

NAGPUR HIGH COURT

Shriniwas Pannalal Chockhani

Vs

Crown

Criminal Appeal No. 31 of 1949

(Mangalmurti and Deo, JJ.)

24.03.1950

JUDGMENT

Mangalmurti, J.

1. The appellant Shriniwas has been convicted under section 7, Essential Supplies (Temporary Powers) Act, 1946 for having contravened clause 2 (1) (a), Central Provinces and Berar Foodgrains Export Restrictions Order, 1943, and sentenced to rigorous imprisonment for two years and a fine of Rs. 1,000. The appellant Pannalal, who is the father of Shriniwas has been convicted of abetment of the offence by aiding Shriniwas in this illegal export and sentenced to rigorous imprisonment for one year and a fine of Rs. 1,000. Appellant 3, Krishnarao also has been convicted of abetment of the same offence for having aided Shriniwas in this illegal export with full knowledge that he was not legally entitled to export the goods, and sentenced to rigorous imprisonment for one year and fine of Rs. 1,000

2. The appellant Shriniwas has also been convicted under section 420, Penal Code, for having cheated the railway officials by making false representations, knowing them to be false, that he was a holder of permit No. 10315, that it was endorsed "on Government account" by the appropriate authorities authorising him to export chuni on Government account, that he was entitled to export more than 500 tons because of the endorsement "to Kalyan for 500 tons" on it, and that the commodity he was exporting was chuni. The finding of the lower Court is that he thereby dishonestly induced the railway officials to deliver to him 7 railway wagons to load 1405 bags to Kalyan. He has been sentenced for this offence to rigorous imprisonment for 18 months and a fine of Rs. 1,000. The third count on which the accused Shriniwas has been convicted is that he fraudulently used as genuine permit No. 10315 which he knew or had reason to believe at the time he used it to be a forged document, the forgeries being (i) the scoring out of the words "Pannalal Gulraj" and "Karsendas Girdhar. bhai" and substituting "self" for the latter, (ii) addition of the words "on Government account" and "To Kalyan for 500 tons." For this offence under

section 471 read with section 465 he has been sentenced to rigorous imprisonment for one year and a fine of Rs. 1,000. All these sentences of imprisonment are to run consecutively. The 1405 bags were ordered to be forfeited to the Crown.

3. It is common ground that this permit No. 10315 was first issued on 24.11-1944 by the Deputy Commissioner Yeotmal under the powers delegated to him by the Director of Food Supplies under Clause 6, Central Provinces and Berar Foodgrains Export Restrictions Order, 1943, in the name of Pannalal Gulraj Chokbani (appellant 2) as consignor with Karsandas Girdbaribhai, Bombay, as consignee, for export of 500 tons of chuni from Yeotmal to "Wadibundar and that it was valid till 31-12-1944. The period was, however, extended twice till 30-4-1945 by which date only about 130 tons were exported. No further extension was asked for nor was the permit returned by the consignor to the Deputy Commissioner. The permit remained inactive with the holder for about 18 months. In the meantime, the powers of the District Magistrates to issue permits for export of chuni to places outside the province were withdrawn by the order of the Director of Food Supplies, Central Provinces and Berar (No. 19519-836 XXV FM, dated 10-9-1946, Ex. P-81). It was after this that the accused Shriniwas took this permit No. 10315 (duplicate and triplicate of that permit) to the bungalow of the officiating Deputy Commissioner Shri Mukerji (P. W. 30) on 25-10-1946 which was the last day of the Diwali holidays. After some talk between Shriniwas and Mukerji, the latter agreed to renew the permit and passed orders to that effect on the application which Shriniwas had taken with him for that purpose. The accused Shriniwas then took that application bearing the orders of the Deputy Commissioner for renewal of the permit to Barve (P. W. 10) who made alterations in the permit No. 10315 and an endorsement as per orders of the Deputy Commissioner. The application and the permits were taken to the Deputy Commissioner who signed the endorsement and initialed the alterations. According to prosecution the accused Shriniwas took them to the Deputy Commissioner while according to the latter Barve and he went with these papers.

4. The difference in the prosecution and the defense versions begins at this stage. According to the prosecution only two changes were sanctioned by the Deputy Commissioner and made by Barve, viz., the place was changed from Wadibundar to Kalyan and the period was extended till 31-12-1946. The first alteration was initialled by the Deputy Commissioner Mukerji at two places and he also signed the endorsement regarding the extension. On the other hand, according to the accused Shriniwas, the Deputy Commissioner not only sanctioned these two changes but also sanctioned the following other changes and initialled the alterations and additions in the permit to give effect to them: (1) Scoring out of the words ' Pannalal Gulraj ' from consignor; (2) scoring out of the words ' Karsandas Girdharbhai, Bombay' and substitution of the word ' self' in their place as consignee ; (3) addition of the word ' Bharda ' after the word 'Chuni' in the description of the commodity; (4) addition of the words " To Kalyan for 500 tons " in the top line of the permit. Shriniwas also says that Barve put his initials at two places, one near the word 'Bharda' and the other near the words 'for Deputy Commissioner, Yeotmal' in the endorsement at the top. These four alterations and the corresponding six initials of the Deputy Commissioner and

two initials of Barve are according to the prosecution forgeries.

5. Beyond this stage also, there are the following undisputed facts: On the basis of the altered permit the appellant Shriniwas despatched 370 tons of grain by 10-12-1946. After this on 26-12-1946 he despatched from Yeotmal to Kalyan 1405 bags containing 130 tons of grain in seven wagons under Permit No. 10315. On 28-12-1946 at Murtizapur on the way, where goods had to be transhipped from the metre gauge wagons on the Yeotmal Murtizapur line to the broad gauge railway wagons on the Murtizapur Kalyan line, some grain fell down from the bags during the transhipment and as they were found to be grains of tur dal, the station authorities gave information about it to the railway Sub-Inspector Kanhaiyalal (P. W. 1) and the latter detained the wagons at Murtizapur. It is also common ground that articles A D, and E are the samples of the stuff in question taken from time to time during investigation and Ex. p. 40 is the analysis of the ingredients of article E.

6. Under Section 15, Essential Supplies (Temporary Powers) Act, 1946, where any person is prosecuted for contravening any order made under section 3 ibid which prohibits him from doing an act without a permit, the burden of proving that he has such a permit shall be on him. Clause 2 (1) (a), Central Provinces and Berar Foodgrains Export Restrictions Order, 1943, prohibits export of tur and its products outside the province without a permit issued in that behalf by the Director of Food Supplies, Central Provinces and Berar. It is not disputed that what was exported on 26-12-1946 by the accused Shriniwas was a tur product. The burden is, therefore, on him to prove that he had the required permit. According to him Ex. P.-72 is the permit which authorised him to export the tur product which he had exported. The validity of this permit has been challenged by the prosecution on various grounds but we will for the time being examine whether the permit authorized the accused to export the commodity in question. It may be noted here that 500 tons were already exported on this permit by 10-12-1946.

7. The learned counsel for the appellant Shriniwas contended that the stuff which was exported on 26-12-1946 was 'bharda' and in the absence of any other term the Food Office and its officers at Yeotmal were including bharda in 'chuni'; they were sometimes describing it as chuni, at times as bharda, and at other times as chuni-bharda. The learned counsel did not point out any definition of 'bharda' but he admitted that the test for distinguishing dal from bharda, chuni-bharda, or chuni was whether the stuff was fit for human consumption or was not so fit and was merely a cattle-feed. In the former case, he conceded, it was dal and in the latter, bharda, chuni-bharda, or chuni. The learned counsel's submission was that Shriniwas exported cattle-feed and not a tur product fit for human consumption.

8. The Government had two plans: "basic plan" and "free export policy". The former was chalked out by the Central Government with regard to movement of foodgrains of human consumption from one province to another. "Free export policy" related to the foodstuffs that were not fit for human consumption. Exhibit P.-77, dated 5-1-1946 is the memorandum of the

Director of Food Supplies addressed to the Deputy Commissioners. It says that the extension of the period of validity of permits may be granted only in respect of permits under the basic plan and that permits issued under the free export policy should not be renewed under any circumstances. The basic plan permits can be easily distinguished from the other permits as the former bear the endorsement "on Government account."

9. Exhibit P-40, dated 20-2-1947 is the analysis of the sample article E, made by Shri Mohrikar (P. W. 33), Testing Bureau Officer of the Provincial Government. The accuracy of this analysis (Ex. P-40) has not been disputed by the appellant. The result of the analysis was as under: Shri Mohrikar says that by 'khanda' is meant particles of grain which are more than 1/4th of a dal in size and less than 3/4 th of a dal. Dal is tur split into two. Ghuni contains dal particles less than 1/4th in size of a dal grain and also broken particles phol (husk). Husk is the outer cover of the whole grain of tur. According to the witness the sample was of ground tur uncleaned, i. e. of tur which has undergone the first process in the making of dal. The dal portion in the sample is according to him represented by items 5, 6, and 7 in Ex. P-40 and is approximately 77 per cent. It cannot be disputed that husk is unfit for human consumption and those small particles of dal grain which are mixed with broken particles of husk and which cannot be easily separated from it would also be unfit for human consumption. Khanda is not mixed with husk and cannot therefore be said to be unfit for human consumption. It is, however, usually not sold in the market as dal. As Shri Mohrikar has said, when cleaned tur dal is purchased by Government, the following allowance is made: one per cent. for bhusa, husk and dirt; one per cent. for other food grain; two per cent. for broken pieces and; one per cent. for split tur with husk on. Thus even cleaned tur dal has the same ingredient though the proportion differs. It will thus be seen that if whole tur is ground the mixture will contain about 80 per cent. including Khanda as fit for human consumption.

10. In exercise of the powers conferred on him by clause 6, Foodgrains Export Restrictions Order, 1943, the Director of Food Supplies authorised all District Magistrates in the Central Provinces and Berar to issue Export permits under sub-Clause (1) (a) of Clause 2 of the said Order in respect of chuni, bhusa and konda, subject to the following conditions namely: (1) That *bona fide* demands from within the province are given first priority, and (2) that prices f. o. r. the despatching station do not exceed such ceilings as may be prescribed by the Provincial Government from time to time. [Order No. 18830-5506-xxv F. S., dated 20-11-1944.] The Provincial Government had fixed Rs. 6 per maund as the ceiling price of chuni f. o. r. the despatching station. The District Magistrates were requested to see that the exports permitted from their districts did not affect the local stock position adversely nor forced up prices unduly. It would thus be seen that the District Magistrates to whom power to issue export permits was delegated could exercise it only subject to the conditions mentioned therein. It was therefore necessary to make enquiries before granting a permit.

11. In the application (Ex. P.25), dated 23-11-1944, for an export permit we find Rs. 6 per maund

as the export rate for chuni. The report of enquiry endorsed on this application states that the applicant had 500 tons of tur chuni (bharda) in stock, that the commodity was surplus and could be easily allowed to be exported, and that the current market rate of that quality of chuni was Rs. 6 per maund f. o. r. Yeotmal, The report contains a recommendation that permit be granted. On this recommendation the export permit No. 10315 dated 23-11-1944, was issued in the name of Pannalal Gulraj Chokhani. Exhibit p-23 is the original of this permit which remained in the Food Office. Two carbon copies (described as duplicate and triplicate) were issued and were received by the accused Shriniwas for the consignor. The export price stated in the permit was Rs. 6 f. o. r. Yeotmal, which is the ceiling price fixed by the Government.

12. In the application dated 15-3-1945 (Ex. p-86a) for a permit to export 600 bags of chuni bharda to Wadibundar, made in the name of Pannalal Gulraj Chokhani, the export price was stated to be Rs. 5/12 per maund f. o. r. Yeotmal. The report on the application shows that the applicant had stock of chuni bharda and there was no demand for it locally and the market rate f. o. r. Yeotmal was then Rs. 5-12 0 per maund. Permit no. 14971 (ex. p-85) was accordingly issued on 17-3-1945 which mentioned the export price at Rs. 6-12-0 per maund. On 9-4-1946, an application (ex. P-86B) signed by the accused Shriniwas, was made to change the destination station in permit No. 14971 to Thana. The application was granted and on 11-4-1945 changes were made in all the three copies of the permit. An intimation of the change (Ex. P-86C) was sent to the Director of Food Supplies, Nagpur. This permit was extended till 31-5-1945 but only 200 bags were exported till then. Under this Permit No. 14971 in all 200 bags (165 plus 35 bags) were exported to Kalyan on 1-11-1946, 3-11-1946 and 18-11-1946 with "Chokhani" as consignor and "self" as consignee. The goods were described as 'chuni bharda.'

13. A bag of tur usually contains 2 3/4 maunds as appears from Ex. P-58 where in purchases by the accused from one Babulal are recorded. It cost As. 6 per bag for grinding tur. The labour for winowing and separating dal from it may be safely taken at about as. 9 per bag. Thus the expenses of converting tur into tur dal and chuni of the sample Art. E, analysed as found in Ex. P-40, would be at a liberal estimate about As. 6 per maund. The ceiling export prices for a maund of tur, tur dal and chuni, as fixed by Government during all material times were Rs. 11-4-0, Rs. 14-4-0 and Es. 6 respectively. The other costs namely transport etc., per bag would be more or less constant. Out of one unit of tur we get roughly 80 per cent dal and 20 per cent chuni. That is the result in Ex. P-40. By the second operation of grinding, to split remaining tur and to remove husk on tur dal, the proportion would be roughly 75 per cent. of tur dal to 25 per cent. chuni. Calculating costs on the first grinding the result would be :-

	Rs.	as.	p.
80 per cent dal atper Rs. 14-4-0 maund	11	6	6
20 per cent chuni at Rs. 6 per maund	1	3	0
per maund	12	9	6

	Rs.	as.	p.
75 per cent dal at Rs. 14-4-0 per maund	10	11	0
25 per cent chuni at Rs. 6 per maund	1	8	0
Total	12	3	0

while the cost would be about Rs. 12 per maund as the second operation would be involved. This would leave a very small margin. The anxiety of the traders would therefore be to pass on as much quantity of uncleaned tur dal as dal as possible to make greater profits.

14. The accused had sold 3801 bags of tur product to Hansraj (P. W. 14) from 25-9-1946 to 7-12-1946 (Ex. P-42). This purchase book of Hansraj (Ex. p-42) describes the purchase as chuni, chuni bharda and tur chuni and the terms are used as interchangeable. A lot described as tur chuni in Ex. P-42 is described as chuni bharda in Ex. P-45, the rokad bahi of the witness. This we could find at three places during this period. In one lot the weight per bag is shown as 2 3/4 maunds, while in all other lots it is shown as 2 maunds per bag. It thus appears that there is no uniform weight per bag and that the terms chuni, chuni bharda and tur chuni are interchangeable. It is curious that this important witness Hansraj has not been asked a single question about the meanings of these terms or the composition of the stuff purchased by him.

15. Exhibit P-58 shows that the accused purchased from Babulal 1598 bags of tur from 24-11-1946 to 8-12-1946. The weight in most of these lots is 2 3/4 maunds per bag. The price per maund is from Rs. 11 to Rs. 11-8-0 except for one lot for which it is Rs. 12-8-0 per maund. This exhibit shows the purchase of 1241 bags of bhusa by the accused during this period at the rate of Rs. 6 per maund. The weight of bhusa in a bag varied from 22 seers to 24 seers. Each lot was of uniform filling. We also find that on 9-12-1946 the accused purchased tur dal at Rs. 13 per maund. On 17-9-1946 the accused Shrinivas was granted 3 permits (Ess. D-16 to D-18) for export of tur dal in September and October 1946 and the export price is stated at Rs. 13-8-0 per maund f. o. r. Yeotmal. Thus during the material period the accused was purchasing tur at about Rs. 11-8-0 per maund, tur dal at Rs. 13 per maund, and bhusa, at Rs. 6 per maund.

16. The price of the disputed stuff sent on 26-12-1946 was about Rs. 15 per maund f. o. r. Yeotmal, while the export rate of tur dal during that period was Rs. 13-8-0 f. o. r. Yeotmal. It is absurd to believe that chuni bharda or chum (a cattle feed) was selling at higher rate than tur dal itself. It is true that in all the relevant documents of the consignor, consignee, and their agents, the article is described as chuni. It cannot be expected that these persons would describe the article as tur dal for the simple reason that its export was prohibited and discovery would have exposed them to prosecution for the offense or for its abetment. We, therefore, do not attach any importance to the mention of chum in those documents. It is also true that the accused have been able to elicit from the prosecution witnesses in their cross-examination that the samples of the consignments dated 26-12-1946 (Arts A to E) were of chuni bharda. None of them were asked to define what exactly they meant by chuni bharda, nor were they asked to distinguish between the

unsorted product of the first grinding of tur and the products of the several subsequent processes. We, therefore, do not attach any importance to calling the stuff as chuni bharda or bharda by these witnesses. In Ex. D-10B, the register produced by the accused, all the goods sent under Permits Nos. 14971 and 10315 are described as chuni bharda, while in the relative railway receipts they have been described chuni bharda and chuni respectively in accordance with the permits themselves, From the foreign discussion of the documentary and oral evidence it is clear beyond reasonable doubt that chuni, chuni bharda and bharda are, according to these witnesses, synonymous terms and they sell at the same rate.

17. The prosecution has examined several witnesses who had seen these samples during the course of the investigation. P. W. 1 is the railway Sub-Inspector, P. W. 2 is the station master at Murtizapur, P. W. 3 is the tally clerk at Murtizapur and P. W. 4 is the goods clerk. P. W. 3 first discovered that the consignment though labelled as chuni was of tur dal. On his making a report, P. W. 4 and P. W. 2 examined the stuff. Having discovered it to be tur dal they made a report to the police. P. W. 1, therefore, himself examined the stuff and found it to be tur dal. P. W. 27 was then the Deputy Commissioner at Yeotmal to whom the sample was taken and he found it to be of uncleaned tur dal. In the presence of P. W. 6, a trader of Murtizapur, a sample was taken on 29-13-1946 and it was found to be of ground tur dal having husk. This description is to be found in ex. P-3. The witness swears that the sample was of tur dal was husk, but in cross-examination he says "I accept that grain of the description given in Ex. P-3 is called 'bharda.'" If this witness is telling the truth in cross-examination then tur dal with husk is known as 'bharda.' We do not believe that the witness was telling the truth in cross-examination. P. W. 7, another trader of Murtizapur, is a witness in whose presence the sample Art. E was taken out and he has signed the panchnama (Ex. P-39) in which witnesses have verified that the sample seen by them was of tur dal with husk, This witness says in cross-examination that the grain is usually known as bharda because it had in addition to tur dal with husk powdered dal with bhusa in it. Evidently these witnesses are made to say that it is bharda because the word 'bharda' appears in Ex. P-72. We find that the evidence of P. W. 33 Shri Mohrikar, the Testing Bureau Officer, is corroborated by the evidence of the other prosecution witnesses referred to above and other circumstantial evidence discussed above.

18. Dr. Kedar contends that Section 15, Essential Supplies (Temporary Powers) Act, 1946, lays down nothing more than what is to be found in Section 105, Evidence Act, and that the burden of proving the guilt of the accused always remains on the prosecution and there is no burden on the accused to prove his innocence although in certain circumstances the accused may have to introduce facts which will create a reasonable doubt that the act committed did not amount to an offence. He further contends that the evidence on record though it may not be sufficient to show that the stuff that was exported by the accused, Shriniwas on 26-12-1946 was chuni or chuni bharda was at least sufficient to raise a doubt whether it was or was not chuni bharda, and further submits that he has thus discharged the burden of proof that might lay on him under section 15, Essential Supplies (Temporary Powers) Act, 1946 He mainly relies on the passage in *Woolmington v. The Director of Public Prosecutions*¹, reproduced in *Provincial Government*,

*Central Provinces and Berar v. Champalal*², and approved in *Holla v. Emperor*³, The passage quoted is not the full statement of the English law. It has an important qualification "subject to what I have already said as to defence of insanity and subject also to any statutory exception." (Page 481 *ibid.*) The argument of the learned counsel, if accepted, renders Section 15 Essential Supplies (Temporary Powers) Act of 1946 otiose.

19. It has been held in *Superintendent and Remembrancer of Legal Affairs, Bengal v. D. B. Futnani*⁴, that the common law doctrine that the prosecution must establish the guilt of the accused beyond all reasonable doubt has no application to statutory offences of the type created by R. 5, read with other rules framed under the Defence of India Rules. It is for the accused to establish under Rule 5, Defence of India Rules, that he had a lawful authority to export the commodity exported by him and if he fails to prove it he shall be deemed to have contravened clause 2 (1) (a), Central Provinces and Berar (Foodgrains) Export Restrictions Order, 1943. Section 13 of the Essential Supplies (Temporary Powers) Ordinance, xviii [18] of 1946, and Section 15, Essential Supplies (Temporary Powers) Act, XXIV [24] of 1946, enact the same law. In view of these express provisions the common law doctrine is not applicable and the burden lies heavily on the accused to prove that he held a valid permit entitling him to export uncleaned tur dal. It is not enough for him to produce a document purporting to be a permit which admittedly was not the original permit and the corrections in which are in dispute. Appellant 1 must prove that the commodity actually exported by him on 26-12-1946 was covered by the permit. He has attempted to do so by eliciting from certain prosecution witnesses that the commodity exported was called 'bharda', without eliciting facts which would place the commodity in the class of cattle feed. Mere appearance of the word 'bharda' in the permit, coupled with this evidence, would not be sufficient to discharge the burden. The learned counsel for the appellants has strenuously contended that his client's exports for over a month were being watched by the officials concerned on an alleged suspicion that he was exporting tur dal as chuni and the reports of these persons indicate that he was not contravening the export restrictions. We do not attach any importance to the alleged supervision or watch. If we have to take his previous exports into consideration, we find from Ex. P-42 that the price of sales of chuni, chuni-bharda or tur chuni varied from Rs. 13-4-0 to Rs. 16 per maund f. o. r. Yeotmal i. e. the alleged cattle fodder was sold at rates higher than the rates of cleaned tur dal. We are using these facts only to meet the argument of the learned counsel for the appellants and not at all for drawing any inference of guilt therefrom.

20. Considering the evidence and the circumstances and even ignoring the burden cast on the accused by Section 15, Essential Supplies (Temporary Powers) Act, 1946, we find that the prosecution has established beyond any reasonable doubt that the commodity that was exported on 26-12-1946, was the product of the first operation of grinding tur without separating the tur dal from the husk and other material and this is not covered by the permit Ex. P-72, even if we assume that the permit was for export of chuni bharda.

21. The learned counsel for the appellants contends that clause 2 (1) (a), Foodgrains Export Restrictions Order, 1943, was ultra vires the Provincial Government as it contravened the provisions of section 297 (1) (a), Government of India Act, 1935, and being thus invalid could not be deemed to have been made under section 3, by virtue of Section 5, Essential Supplies (Temporary Powers) Ordinance, No. XVIII [18] of 1946, or under section 3 Essential Supplies (Temporary Powers) Act 1946, by virtue of section 17 of that Act. The learned counsel relied on *Empress v. Burah*⁵, and *Ramcharan v. Rex*⁶,

22. The relevant sections of the Government of India Act, 1935, are:

Section 100. (3) "Subject to the two preceding sub-sections the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List ii in the said (Seventh) Schedule (hereinafter called the 'Provincial Legislative List')." Section 102. (1) "Notwithstanding anything in the preceding sections of this chapter, the Federal Legislature shall, if the Governor-General has in his discretion declared by Proclamation (in this Act referred to as and 'Proclamation of Emergency') that a grave emergency exists whereby the security of India is threatened, whether by war or internal disturbance, have power to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial Legislative List, or to make laws, whether or not for a Province or any part thereof, with respect to any of the matters not enumerated in any of the lists in Schedule 1 to this Act"

(2) "Nothing in this section shall restrict the power of a Provincial Legislature to make any law which under this Act, it has power to make, but if any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature has under this section power to make, the Federal law, whether passed before or after the Provincial law, shall prevail, and the Provincial law shall to the extent of the repugnancy, but so long only as the Federal law continues to have effect, be void."

(4) "A law made by the Federal Legislature which that Legislature would not but for the issue of a Proclamation of Emergency have been competent to make shall, to the extent of incompetency, cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period."

[The underlined (here italicised) amendment in Section 102 (1) was made by the India (Proclamation of Emergency) Act, 1945 (9 and 10 Geo. VI, Ch. 23) and that in Section 102 (4) was made by the India (Central Government and Legislature) Act, 1946 (9 and 10 Geo VI, Ch. 39).] Section 297. (1) (a) - "No Provincial Legislature or Government shall by virtue of the entry in the Provincial Legislative list relating to trade and commerce within the Province, or the entry in that list relating to the production, supply, and distribution of commodities, have power to pass any law or take any executive action prohibiting or restricting the entry into or export from the Province of goods of any class or description;"

(2) "Any law passed in contravention of this section shall, to the extent of the contravention, be invalid."

23. The learned counsel for the appellant has assumed that clause 2 (1) (a), Central Provinces and Berar Foodgrains Export Restrictions Order, 1943, was made by the Provincial Government in exercise of the power under section 100, Sub-Section (3), Government of India Act. If that were so, clause 2 (1) (a) would have been invalid, being in contravention of Section 297 (1) (a) of the Act. The order was, however, made in exercise of the powers conferred by Rule 81 (2) (a), Defence of India Rules which was to the following effect :

"The Central Government (or the Provincial Government), so far as appears to it to be necessary or expedient for securing the defence of British India or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may by order provide for regulating or prohibitingmovement, transport, distribution..... of articles or things of any description whatsoever....." Rule 81 (2) gave power to the Provincial Government to issue order for regulating or prohibiting transport of articles. Thus, the Central Provinces and Berar Foodgrains Export Restrictions Order was made in exercise of the powers of the Central Legislature under section 102, Government of India Act, delegated by it to the Provincial Government. It was thus a power different from the Provincial Government's power under section 100 (3) *ibid*, which still continued in the Provincial Legislature under section 102(2).

24. The learned counsel for the appellant contended that even in the exercise of that delegated power not only the Provincial Government or Provincial Legislature but even the Central Legislature and Central Government were bound by the provisions of section 297 (1) (a) *ibid*. We are unable to accept this view. This section lays down a restriction when the Provincial Legislature or Government acts by virtue of Entry No. 27 or 29 in the Provincial Legislative List. Neither the Central Legislature in passing the Defence of India Act nor the Central Government in making the Defence of India Rules, nor the Provincial Government in making the Central Provinces and Berar Foodgrains Export Restrictions Order, 1943, under Rule 81 (2), Defence of India Rules, were acting by virtue of the entry in the Provincial Legislative List and so the limitation in Section 297 (1) (a) did not apply. Clause 2 (1) (a), Central Provinces and Berar Foodgrains Export Restrictions Order, 1943, was thus not ultra vires the Provincial Government' when it was passed on 20-5-1943. We may cite *Purshottam Devjibhai v. Imperator*⁷, *Ragho Sao v. Emperor*⁸, and *Roshanlal v. Emperor*⁹,) in support of our view.

25. The passage in *Empress v. Burah*¹⁰, relied on by Dr. Kedar in no way supports his argument. *Ramcharan v. Rex*¹¹, is clearly distinguishable. In that case the notification regarding the export of matches issued under Rule 81 (2) (b), Defence of India Rules, was not continued after 30-9-1946 by any of the ordinances issued by the Governor-General. It was continued in force by an

Ordinance promulgated by the Governor of the United Provinces and subsequently by the United Provinces Control of Supplies (Temporary Powers) Act, 1947. This Act could be and was passed only in exercise of the powers under section 100 (3), Government of India Act. The limitation in Section 297 (1) (a) therefore applied and the restriction on export outside the province was invalid under section 297 (2).

26. Dr. Kedar next contended that the proclamation of emergency made on 3-9-1939 having been revoked under section 102 (3) on 1-4-1946, the rules made under the Defence of India Act expired on 30-9-1916 except to the extent they were continued by the Emergency Provisions (Continuance) Ordinance No. XX [20] of 1946 and that as the impugned provisions were not admittedly continued by this Ordinance, the Central Provinces and Berar Food-grains Export Restrictions Order, 1943, came to an end on 30-9-1946. He further contended that the Essential Supplies (Temporary Powers) Ordinance 1946, and the Essential Supplies (Temporary Powers) Act, xxiv [24] of 1946 do not therefore continue the 1943 Order, and that in any case the order in so far as it is in contravention of Section 297 (1) (a), is invalid.

27. It is true that Ordinance No. xx [20] of 1946 does not continue the Defence of India Rule 81 (2) so far as it concerns trade and commerce. The Central Provinces and Berar Foodgrains Export Restrictions Order, 1943, is however, continued by section 5 of Ordinance No. xviii [18] of 1946 and subsequently by Act No. xxiv [24] of 1946. The question therefore is whether these enactments in so far as they contravene Section 297 (i) (a) are invalid. The India (Central Government and Legislature) Act, 1946 (9 and 10 Geo. vi ch. 39) was already passed on 26-3-1946 to extend temporarily the powers of the Indian Legislature to make laws, to amend Section 102 (4) as to the effect of laws passed by virtue of a Proclamation of Emergency, and for purposes connected with the matters aforesaid. The material sections are : Section 2 (1) "Notwithstanding anything in the Government of India Act, 1935, the Indian Legislature shall during the period mentioned in section four of this Act have power to make laws with respect to the following matters :

(a) trade and commerce (whether or not within a Province) in and the production, supply and distribution of, cotton and woollen textiles, paper (including newsprint), foodstuffs (including edible oil seeds and oils), petroleum and petroleum products, spare parts of mechanically propelled vehicles, coal, iron, steel, and mica ; and

Section 2 (2) "Any power of the Indian Legislature to make laws under this section with respect to any matter shall include power to make laws as respects a Province conferring powers and imposing duties, or authorizing the conferring of powers and the imposition of duties, upon the Governor-General in Council or officers and authorities of the Governor-General in Council as respects that matter, notwithstanding that it is one in respect of which the Provincial Legislature also has power to make laws." Section 2 (4) "Sub-section (2) of section one hundred and seven of

the Government of India Act, 1935 (which relates to inconsistency between Federal Laws and Provincial laws) and subs. (2) of section one hundred and twenty-six of that Act (which relates to the giving of directions to a Province as to the carrying into execution of Federal Laws relating to matters specified in Part II of the Concurrent Legislative List) shall apply in relation to a law enacted by virtue of this section with respect to any matter, being a matter with respect to which a Province has power to make laws, as if that matter were a matter specified in Part II of the Concurrent Legislative List." Section 5 : "Duration of laws passed by virtue 'of a Proclamation of Emergency. - A law made by the Indian Legislature whether before or after the passing of this Act, during the continuance in force of the Proclamation of Emergency being a law which that Legislature would not but for the issue of such Proclamation, have been competent to make, shall not cease to have effect as required by Sub-Section (4) of section one hundred and two of the Government of India Act, 1935, except to the extent to which the said Legislature would not, but for the issue of that Proclamation, have been competent to make it, and accordingly.' in the said Sub-Section (4) for the words 'shall cease to have effect' there shall be substituted the words 'shall to the extent of the incompetency, cease to have effect.' " According to Section 4, the period mentioned in section 2 is one year beginning from 30-9-1946 when the Proclamation of Emergency ceased to operate. This period could be extended to 2 years by the Governor-General and to a maximum period of 5 years in the way mentioned in that section on the passing of a resolution by both Houses of Parliament.

28. In view of this power conferred on the Indian Legislature and as the Indian Legislature was not in session, the Governor-General promulgated the Essential Supplies (Temporary Powers) Ordinance, 1946, on 25-9-1946 in exercise of the powers conferred by section 72 as set out in Schedule 9 to the Government of India Act, 1935. The Essential Supplies (Temporary Powers) Act, 1946, was subsequently passed by the Indian Legislature, which received the assent of the Governor-General on 19-11-1946 and it was in force on 26-12-1946 when the offence took place. The material provisions of the Ordinance and the Act are:

"Essential commodity' as defined in section 2 includes 'foodstuffs.'

Section 3 (1) of the Ordinance : "The Central Government, so far as it appears to it to be necessary or expedient for maintaining or increasing supplies of any essential commodity, or for securing their equitable distribution and availability at fair prices may by notified order provide for regulating or prohibiting the production supply and distribution thereof, and trade and commerce therein ; Section 3. (2) Without prejudice to the generality of the powers conferred by Sub-Section (1), an order made thereunder may provide,

(d) for regulating by licenses, permits or otherwise the storage, transport, distribution, disposal acquisition, Use or consumption of any essential commodity ;

Section 3 (3) : An order made under Sub-Section (1) may confer powers and impose duties upon

the Central Government or officers and authorities of the Central Government notwithstanding that it relates to a matter in respect of which the Provincial Legislature also has power to make laws." Section 4 : Delegation of powers. - The Central Government may by notified order direct that the power to make orders under section 3 shall, in relation to such matters, and subject to such conditions, if any, as may be specified in the direction, be exercisable also by-(a) such officer or authority subordinate to the Central Government, or

(b) such Provincial Government or such officer or authority subordinate to a Provincial Government, as may be specified in the direction.

Section 5 : Until other provisions are made under this Ordinance, any order whether notified or not, made by whatever authority under Rule 80-B, or sub-rule (2) or sub-rule (3) of Rule 81 of the Defence of India Rules in respect of any matter specified in Section 3, which was in force immediately before the commencement of this Ordinance shall, notwithstanding the expiration of the said rules, continue in force so far as consistent with this Ordinance and be deemed to be an order made under section 3; and all appointments made, licences or permits granted and directions issued under any such order and in force immediately before such commencement shall likewise continue in force and be deemed to be made, granted or issued in pursuance of this Ordinance." Section 7 : "Effect of orders inconsistent with other enactments. - Any order made or deemed to be made under section 3 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Ordinance or any instrument having effect by virtue of any enactment other than this Ordinance." Thus the Central Provinces and Berar Food-grains Export Restrictions Order, 1943, was continued in force under section 5 of the Ordinance. Section 17 of the Act is to the following effect : "17. (1) The Essential Supplier (Temporary Powers) Ordinance, 1946 (XVIII [18] of 1946), is hereby repealed.

(2) Any order made or deemed to be made under the said Ordinance and in force immediately before the commencement of this Act shall continue in force and be deemed to be an order made under this Act, and all appointments made, licences or permits granted and directions issued under any such order and in force immediately before such commencement shall likewise continue in force and be deemed to be made, granted or issued in pursuance of this Act.

(3) For the removal of doubt it is hereby declared:

(a) that for the purposes of the said Ordinance and this Act an order of the nature referred to in section 5 of the said Ordinance made before the commencement of the said Ordinance and not previously rescinded shall be deemed to be, and always to have been, an order in force immediately before such commencement, notwithstanding that such order or parts of it, may not then have been in operation, either at all or in particular areas;

(b) that for the purposes of this Act an order made or deemed to be made under the said Ordinance and not rescinded prior to the commencement of this Act shall be deemed to be an order in force immediately before the commencement of this Act, notwithstanding

that such order, or parts of it, may not then be in operation, either at all or in particular areas."

The Food grains Export Restrictions Order, 1943, has thus been validly continued and was in force at all material times.

29. The learned counsel for the appellants further contended that as the Essential Supplies (Temporary Powers) Ordinance, 1946 (xviii [18] of 1946) and the Essential Supplies (Temporary Powers) Act, 1946 (xxiv [24] of 1946), dealt with "foodstuffs" and not "cattle feed" export of chuni, a cattle feed, was not prohibited under the Food grains Export Restrictions Order, 1943. The term "foodstuff" has not been defined either in the Ordinance or in the Act. In common parlance, foodstuffs mean "materials used as food". The term is not used only for material which is immediately fit for human consumption but it also applies to material which can be used as food after subjecting it to processes like grinding, cleaning etc. For instance, paddy as such is not fit for human consumption but rice in it is, and yet paddy is called foodstuff. So also tur. There is no reason to suppose that the word "foodstuffs" is not used, in these laws, in this usual sense but is used in the restricted sense of material which is fit for human consumption immediately without subjecting it to any process. If such a restricted meaning is accepted, it would lead to evasion of the law in question by mixing some foreign matter with the stuff that is immediately fit for human consumption. The test is not whether it can be immediately used for human consumption but whether it can be so used after subjecting it to the usual processes The uncleaned tur dal (i. e. tur dal without separating from it wastage and foreign matter) which was being exported on 26-12-1946 in this case was such a foodstuff and comes within the provisions of the Essential Supplies (Temporary Powers) Ordinance, 1946, and the Essential Supplies (Temporary Powers) Act, 1946

30. We are thus of the opinion that the conviction of the accused Shriniwas under section 7, Essential Supplies (Temporary Powers) Act, 1946, read with clause 2 (1) (a). Central Provinces and Berar Foodgrains Export Restrictions Order, 1943, is correct and it is maintained.

31. Next we take up for consideration the conviction of the accused Shriniwas under section 471 read with Section 465, Penal Code, for fraudulently or dishonestly using the forged original of Ex. p. 72 as genuine, knowing it to be a forged document. The forgery is said to have been committed and the forged document used in three stages, one before 9-11-1946. the second on 5-12-1946 and the third on or about 26-12-1946. The facts are already given in paras. 3 to 6 above.

32. The prosecution relies on the evidence of P. W. 10, Barve and P. W. 80 Shri Mukherji in support of this charge. [Their Lordships discussed the evidence of the two witnesses and proceeded.]

33-37. The Government handwriting expert has been examined by the accused as D. W. 1 and he

has given evidence that the disputed corrections "To Kalyan for 500 tons" "for" and "self" are similar to the writings of p. w. 10 Barve and the initials which purport to be those of Shri Mukherji are genuine and are his. He has stated that he did not find any signs of imitation in the disputed document so as to suggest that some one other than the witness Barve was imitating his style of writing. The witness was subjected to a very searching cross-examination by another handwriting expert. If really the evidence of Shri Dixit was challengeable in the manner suggested in his cross-examination, nothing prevented the prosecution from examining another expert in support of its story. The learned Judge of the trial Court has given his reasons for disbelieving Shri Dixit. We have gone through those reasons and also Shri Dixit's evidence carefully and do not find those reasons to be satisfactory. We are satisfied that the evidence of Shri Dixit is correct and we accept it.

38. The learned counsel for the respondent contends that the evidence of Shri Dixit (D. W. 1) should be discarded as it is based solely on the photograph and as he had no opportunity to peruse the original which was Suppressed by the accused. We fail to understand how this alleged suppression entitles us to discredit the evidence of Shri Dixit. We are examining whether the original of Ex. P-72, is a forged document. The burden lies on the prosecution to establish this charge beyond any reasonable doubt. That cannot be done unless the prosecution relies on Ex. P-72 and establishes from it that the original was forged. If we ignore Ex. p-72, altogether, the prosecution must fail. The contention that the evidence of P. w. 10 Barve and P. w. 30 Shri Mukerji, based on the examination of the photograph, Ex. P. 72, must be accepted while that of Shri Dixit should be rejected, does not appear to us to be sound. Mukerji has once said that he cannot say definitely whether the initials are his without seeing the original and without recollecting the circumstances. It is, therefore, not necessary to examine whether the original of Ex. P-72 remained with the accused or was sent by him to the Food Office.

39. Next we take up the question whether the opinion of Shri Dixit should be rejected because it is based solely on the photograph. Osborn in his book "Questioned Document", (and Edn.) at pp. 16 to 48 gives the following valuable observations regarding photographs:

"Objections to the use of photographs in Court are based upon the theory that they may be distorted and not true representations of the original, and it is also often incorrectly asserted that the original affords the best means for study and comparison and that no reproduction of it is necessary.

It is true that photographs may be distorted and may be dishonest and if they cannot be properly proved or verified by comparison with original they should be excluded. If there is any doubt about the accuracy of photographs of documents they can easily be verified by comparison with the original document. There is not, therefore, the legitimate objection to photographs of a questioned document that may arise over photographs of a different nature which cannot be verified by Judge, jury, and opposing counsel. The best modern lenses make photographic

reproductions with the utmost accuracy. They render 'straight lines as such', which is the quality described as 'rectilinear'. They also are without astigmatism and reproduce without distortion. Involuntary distortions and inaccuracies are thus entirely eliminated and an objection to photography is now removed that might have been valid in the early days of the art. Lenses are made so accurately that they are certified by the Government Bureau of Standards as 'making reproductions with appreciable distortion.' There are as good reasons for objecting to the use of an ordinary magnifying glass as to an enlarged photograph, since such a photographic reproduction is simply the enlarged view in permanent form. The real reason for most objections to photographs is that they do well just what it is intended they should do, that is, assist in showing the facts. Some ancient opinions recite a long array of conditions that may make photographs dangerous in Courts of law, but not one of these objections is valid when applied to properly proved document photographs. Photographs can be made correctly, and this fact can be shown, and thus all objections are disposed of. Photographs are now rarely excluded and in a number of states it is not necessary that the one who made the photographs should prove them. They can be proved by anyone competent to say that they are correct." Therefore, the photograph must be taken to represent the condition of the original correctly. That is what the prosecution itself says and we are unable to understand this objection.

40. It is true that Shri Dixit has at one place admitted that he was handicapped to some extent by the absence of the original and that; he could not study the pen-pressure with any degree of accuracy. But pen-pressure is only one of the several items to be considered in deciding the genuineness or otherwise of a document. This is not sufficient to reject the photograph and the testimony of Shri Dixit. If the photograph cannot be used there is no evidence of forgery.

41. We prefer the evidence of D. w. 1 Shri Dixit to the evidence of P. w. 10 Barve and P. w. 30 Shri Mukerji, and hold that the disputed corrections were made by Barve and initialled by Sbri Mukerji. The next question for consideration is whether the alterations except as to destination and extension of period were made subsequent to 25-10.1946 as alleged by the prosecution. [Their Lordships held that no alterations were made as alleged by, the prosecution and proceeded:]

42. We wish to discuss at some length the alleged addition of the words "on Government account" on 5-12-1946 and the subsequent pasting of a slip over it after 26 12-1946 as it would throw some light on the affair and would show how unreliable some of the prosecution witnesses are. [Their Lordships after discussing the evidence concluded that the words "on Government account" were not on the permit and proceeded.]

43-49. The learned Magistrate has further held that even if the amendments were held to have been permitted by Shri Mukerji he had no power to do so as his power was withdrawn by the order dated 10-9-1946. That may be material on the first count of export without a permit but not on the second count under section 471, Penal Code. There is no evidence to show beyond reasonable doubt that the accused had knowledge of the withdrawal of the power though there

may be some suspicion about it. There being no knowledge or reason to believe on the part of the accused Shriniwas that the document is forged one, his conviction under section 471 read with Section 465, Penal Code, cannot be sustained and it is hereby set aside along with the sentence. The accused Shriniwas is acquitted of this charge. The fine, if recovered, be refunded. [Their Lordships examined the evidence relating to the third charge against the accused and acquitted him of that charge. The charge of abetment against appellants 2 and 3 was held not established and they were acquitted.]

Order accordingly.

¹1935 A. C. 462 at p. 481: (104 L. J.K.B. 433)

²I. L. R. (1946) Nag. 504 at p. 507: (AIR 1947 Nag 86 : 47 Cr. L. J. 739)

³I. L. R. (1948) Nag. 903 at p. 908 : (A I. r. (36) 1949 Nag. 163 : 50 Cr. L. J. 465)

⁴AIR 1945 Cal 402: (47 Cr. L. J. 257)

⁵4 Cal. 172 at p. 180: (5 i. A. 178 P.C.)

⁶1949 A. L. J. 197: (AIR 1949 All 463 : 50 Cr. L. J. 694)

⁷ILR 1944 Bom 429; (AIR 1944 Bom 247 : 46 Cr. L. J. 354)

⁸ILR 1944 Pat 135: (AIR 1944 Pat 205 : 45 Cr. L. J. 753)

⁹ILR 1945 All 782 : AIR 1946 All 161 : 47 Cr. L. J. 601

¹⁰4 Cal. 172: (5 I. A. 178 P.C)

¹¹1949 A. L. J. 197 : (AIR 1949 All 463 : 50 Cr. L. J. 694)