

# KERALA HIGH COURT

Food Inspector

Vs

Prabhakaran

Criminal Appeal No. 284 of 1979 and Criminal Appeal No. 96 of 1980

(Subramonian Poti, Acting C.J., Vadekkel and Chandrasekhara Menon, JJ.)

08.10.1982

## ORDER

### **Supramonian Poti, Ag. C.J.**

1. Crl. R.P. of 96 of 1980 came up in the first instance before T. Chandrasekhara Menon, J. who referred it to a Division Bench and the Division Bench referred the matter to the Full Bench since a question of law of considerable importance touching the interpretation of Rule 9A of the Prevention of Food Adulteration Rules is said to arise in the revision. The same question arises in Crl. Appeal No. 284 of 1979 which came up originally before Kader, J. and on reference by the learned Judge the Division Bench took up the matter. That too was referred to a Full Bench by the Division Bench. In that case a further question arises, namely, the interpretation of subsection (7) of Section 10 of the Prevention of Food Adulteration Act, 1954. It was argued before the Division Bench that in the light of the decision of the Supreme Court in *Ashu Jaiwant v. State of Maharashtra*<sup>1</sup>, such a question arose for consideration. The question that we have to decide in these cases may be formulated thus :

1. Is the obligation of the Food Inspector to take signatures of one or more persons called to be present at the time action was taken by him met by taking signature on the mahazar prepared by him ?
2. What would be the consequence if the Food Inspector fails to call one or more persons to be present or fails to take his or their signature under Section 10(7) of the Act ?
3. Whether the obligation of the Local (Health) Authority to forward a copy of the report of the result of analysis in Form III immediately after the institution of prosecution envisaged in Rule 9(A) of the Rules discharged by sending it not necessarily on the same day or the next day but reasonable soon thereafter ?

2-3. The first two questions are allied and therefore we consider them together. The obligation cast on a Food Inspector under Section 10(7) to call one or more persons to be present at the time he takes action is to lend credibility to his evidence and the

<sup>1</sup> AIR 1975 SC 2178

obligation to have the signatures of those present to be taken is only to enable him to prove, if challenged that the action was done by him in accordance with law. Since the Food Inspector functioning under the Act would necessarily be a person interested in getting conviction in the case it would be unsafe generally to rely on his sole evidence to enter a conviction. Even if there are irregularities in the mode or manner of taking action under Section 10, when he deposes as a witness in court in support of the case charged by him he would not normally speak to a case of such irregularity. Any witness who is very intimately interested in the prosecution such as the Peon of the Food Inspector who accompanies him though he may have witnessed the action taken by Food Inspector and may have been participated in such action by assisting the Food Inspector cannot be an independent witness since his version would also be coloured as he would also be interested in furthering the prosecution case. That is the reason why the statute expects the Food Inspector to be prudent in calling proper witnesses to his action so that their evidence may be available to a court for assessing the regularity of his conduct in taking sample under the Act. It may happen that he may call witnesses to be present. But if he fails to take their signature he may not be able to prove that they witnessed the action. If such persons are cited as witnesses it is likely that they may not support the prosecution or even if they support, their evidence may be challenged as that of persons who were rely nor present at the scene. The requirement of Section 10(7) is therefore one which prudence should dictate compliance with by a Food Inspector lest he runs the risk of the case being thrown out of court for want of independent evidence. The question argued before us by learned counsel Sri P.V. Ayyappan in these cases is that the Section is mandatory and any violation of the provision of the section, as for instance by failing to call independent witnesses or failing to take their signatures, could be fatal to the prosecution and there can be only one consequence, namely, that of acquittal of the accused.

4. Learned counsel further contends that Section 10(7) having not specifically referred to the papers on which the signature of the witnesses are to be taken it must necessarily follow that these must be taken in all papers prepared by the Food Inspector on the spot. According to counsel such signature must be taken on the packets of the samples sealed by the Food Inspector after sampling, on the voucher prepared by the Food Inspector for the signature of the party selling the Food and the notice to be issued by him under Section 11(1)(a) of the Act.

5. The purpose of a statutory provision must necessarily determine whether it is of a mandatory character. Even the provisions which are mandatory in form have been understood as merely directory. For a proper determination of this question the background of the provision will have relevance. It is not difficult to notice the purpose of Section 10(7). We have already indicated that. A Court will be cautious in accepting uncorroborated evidence of the Food Inspector or evidence corroborated only by interested testimony. But that is not to say as a proposition of law, that in any and every case where the Food Inspector's evidence is not corroborated the prosecution must fail. If, in the circumstances of a case, a court feels that the Food Inspector's evidence is entitled to credence and that even if it is supported by only interested testimony. There is no reason why such testimony should be rejected, the court is not precluded from acting on that evidence. The Food Inspector might not have called witnesses to attest because witnesses might not have been available or such of those witnesses as were available might not have assented to affixing their signatures. It may be that because of the situation at the time he takes samples he might have failed to call independent witnesses. It may also be that by an error of judgment he may have called witnesses who turned out to be not independent witnesses though the Food Inspector might have assumed otherwise. In all these cases the failure to call witness

and seek their attestation may no doubt have bearing on the ultimate outcome of the case in that it would call for a closer scrutiny of the evidence by court. The provision is not mandatory in the sense that failure to act in accordance with Section 10(7) as to attestation will not by itself be fatal to the prosecution. In *Ram Labhaya v. Delhi Municipality*<sup>2</sup>, the Food Inspector failed to call "one or more persons" when he took action. But the facts of the case showed that the neighbouring shop keepers were called to witness the taking of the sample but none was willing to cooperate. Under these circumstances naturally the court found that the prosecution must be relieved of its obligation under the provision. The court also observed that "this ought not to be understood as minimizing the need to comply with the salutary provision in Section 10(7) which was enacted as a safeguard against possible allegations of excesses or unfair practices by the Food Inspector." We may advert in this context to a decision of the Division Bench of this court in the *Food Inspector v. Padmanabhan Nair*<sup>3</sup>, That was a case where there were three witnesses to the mahazar. Two of them were employees of the hotel and the other a maistry of the corporation. The maistry was examined and he spoke to the action of the Food Inspector. Mathew, J. speaking for the Bench observed in that case thus :-

"We do not think that the learned Magistrate was justified in acquitting the accused on the ground that the persons called to be present at the time of the action of Food Inspector were not independent. He has consider the evidence adduce on its merits and come to a conclusion."

The court expressed the view that the idea behind the necessity of calling independent persons is to secure the corroboration of the evidence of Food Inspector the object of attestation being evidentially in character. The court concluded in that case thus :-

"We think that if the evidence adduced at the trial is sufficient and reliable for the court to come to the conclusion that the action of the Food Inspector was regular, the fact that no independent person called to be present at the time of the action of the Food Inspector should have no adverse consequence on the case of the complainant. To say this is not say that the Food Inspector need not observe the provisions of Section 10(7) of the Act."

6. It is one thing to say that the Section obliges witnesses to attest to action taken by the Inspector and another to say that those witnesses should be examined in the case Section 10(7) does not deal with the corroboration of the evidence of the Food Inspector to call one or more persons to be present at the time action is taken under clause(a) or sub-section (1) of the Section 10 of the Act and the obligation to take the signatures of such persons. It was held in *Cr. R.P. No. 424 of 1979* by one of us Ag. Chief Justice (1981 K.L. T.S.N. 97) that :-

<sup>2</sup> AIR 1974 SC 789

<sup>3</sup>1967 K.L.T. 825

"Even a case where a Food Inspector has called independent witnesses to arrest to his acts and has taken their signatures it may be that the benefit of their evidence is not available and the court is left with only the evidence of the Food Inspector. It will be a question of fact in each case whether, in circumstance of that case, the Court should act upon the sole testimony of the Food Inspector. Even in a case where there are no witnesses to attest of the acts of the Food Inspector under Section 10, the court need not, merely for that reason,

consider that there is any violation of Section 10(7)."

The question has received more exhaustive consideration by Janaki Amma J. and the learned Judge has summed up the propositions relevant in the matter in paragraph 23 of the Judgment, in *Food Inspector v. Joy*<sup>4</sup>, at page 224 thus :

"In my view the law as laid down by the above decisions can be summarised as follows :

(i) While taking action under clause (a) of sub-section (1), sub-section (2) sub-section (4) or sub-section (6) of the Act the Food Inspector must call one or more persons to be present;

(ii) The obligation which Section 10(7) casts on the Food Inspector is only to "call" one or more persons to be present when he takes action. In a case where the Food Inspector did call persons to witness the taking of sample and none was willing to co-operate the prosecution is relieved of its obligation to cite independent witness;

(iii) The provision contained in Section 10(7) is akin to the law relating to search laid down in Section 100(4) of the Code of Criminal Procedure 1973 corresponding to Section 103 of the Code of Criminal Procedure, 1898. The provision is enacted as a safeguard against any possible allegations of excesses or resort to unfair means by the Food Inspector. This being the object it is in the interest of the prosecuting authority to comply with the provisions of the Act, the non-compliance of which may in some cases result in the testimony of Food Inspector being rejected;

(iv) Since the Food Inspector has no means of enforcing the presence of persons in witness the action taken by him and the section does not provide any penalty failure to respond to his call the Parliament could not have intended that the presence of such persons is a mandatory requirement for the validity of the action taken by Food Inspector. Therefore non-compliance of the provision will not affect the legality of the action taken by the Food Inspector, but only the weight of the evidence available in the case;

(v) The object of calling persons to witness action being to assure fairness in the action the persons called must be independent and not susceptible to the influence of the Food Inspector;

(vi) It is different to lay down any hard and fast rule as to what classes of persons will be independent. It is at the same time too much to assume that because the Food Inspector can take action persons dealing with articles of food all persons connected with the trade in articles of food would be dependent upon the Food Inspector;

(vii) A Food Inspector is not an accomplice. There is no rule of law that a

<sup>4</sup>1982 K.L.T. 219

conviction cannot be based on the sole testimony of the Food Inspector. It is due to a sense of caution based on prudence that Courts insist that the testimony of the Food Inspector should be corroborated by some independent witness. The weight to be attached to the evidence of the Food Inspector will depend upon the circumstances of each case;

(viii) If the evidence adduced at the trial is sufficient and reliable for the Court to come to the conclusion that the action of the Food Inspector was regular the fact that no

independent person was called to be present at the time of action should have no adverse consequences on the case of the complainant. To say this not to say that the Food Inspector need not observe the provisions of Section 10(7) of the Act."

The decisions of our learned brother Khalid, J. in *Food Inspector v. Narayanan Nair*<sup>5</sup>, and *Bhat J. in Alotius Wilson v. Food Inspector*<sup>6</sup>, may also be adverted to in this context.

7. It is therefore clear that it may not be correct to say that the provision in Section 10(7) is mandatory in the sense that when once it is shown that there has been non-compliance with the section, the prosecution automatically fails. To quote the words of Mathew, J.S. 10(7) is evidentiary in character.

8. The first of the questions posed by us is answered as above. It appeals to us to be strange that it should be contended that Section 10(7) of the Act does not contemplate the preparation of a mahazar and therefore it is not the record to be signed by the witnesses called to attest. The attestation is of the acts of the Food Inspector. There, cannot be such attestation of acts on a piece of blank paper or on a paper which has no relevance to what did take place when the sampling was done. It is for this reason that a contemporaneous record is made of what took place and that is attested by the witnesses called on to attest by affixing their signatures whether that is referred to as Mahazar or memorandum is immaterial. It appears to us that though the Section does not in terms refer to preparation of a Mahazar or a memorandum or minutes of what did take place attestation by the witnesses contemplated in Section 10(7) must necessarily be of a contemporaneous record. We see no logic in considering that Section 10(7) imposes an obligation on the Food Inspector to take the signature of such attestors in the notice to be issued by him under Section 11(1) or even on the packets in which the samples are placed. There is no harm in taking the signatures on these. But it is not as if there is an obligation on him to do so. We are also unable to appreciate the contention of Sri P.V. Ayyappan that the witnesses must sign in the voucher issued by the owner to the Food Inspector in token of having received the price for the goods taken for sampling. In fact the Act does not in terms speak about the passing of a voucher much less does it contemplate attestation on such a voucher by the witnesses. Evidently counsel's argument has been developed on the basis of the decision adverted to in the reference order, *Ashu Jaiwant v. State of Maharashtra*<sup>7</sup>, To this we will therefore refer.

9. The sale of 450 grams of Til seeds to the Food Inspector which Til seeds were

<sup>5</sup>1980 K.L.T. 454

<sup>7</sup> AIR 1975 SC 2128

<sup>6</sup>1980 K.L.T. 834

found to be unfit for human consumption was the subject-matter of the charge that ended in conviction appealed against in the Supreme Court in *Ashu Jaiwant v. State of Maharashtra*<sup>8</sup>, Tambe was the person who had been called by the Food Inspector to witness his act. On the appreciation of Tambe's evidence the Court found that he had not witnessed at all at the time the Food Inspector took the sample. No record of what took place in any form was prepared by the Food Inspector in that case and therefore evidently no such record as mahazar was proved in the case. But it was said that Tambe's signature was taken on the sealed packets of the sample. That too was not believed. It is in that context that the court observed in paragraph 12 that the court cannot ignore the fact that the signatures of Tambe are absent on all those documents on which they could have been present. We must notice that this was said in the context of the court holding that it was more likely that Tambe was not there at all to witness the

occurrence. It was while appreciating the question whether Tambe was witness to the action by the Food Inspector that mention is made in the judgment that Tambe's signatures could have been obtained in all the papers. That would have served to establish his presence. Of course Section 10(7) speaks of taking signature and naturally it can only be signature on any document which records the steps taken by the Food Inspector. We see no logic in assuming that in the notice to be issued under Section 11(1)(a) there should be an attestation by any independent witness. We also see no warrant in accepting the contention of learned counsel that in the voucher to be signed by the owner of the article taken as sample there should be such a signature. In fact we see no provision by which there is an obligation so issue such a voucher. In these circumstances the question posed before us present no difficulty. The signature is necessarily to be taken on such document as would evidence the fact that the witness was present at the time action was taken by the Food Inspector.

10. The more serious contention raised in both these cases concerns the scope of the term 'immediately' in Rule 9A of the Prevention of Food Adulteration Rules. Rule 9 as it now stands reads :-

"Local (Health) Authority to send report to person concerned. 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 has been disclosed under Section 14-A of the Act :

Provided that where the sample conforms to the provisions of the Act or the rules made thereunder, and no prosecution is intended under sub-section (2), or no action is intended under sub-section (2E) of Section 13 of the Act, the local (Health) Authority shall intimate the result to the Vendor from the sample has been taken and also to the person, whose name, address and other particulars have been disclosed under Section 14-A of the Act, within 10 days from the receipt of the report from the Public Analyst." The controversy before us is whether the term 'immediately' should be read so as to hold that where the copy of the report is not sent on the date of institution of the prosecution or quite soon thereafter there is violation of the Section, whether such

<sup>8</sup> AIR 1975 SC 2178

violation has mandatory consequences and therefore, the accused is to be acquitted for that reason. "It is" necessary in this context to refer to the history of the Rule, Rule 9A has taken the place of Rule 9(j) by incorporation in the Rules by notification No. GSR, 4 (E) dated 4-1-77 and the same Notification omitted Rule 9(j). Prior to amendment on 13th February, 1974 Rule 9(j) read as :-

"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 there under as soon as the case is filed in the court."

It was enumerated as the duty of the Food Inspector. Hence under the rule as it stood prior to 13th February, 1974 there was an obligation on the Food Inspector to send a copy of the report as

soon as the case was filed in Court. By the amendment which came into force in February 1974 "as soon as the case is filed in court" was replaced by the words "within 10 days". Rule 9A which took the place of Rule 9(j) has effected substantial changes in the rules. Whereas under Rule 9(j) it was the duty of the Food Inspector who filed the prosecution in court to forward the report under Rule 9A the duty is that of the Local (Health) Authority. The Local (Health) Authority can come to know of the institution of the prosecution only on information being furnished by the Food Inspector. Nevertheless the Local (Health) Authority is under Rule 9A obliged to forward the report "immediately after the institution of the prosecution".

11. It is contended by counsel appearing for the accused in these cases that the term "immediately" replaced the expression "within 10 days" which found a place in the corresponding rule, with a purpose, namely to limit the period of time even to less than 10 days. On the other hand for the State Prosecutor it is urged that the object of the change is to made the rule elastic. In other words counsel's contention is that the restriction of the period of 10 days was taken away in the new rule.

12. It may be of benefit of refer to Section 13 of the Act in this context Sub-section (1) of this Section obliges the Public Analyst to deliver in the prescribed form a 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) of Section 13 is relevant here, and therefore, we extract the sub-section. Sub-section (2) reads thus :-

"13(2). On receipt of the report of the result of the analysis under sub-section (1) to the effect that the article of food is adulterated, the Local (Health) Authority shall, after the institution of prosecution against the person from whom the sample of the article of food was taken and the person, if any whose name, address and other particulars have been disclosed under Section 14-A, forward, in such manner as may be prescribed, a copy of the report of the result of the analysis to such person or persons, as the case may be, informing such persons that if it is so desired, either or both of them 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 analyzed by the Central Food Laboratory."

Rule 7(3) of the Rules obliges the Public Analyst to deliver to the Local (Health) Authority a report of the result of Analysis in Form III within a period of forty-five days from the date of receipt of any sample for analysis. The obligation of the Local (Health) Authority under Rule 9A is to furnish a copy of the report not only in cases where a prosecution is instituted but even in a case where no prosecution is intended and that within 10 days of the receipt of the report from the Public Analyst. "To complete the narration it may be useful also to refer to Section 11(3) and Rule 17. Sub-section (3) of Section 11 obliges the Food Inspector to send the sample of the food or adulterant by the "immediately succeeding working day." Rule 17 of the Rules reiterates the obligation to send the sealed packet of sample to the public analyst "immediately but not later than the succeeding working day" by any suitable means.

13. A time schedule is seen to be envisaged in the scheme of the provisions of the Act and Rules. That commences with the Food Inspector taking samples under Section 10 of the Act. He divides

the sample of food into three parts and makes and seals or fastens up each part in such a manner as its nature permits. He sends one of the parts for analysis to the public analyst under intimation to the Local (Health) Authority and sends the remaining two parts to the Local (Health) Authority for the purposes of sub-section (2) of Section 11 and sub-section 2A and 2E of Section 13, sub-section (3) of Section 11 obliges the Food Inspector to send the sample by the "immediately succeeding working day" and R-17 adverted to obliges him to do so in regard to the sample to be sent to the Public Analyst as well to the sample to be sent to the Local (Health) Authority. The Public Analyst has to deliver to the Local (Health) Authority a report of the result of the analysis within a period of 45 days. The report of the Public Analyst may be either that the sample conforms to the provision of the Act or the rules made thereunder or that sample is adulterated. In the former case there will be no scope for prosecution. Even so the Local (Health) Authority has a duty to intimate the result of the analysis to the vendor and also the person whose particulars are disclosed under Section 14-A of the Act. The period is within 10 days from the date of Public Analyst's report. If, on the other hand, a decision to prosecute is taken there is no obligation to send the copy of the Public Analyst's report within 10 days of the receipt of the report from the Public Analyst. The obligation to send the copy of the report to the vendor arises only on the institution of the prosecution. Once that is instituted it is the duty of the Local (Health) Authority to send a copy of the report immediately and that may be by registered post or by hand or by any suitable means. It is on receipt of copy of the report intimating the result of the analysis that the person who receives it could decide whether he is to make an application under sub-section (2) of Section 13 to forward part of the sample kept by the Local (Health) Authority to the Central Food Laboratory for analysis. That is a very valuable right since the report of the Central Food Laboratory would supersede the report of the Public Analyst.

14. The rule making authority has not left it to the Local (Health) Authority to choose the period within which the copy of the Public Analyst's report is to be supplied to the vendor. The discretion of such authority is restricted by the term 'immediately'. There must necessarily be an object or purpose for this restriction. That is particularly so when as the Rule stood originally the Food Inspector had to send a report "as soon as possible" and later the obligation was to send it "within ten days" and now the obligation is with the Local (Health) Authority and that to send the copy of the report "immediately". The time is evidently of consequence. As noticed by a Division Bench of the High Court of Madras in the decision in *Kundansami v. Food Inspector*<sup>9</sup>, there is a dual purpose sought to be achieved by the time element, namely the trial of the cases filed under the Act are not protracted by the accused by making applications at a belated stage for the sample being sent to the Central Food Laboratory for further report and at the same time enduring that due opportunity is given to the accused to set right any mistake contained in the report of the Local (Health) Authority by having a sample sent to the Central Food Laboratory and obtaining a report from that institution. The delay may be fatal in the matter of the result of the analysis by the Central Food Laboratory. Even if a time is specified within which the vendor has to move the court for directing the Local (Health) Authority to make available the remaining sample or samples for analysis by the Central Food Laboratory that may not by itself be an adequate safeguard. If the Local (Health) Authority intimates the results of the Analysis by the Public Analyst long after the prosecution is commenced. The delay may materially affect the nature of the sample itself. The case itself is likely to be protracted if no time limit within which the Local (Health) Authority is to supply the copy of the Public Analyst's report to the vendor is specified.

15. The dictionary meaning of the term "immediately" has been adverted to by Justice Sathar Sayeed of the Madras High Court in *Perumal v. Kumbakonam Municipality*<sup>9</sup> "Without interval of time, without delay, straightaway, or without any delay or laps of time, forthwith" all convey the idea envisaged by the term "immediately". Such dictionary meaning notwithstanding what one understands by the term "immediately" in common parlance will vary from situation to situation. A father writing to his son to come home immediately from his place of work since his mother is serious ill and has been hospitalised expects his son to start as soon as the letter is received. A father writing to his son suggesting to him that there are many marriage proposals awaiting to be considered for him, that the marriage should not be further delayed and so he must take leave and come home immediately does not expect his son to apply for leave as soon as the letter is received and catch the next bus or train. Even if he comes a month later that will be in compliance with the father's discretion. That could not be so in the former case, for in that event the son may perhaps have no occasion to see his mother alive at all. Similarly a father writing to a son who is earning well outside India to come over to his place immediately since landed properties are going cheap and it may be profitable to make investment then does not expect his son, despite the use of the word "immediately" to act with the same degree of urgency as in the first case or as even in the second case. We are only indicating that the time element involved in the concept of "immediate" is relative and may vary from case to case and situation to situation. By its very nature the term is elastic. It is perhaps this elasticity which persuaded the amendment of the rule and replacement of the term "within 10 days" by the term "immediate" in the corresponding provision. It would not therefore be possible to say that "immediate" can in no case go beyond 10 days or that up to 10 days could be taken in all cases. Such elasticity is called for in the very nature of the rule. It is only on the Local (Health) Authority getting intimation of the launching of the prosecution that the copy of the Public Analyst's report has to be sent. The rule

<sup>9</sup>(1982 Cr.L.J. 963)

<sup>10</sup>(1981 Cr. LJ. 1366)

does not contemplate the prior issue of the copy of the report and in fact it has been held by the Madras High Court that sending of copy of the report 5 days prior to the institution of the prosecution will not be in compliance with rule 9-A (See 1982 Cr.L.J. 1963). The intimation by the Food Inspector to the Local (Health) Authority of the fact of the prosecution being launched cannot normally be expected to be made on the same day. It is well known that on the same day and that courts may be unable even to number them on that day. It sometimes happens that complaints under Special Enactments are prepared by the prosecuting agency and filed in bulk on days convenient to them. The offices of Courts faced with such a situation take some time to go through them and number them. In such cases it is likely that the Food Inspector may intimate the Local (Health) Authority of the institution not on the day the complaint is filed in court. There may be other circumstances where neither due to the laches nor due to default some time is taken by the Local (Health) Authority to send the intimation under Rule 9A. There is no logic or reason to cut down the elasticity of the term "immediately" by the court self-imposing any restriction as to the period within which copy of the report is to be sent. It will be, we are afraid, too unrealistic to think that such copy of the report must be sent on the same day the prosecution is launched or the very next day. Where performance of acts should not go beyond the very next day the Act and the Rules appropriately said to (See Section 11(3) which uses the term 'by the immediately succeeding working day'. Rule 17(a) which uses the term immediately but not later than the succeeding working day'). Such a limitation is not sought to be imposed on the term "immediately" in Rule 9A. The object behind the specification in Rule 9A of a time element is

adverted to by a Division Bench of the High Court of Madras in *Kundasami v. Food Inspector*<sup>11</sup> and we are in respectful agreement with the observations of the learned Judges in that context thus :

"Firstly, an accused person could delay the trial of the case by applying belatedly for a sample being sent to the Director of the Central Food Laboratory. Since no time has been prescribed for the sample being sent, when an application was made in that behalf by an accused person, the court had no alternative but to send the sample to the Central Food Laboratory and adjourn the trial of the case till the report was received. Another concomitant was that by reason of delay the sample that was likely to get decayed and be unfit for the director of the Central Food Laboratory to examine it and give his report. In such a situation, the accused was deprived of a valuable opportunity available to him under law for contradicting the report of the Public Analyst by obtaining a different report from the Central Food Laboratory. It is only to overcome these situations, the Legislature must have amended the section and enacted it in its present form."

If the object of providing that a copy of the report is to be sent by the Local (Health) Authority immediately to the vendor is to see that the trial was not protracted and there is no undue delay in the vendor being told about the result of the analysis so as to enable him to apply for an analysis of the remaining samples a delay of a day or two by itself may not be material. Therefore to say that the Local (Health) Authority should issue a copy of the report on the same day or at least next day would be unwarranted. We must also remember that the Local (Health) Authority has various

<sup>11</sup>(1982 Cr.L.J. 63)

functions to perform and it is the pressure of its work that must necessarily determine the speed and promptness with which it acts. That is not to say that it can afford to be not prompt. When the rule requires it to act immediately it must do so. But if the delay is such as it would not defeat the purpose for which the rule is made it could not be said that the action is not "immediate".

16. In the case before the Madras High Court in *Perumal v. Kumbakotnam Municipality*<sup>12</sup>, there was a delay of more than 2 months, a delay which was not explained and the court was right in saying that the Local (Health) Authority did not act immediately. So is the case before this Court in *Krishnankutty Nair v. Food Inspector*<sup>13</sup> in which our learned brother Khalid, J. held that a delay of 74 days would not fall within the scope of term "immediate". That of course must be so. A delay of 25 days have been held to be in violation of Rule 9A by the Madras High Court in *Sebastian v. State*<sup>14</sup> where the earlier decision of the Madras High Court in Perumal's case is adverted to.

17. Our attention has been drawn to a decision of the High Court of Bombay in *State of Maharashtra v. Tukaram*<sup>15</sup> Though there is not much of discussion about the meaning of the term "immediately" the learned Judge holds in that case that the copy of the report made available to the accused 6 days after the institution of the prosecution is not in time in the absence of an explanation worth the name as to why the copy could not be furnished immediately after the institution of the prosecution. There the learned Judge took into consideration the circumstances that the accused was a small agriculturist selling milk in the market and as a matter of fact the

offence was said to have been committed nearly five years earlier. According to the learned Judge the cause of justice would not be advanced by interfering with the order of acquittal and sending the accused behind the bar.

18. Our attention has been drawn to the decision of our learned brother Narendran J. in *Kunhappa v. Food Inspector*<sup>16</sup> where the learned Judge observed that :-

"The word "immediately" means without delay, at once or forthwith. So, in the normal course, the copy of the report will have to be dispatched on the same day on which the prosecution is instituted. But if due to reasons beyond the control of the Local (Health) Authority the report could not be dispatched on the same day it will not be a violation of Section 13(3) of the Act and Rule 9A of the Rules. The copy of the report has to be dispatched after the institution of the prosecution and not before that. If by the time the prosecution was instituted, the time for receipt of registered articles in the local post office was over then it goes without saying that the copy can be dispatched only by post on the next working day for the post-office. In such cases, dispatch on the same day may not be practicable or possible. In such a case, the delay caused cannot be considered as violation of the relevant provisions. If on the other hand, the Local (Health) Authority causes the delay, even one day's delay will be hit by the rule 9A because what the rule insists is "immediately".

<sup>12</sup>(1981 Cr.L.J. 1366)

<sup>14</sup>(1982 Cr.L.J. 1359)

<sup>16</sup>(1982 K.L.T. 95)

<sup>13</sup>(1982 L.L.T. 69)

<sup>15</sup>(1982 Cr.L.J. 1462)

With great respect to the learned Judge we cannot agree with respect a categorical statement of the law. That would be to assign a rigid and inflexible meaning to the term "immediately". Such an approach would defeat the very purpose of the provision. 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 court in applying the provisions of the Act to prosecutions thereunder. That Act is intended to serve a social purpose, to punish offenders who indulge in a crime of great consequences to the health and life of the people. No provision is an enactment 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 to issue a copy of the Public Analyst's Report, a delay which is not shown in any way to cause injury or harm to the person prosecuted when there is no express provision providing for such consequence. Regard being had to the nature of the Act and the nature of the punishment under the Act any default or delay which would cause noticeable prejudice to an accused should be frowned upon and the prosecution must fail in that event. A different approach is beset 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.

19. We are not addressing ourselves to the question whether Rule 9A is mandatory or only directory. Our attention has been drawn by the State Prosecutor to a Full Bench decision in

*Kashmiri Lal v. State of Haryana*<sup>17</sup> which holds the view that the Rule is only directory and not mandatory. We refrain from expressing any view on this, for, we are concerned in this reference with the scope of the term "immediately" and for the purpose of the case before us we need confine our consideration to the meaning and purport of this term since on the facts of this case we find that Rule 9A has not been contracted as will presently show.

20. In the light of the law stated by us we will now consider the facts of the case before us. Crl. R.P. 96/80 is a revision against the judgment in Criminal Appeal No. 207/79 of the Sessions Court of Trivandrum in S.T. Case No. 82 of 1979 of the Additional Judicial First Class Magistrate's Court, Trivandrum. The petitioner in the revision was the accused before the Additional Judicial First Class Magistrate and he stands convicted of the offence punishable under Section 16(1)(a)(i) read with Section 7(1) of the Act 750 grams of Peadhall purchased from him by the Food Inspector, Trivandrum on 7-3-1979 was found on analysis by the Public Analyst not to conform to the standard prescribed for good grains and hence was found to be adulterated. The accused was sentenced to rigorous imprisonment for six months and also to pay a fine of Rs. 1,000. This was confirmed in appeal.

21. One of the questions taken up in this revision is that the Local (Health) Authority sent the intimation to the accused forwarding the Public Analyst's Report only on 18-5-1979 though the complainant had been filed on 10-5-1979. Whether the period of 8 days would be fatal is the question that is raised in this revision though this petition

<sup>17</sup>(1982 Cr.L.J. 311)

has not been considered in the judgments of the Courts below. Evidently because this is not so considered there was no occasion for the courts below to go into the reason for the delay. It is not indicated that this delay has in any way materially prejudiced the accused or is of a nature likely to prejudice the accused. It is not possible to read on the facts of the case that the period of 8 days would make all the difference to the accused. Therefore we do not hold that merely for the reason that there was a period of 8 days taken to send the copy of the report that was not issued "immediately".

22. But there is another reason why we propose to interfere with the conviction and sentence. The food article taken by the Food Inspector was Peadhall. The case is that living insects were present and the insect damaged grains amounted to 23.8 per cent (by count and the uric acid arising as a result of insect damage was of the order of 20.00 mgms per 100 gms. Foreign matter as well as otherwise damaged grains were absent. The sample was free from artificial colouring matter. This being the case it is only the presence of 2-8 percent of insect damaged grain that has resulted in finding that the food was adulterated. Insect damaged grain upto 10 percent is permissible and would not violate the rule. Therefore it is the insect damaged, grain in excess of the permissible limit that is the offending factor. It is in this background that the Public Analyst's report calls for examination and that in the light of his evidence. It is admitted that the sample was purchased on 7-3-1979 and that it was forwarded to the Public Analyst on the same day. The Public Analyst's report Ext. P6 is dated 26.3.1979. Ext. P6 does not show the date on which the sample was examined by the Public Analyst. It is not possible to assume that the Public Analyst who receive hundreds of samples would remember the date on which he analyses each sample. If he speaks to the date cannot be depended on. No record is kept by him as to the date on which he analysed the sample. Inasmuch as his report does not indicate that the analysis was on any date earlier to the date of the report it must necessarily be taken that it was on the date of the report

only. If that be the case the report is not of much consequence. The damage is caused by insects. There is no case that at the time the sample was taken it was not insect infected. The case was that it was so infected. That would not amount to adulteration for, if the insect infected grains was less than 10 percent by count, sample could not be held to contravene the Act. Even if on the date sample was taken presence of insects was below 10 percent, it would necessarily grow in course of time. It is possible that the period of nearly a fortnight might have been responsible for the increase of the percentage of insect infected grains. In other words when there is a possibility that due to the delay there would have been increase in the quantity of insect infected grains and there is no evidence as to what that rate would be we cannot assume that on the date the sample was taken the insect infected grains were above 10 percent. If it was below 10 percent than and rose above 10 percent later the sample sold could not be said to be adulterated. For that reason the accused ought to be acquitted. Hence in revision we reverse the judgment of the court's below and acquit the accused.

23. Now we come to Crl. Appeal 284 of 1979. This is an appeal by the Food Inspector, Chalakudy Municipality against the acquittal by the court below of respondents 1 and 2 against whom complaint was filed for offence punishable under Section 16(a)(i) and (ii) of the Act read with Rule 7(i)(v), 2(ia)(m) of the Act. Sample of milk taken from the first accused was found to be adulterated in that the sample contained not less than 15 percent of added water. The second accused is said to be the owner of the milk. The trial Court found that there was no independent evidence to corroborate the testimony of the Food Inspector and for that reason acquitted the accused.

24. Though in this case also the violation of Rule 9A is urged from the materials available in the case the date when the Local (Health) Authority sent the Public Analyst's report to the accused cannot be found and therefore on the facts we are unable to determine this question.

25. According to counsel for the Municipality there is no contravention of Section 10(7) of the Act since PW-3, an independent witness had been called not to attest and he had attested. It is further said that even assuming that PW-3 is not an independent witness Section 10(7) being directory only, in the circumstances of the case there is no reason why the court should not act on the evidence of PW-1, the Food Inspector.

26. This is not a case where the court below failed to act on the evidence of PW-1 merely on the ground that it is not corroborated. On the other hand it chose to go into the merits of the evidence of PWs 1, 2 and 3 and considering the facts and circumstances of the case held that the evidence has not established that the sampling has been regularly done.

27. PW-1, is the Food Inspector. PW-2 is his peon. The milk was taken to a Society for sale by the first accused and PW-3, is the Manager of the Society. By virtue of nomination he was to represent the society in matters concerning the Prevention of Food Adulteration Act. According to the court below PW-3 is interested because he stood to loss by going against the prosecution. If he did not co-operate with the Food Inspector he could also be a target. That by itself is no reason to say that PW-3 is not independent. Apart from this there is the consideration of evidence of PWs 2 and 3 and the trial Court in its judgment has shown how in material particulars they contradict each other. We have been taken through the evidence and we find that the contradictions are real. PW-3 seems to figure, as witness for the Food Inspector in other cases of

prosecution also. It is not as if there were no other really independent witness at the time the sampling was done. According to the evidence of PW-3 about 50 persons were present at the time PW-1 has no case that he called anyone to attest. If there are contradictions in the evidence of PWs 2 and 3 in the absence of other witnesses who could have been called upon to attest, the prosecution must fail. Whatever might be the view we would have taken if the case comes up in the first instance before us we did not think that we should in the face of these facts reverse the acquittal and convict accused. A case for such conviction has not been made out on the evidence in the case. Hence we dismiss the appeal.

Appeal dismissed.