decisions by learned Counsel for the revision petitioner and the learned prosecutor. In *Food Inspector v. Pirayiri Cooperative Milk Supply Society Limited* 1979-85 KUC (KLT Suppl.) 473 : 1984 Cri LJ 225 one of us (Bhat, J.) held that the time limit indicated in Rule 17(a) is not mandatory in nature and delay of a few days cannot lead to presumption of prejudice to the accused. Prejudice to the accused has to be shown. Where delay is shown to cause prejudice to the offender, he has to be protected. Reference has been made to two unreported decisions of Padmanabhan, J. in CrI. R.P. No. 483 of 1981 and CrI. R.P. No. 272 of 1981. His Lordship considered these decisions in *Food Inspector v. Sathish Kumar* 1985 Ker LT 1093 and observed that in the circumstances of the case even non-observance of the minute formalities of Rule 17(a) could not be regarded as fatal. Regarding delay in analysis contrary to the provision in Rule 7(3), there are some decisions of this Court holding that mere delay is necessarily fatal to the prosecution. See *Food Inspector v. Moosa* 1982 Ker LT 37 : 1982 Cri LJ 168; *Food Inspector v. Moosa* 1984 Ker LT 80 : 1984 Cri LJ 563 and *Food Inspector v. Viswanatha Pillai* (1987) 2 Ker LT 761 : 1988 Cri LJ 323. If on account of delay the sample becomes unfit for analysis or becomes decomposed to any extent. Public Analyst would be able to say so and that will be necessarily reflected in the report. This aspect was not taken into consideration in the above decisions. However, we wish to point out that Padmanabhan, J. considered the question in *Food Inspector v. Usman* 1985 Ker LT 1038 : 1986 Cri LJ 535 and held that Rule 7(3) cannot be considered mandatory and its non-compliance or delayed compliance cannot be treated as fatal to the prosecution without proof of prejudice. Learned Judge did not follow the decision in Moosa's case, 1984 Ker LT 80 : (1984 Cri LJ 563) since in His Lordship's view that decision was not in accordance with three earlier decisions of the Supreme Court in

Shambhu Dayal v. State of U.P. : 1980 CriLJ809 , Dalchand v. Municipal Corporation, Bhopal : 1983 CriLJ448 and Tulsiram v. State of M.P. : 1984 CriLJ1731 . With great respect we are inclined to agree with the view taken by Padmanabhan, J. We also notice that this decision was not brought to the notice of the learned Judge who decided the case reported in (1987) 2 Ker LT 761 : 1988 Cri LJ 323 (Food Inspector v. Viswanatha Pillai).

22. Strong reliance is sought to be placed on the decision of the Supreme Court in State of Maharashtra v. Rajkiran 1987 Supp SCC 183. In that case the trial court convicted the accused for selling a sweet in which coal tar dye of prohibited variety was present. The appellate court acquitted him and the High Court dismissed the appeal against acquittal. The matter came up for consideration before the Supreme Court in an appeal by Special Leave. It was argued before the Supreme Court that acquittal on the ground that requirements of Rule 18 were mandatory and non-compliance vitally affects the prosecution was untenable. The Supreme Court perused the judgment and the materials placed before it and agreed with the conclusion of the appellate court. The court adverted to the fact that copy of Form VII memorandum and specimen impression of the seal referred to in Rule 17 were sent by registered post to the Public Analyst as contemplated in Rule 18. The appellate court had taken the view that the prosecution had to establish the despatch by registered post and did not accept the version of the prosecution in the absence of postal receipt. That led to the conclusion that there was non-compliance with the scheme covered by Rules 17 and 18. The court in a brief judgment observed as follows:

Counsel for the appellant does not dispute that it is mandatory to have the materials in Rules 17 and 18 separately sent to the Public Analyst. We accept that there is a purpose behind this requirement and when there is non-compliance, the prosecution is to fail. We are satisfied that in the present case the acquittal is based on the finding that the prosecution has failed to establish despatch of the materials referred to in Rule 18 separately by registered post. We are of the view that the acquittal was thus justified.

(emphasis supplied)

A reading of the above passage makes it clear that appellant before the Supreme Court accepted that Rules 17 and 18 are mandatory and hence the Supreme Court had no occasion to consider whether those Rules are mandatory. Therefore, we are unable to treat this decision as an authority for the position that Rules 17 and 18 are mandatory. In the light of what we have indicated, we hold that Rule 17 is not mandatory in the sense that mere failure to observe all the formalities required in Rule 17 would lead to acquittal without showing prejudice to the accused. The accused is entitled to take advantage of the non-compliance or defective compliance with Rule 17 provided he satisfies the court that he has thereby been prejudiced.

23. We have gone through the evidence of the Food Inspector, PW 1. He gave evidence in support of the steps taken by him in accordance with the provisions of the Act and the Rules. He has specifically spoken of the observance of the formalities contemplated in Rules 17 and 18 except that he did not specifically state that the articles despatched to the Public Analyst under Rule 17 A and the Local Health Authority under Rule 17-B were put in sealed packets. He deposed that one sample bottle together with copies of Form VII memorandum and specimen impression of the seal were sent by him to the Public Analyst and Ext. P5 is the postal receipt and the next day the original receipt together with another copy of Form VII memorandum and specimen impression of the seal were despatched by him to the Public Analyst by registered post with acknowledgment due. He also deposed that two sample bottles together with the copies of Form VII memorandum and specimen impression of the seal were handed over to the Local Health Authority.

24. What is sought to be urged is the omission of PW 1 to specifically mention that he put the sample or the samples, as the case may be, in packets and sealed the packets. There is nothing in the evidence and circumstances to indicate that he did not put them in sealed packet before transmission. He was not cross-examined on this aspect either. Such a contention was not raised before the trial court or even in the memorandum of revision specifically. The act required to be done by the Food Inspector under the Rule is an official act. It is shown that an official act has been performed. If that be so, by virtue of illustration (e) to Section 114 of the

Indian Evidence Act it is open to the court to draw a presumption that official act has been performed regularly, that is, in accordance with the provisions of the Act and the Rules. In a series of decisions this Court has taken the view that such presumption can be drawn. There is nothing in the evidence to contra-indicate the regularity of the action and there has been no challenge by way of cross-examination. See *State of Kerala v. Ramakrishnan Nair* 1965 Ker LT 402, *Food Inspector v. P. Kannan* : AIR1966 Ker70 , *T. A. Ouseph v. State of Kerala* 1967 Ker LT 290 : 1967 Cri LJ 1430 (2), *Muthukumaran v. State of Kerala* 1968 Ker LT 909 : 1968 Cri LJ 1554 which has been affirmed by the Supreme Court in *Kasumkunju v. Ramakrishna Pillai* 1969 Ker LT 50, *Food Inspector v. Hameed* 1983 Ker LT 901 : 1983 Cri LJ NOC 224, *Food Inspector v. Pirayiri Co-op. Milk Supply Society Limited* 1979-85 KUC (KLT Supp) 473 : 1983 Ker U 579 : 1984 Cri LJ 225, *Bavenna v. State of Kerala* 1985 Ker LT 463 : 1985 Cri LJ 1126, *Food Inspector v. Abdulla Haji* 1985 Ker LT 781 : 1986 Cri LJ 1, *Food Inspector v. Usman* 1985 Ker LT 1038 : 1986 Cri LJ 535, *Food Inspector v. Sathish Kumar* 1985 Ker LT 1093, *Food Inspector v. Karinagarappully Co-operative Milk Supply Society Ltd.* 1986 Ker LT 174 : 1986 Cri LJ 719, *Food Inspector v. Varghese* 1986 Ker LT 852 and *Food Inspector v. Velayudhan* (1987) 1 Ker LT 722 : 1987 Cri LJ 1137. Similar view has been taken by a Full Bench of the Madhya Pradesh High Court in *State of M. P. v. Chhotekhan Nannekhan* : AIR 1970 MP29 and a Full Bench of this Court in *State of Kerala v. Mammu Musaliar* 1974 Ker LT 792 : 1975 Cri LJ 409. See also the observations of the Supreme Court in *Gopaldas Baheti v. State of Assam* 1979 FAJ 173 (2).

25. Ext. P12 report of the Public Analyst shows that he received the sample in this case properly sealed and fastened and he found the seal intact and unbroken and that the seal affixed on the container and the outer cover and compared the seals on the container and the outer cover with the specimen impression received separately from the Food Inspector and the sample was in a condition fit for analysis. This would lead to the inference that besides the seal and the container there was an outer cover which also had been sealed. It is clear that the sample sent to the Public Analyst was in a sealed packet. In these circumstances, the contention has to fail.

26. It is argued that samples in this case and two other cases were put in one packet and despatched to the Public Analyst and that is illegal and prejudice has to be inferred. There is no provision in the Act or Rules prohibiting such a procedure. In any event, such a procedure would amount to substantial compliance with the Rules. No prejudice to the accused has been shown. Hence this contention has to fail.

27. It is next contended that the revision petitioner is only a licensee of the business and not the vendor or the owner and, therefore, cannot be prosecuted. Section 7 states, inter alia, that no person shall himself or by any person on his behalf manufacture for sale, or store, sell or distribute any adulterated food. The commencing words of Section 16(1)(a)(i) are:..whether by himself or by any other person on his behalf, imports into India or manufactures for sale, or stores, sells or distributes any article of food....

It is clear that in regard to sale of any adulterated article of food it is not only the vendor who is liable to be prosecuted and punished; the person who by another person on his behalf sells an article of food is also liable. In other words, when a salesman sells an article of food, his employer, namely, the licensee is also liable. When a servant effects the sale, he does so on his master's behalf.

28. Section 23 of the Act confers on the Central Government power to make rules to carry out the provisions of the Act. Section 23(1A)(g) states that such Rules may define the conditions of sale or conditions for licence of sale of any article of food in the interest of public health. Sub-rule (1) of Rule 50 of the Rules states, inter alia, that no person shall manufacture, sell, stock or exhibit for sale any article of food, including prepared food or ready to serve food except under a licence. Sub-rule (15) of Rule 50 states that every licensee who sells any food shall display a notice board containing the nature of the articles which he is exposing or offering for sale. The above provisions make it clear that licence is to be issued in the name of person who conducts the business of the nature mentioned above including sale of articles of food.

29. It is undisputed and it is also proved that the revision petitioner is the licensee of the business conducted in the premises visited by the Food Inspector and the

purchase was made from there. There is no case put forward at any stage that the particular article of food was not kept for sale, even assuming that such a defence is possible. The evidence of the Food Inspector would show that first accused was a salesman working in the shop and the person in charge there. The sale to the Food Inspector in this case can only be a sale effected by the licensee through the first accused. Therefore, the revision petitioner is liable.

30. Learned Counsel for the revision petitioner has referred to the decision in *Manibai v. State of Maharashtra* : 1974 CriLJ451 . That was not a case of master and servant but a case of two co-licensees. The High Court held that Manibai was not in charge of conducting the business in the shop and since in the case of company as provided under Section 17, it is the person in charge and responsible for the conduct of the business who is liable and Manibai cannot be found guilty. The present is not a case of a company or other entity covered by Section 17 of the Act. Therefore, this decision is not really relevant. Janaki Amma, J. had occasion to consider an identical fact situation in *Rajan v. State of Kerala* 1979 Ker LT 658 : 1980 Cri LJ 177. Learned Judge distinguished the decision of the Supreme Court in Manibai's case : 1974 CriLJ451 and observed (at p. 180 of Cri LJ):

The decision may not have application in the instant case inasmuch as it is nobody's case that accused 1 and 2 are co-licensees or partners of a firm which comes under Section 17(1). The evidence is only to the effect that the second accused is the sole licensee of the shop and it was the first accused who sold the sample. In the absence of material or even a case that the first accused is a co-licensee along with the second accused, the first accused can be treated only as a salesman working under the second- accused. Therefore, Section 17(1) has no application in the instant case.

We respectfully agree with the view taken by Junaki Amma, J.

31. The oral evidence and documents show that Food Inspector demanded and purchased ghee. Report of the Public Analyst shows that the sample did not conform to the prescribed standards. No doubt the sample contained 87%

hydrogenated vegetable oil or vanaspati. That is not sufficient to show that it was not a case of sale of adulterated ghee. Whether or not it was a case of misbranding, it was a case of sale of adulterated article of food.

32. Learned Counsel for the revision petitioner finally contended that the sentence imposed on the revision petitioner is excessive. The revision petitioner has been convicted and sentenced under Section 16(1)(a)(i) in regard to the sale of article of food which is adulterated within the meaning of Section 2(ia)(m). There is no dispute that if the report of the Public Analyst is to be accepted the article is proved to be adulterated. Section 16(1) states that in such a case the offender shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall not be less than one thousand rupees. There are two provisos which contemplate reduced sentence in certain cases. Learned Counsel has no contention that the facts of the case would attract the operation of any of the provisos. Hence the court has no option but to impose the minimum sentence contemplated. Learned Counsel for the revision petitioner invited our attention to one or two decisions of the Supreme Court reducing the sentence or declaring the sentence already undergone as sufficient. The decisions do not lay down a proposition that the courts acting under Section 16 of the Act have jurisdiction to impose sentence below the minimum even in cases not covered by the provisos. We do not see our way to reduce the sentence still further.

33. No other contentions have been urged before us. We find no ground to interfere and accordingly dismiss the revision petition.