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SOCIO-ECONOMIC OFFENCES

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I INTRODUCTION

THE SURVEY contains an analysis of selected cases decided by the Supreme Court and the high courts under various socio-economic legislations in India. The legislations which are covered in the survey are the Essential Commodities Act, 1955(EC Act); Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980 (PBMMSEC); Food Safety and Standards Act, 2006 (FSSA); Prevention of Corruption Act, 1998 (PCA); Narcotics and Psychotropic Substances Act, 1985(NDPS); Foreign Exchange Regulation Act, 1973 (FERA); Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA); Income Tax Act, 1961 (IT Act) and Drugs and Cosmetics Act, 1940.

II. ESSENTIAL COMMODITIES ACT, 1955

Malfunctioning of the public distribution system (PDS)

In the case of *Shyam Behari Singh* v. *State of* UP,[1] the accused had a fair price shop at his home without any stock board, rate list or sign board. Out of 800 litres of kerosene allotted to him, 400 litres were not brought to the shop. Moreover, he did not co-operate in the inquiry and was in breach of Uttar Pradesh Essential Commodities Display of Price and Stock and Control of Supply and Distribution Order, 1977 and hence punishable under section 3 and 7 of the EC Act, 1955. The trial court held him guilty and against that decision an appeal was filed to the Allahabad High Court. The court observed that during enquiry, there was no dispute about the quantity that was procured, but the accused could not account for kerosene taken by him for distribution to card holders. Thus, it was held that the trial court has not erred in convicting the accused.

Taneeru Rama Kotaiah v. *State of A.P*[2] is a case of victimisation of PDS shop owner by the authorities under the EC Act. The mandal revenue inspector inspected the fair price shop and on his report a show cause notice was served of an excess of 44 kg of rice. His license was also cancelled on this ground. The petitioner questioned the ground of revocation and the High Court of Judicature at Hyderabad

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1 MANU/UP/2676/2014.

2 2015 (3) ALT 76.

for the State of Telangana and the State of Andhra Pradesh set aside the order of suspension while allowing the writ petition.[3] After the court order, when the shop owner resumed his functions, within a week there was another inspection and this time by the vigilance and revenue officials together. They prepared a panchanama, a reading of which show that stock of 51.98 quintals of PDS rice and 86 kgs of sugar along with records from the shop of the petitioner were seized only on the ground that a quantity of 93 kgs of PDS rice was found in excess. Evidently, based on this action, the shop owners supplies were stopped. Under clause 24 of the Andhra Pradesh State Public Distribution System (Control) Order, 2008, variation upto 1.5% of total stock is permissible. As per the clause, there could be variation upto 78 kgs of PDS rice. Even if the allegations contained in the panchanama are taken on their face value, the variation in excess of the permissible limits is only 15 kgs. For this reason, the official machinery thought it worth to seize the entire rice and sugar. On a careful consideration of the facts of the case, the high court held that the very act of seizure of the essential commodities only on the allegation that there was excess stock of 93 kgs of PDS rice out of 51.98 quintals of PDS rice, in the absence of any other allegation of omissions and commissions by the petitioner, constitutes patent arbitrariness and abuse of power on the part of the respondents. Therefore, the panchanama was quashed and supplies to the shop were ordered to be resumed.

Fairness in exams to qualify as dealer of fair price shops under the PDS system

To bring in transparency and fairness, exam pattern was introduced to qualify as dealer in Fair Price Shops (FPS) under the PDS system. In *M. Rajitha* v. *The Revenue Divisional Officer*,[4] the petitioners were initially appointed as fair price shop dealers on permanent basis. Since the notifications under which they were appointed was set aside on the ground that reservations were not followed, their appointments were cancelled. However, they continued on temporary basis till regular appointments are made. In this case, the main grievance of the petitioners pertains to allocation of 50% of marks for interview for dealership in FPS. The petitioners argue that allocation of 50 marks for interview out of the total prescribed marks of 100 gives raise to abuse and arbitrary exercise of discretion by the appointing authority. The court held that even in cases relating to public employment, where the candidates selected and appointed have to discharge duties involving higher efficiency and far more responsibility than a fair price shop dealer,

3 In the case of *K. Nirmala* v. *Revenue Divisional Officer*, 2013(1)ALT 339 the Andhra Pradesh High Court held that an order of suspension of fair price shop authorization being punitive in nature cannot be resorted to on trivial and flimsy grounds and that unless the appointing authority or the disciplinary authority has the reason to believe that the fair price shop dealer has been indulging in serious irregularities and that his further continuance pending enquiry as a dealer will cause serious prejudice to the public interest, suspension cannot be resorted to. The court held that in this case the revenue divisional officer has also completely failed to consider this aspect and rejected the petitioner's application for stay without even assigning any reasons therefore. For the aforementioned reasons, the order for suspension of license is set aside.

4 2013(6) ALT 336.

the Supreme Court of India has in unequivocal terms held that the percentage of marks prescribed for interview must be as low as possible. The ratio behind these judgments is the higher the marks for interview, more will be the scope for arbitrary exercise of discretion by the appointing authority. Therefore, the artificial distinction sought to be introduced by the respondents between the selections relating to public employment and that for the fair price shop dealerships cannot, therefore, be accepted. The High Court of Andhra Pradesh their held that the same ratio which has been laid down by the courts in the matter of public employment would equally apply for any selection undertaken by the State and the fair price shop dealership can be no exception to this rule.

Prices of essential commodities under the EC or full or heavy can only be regulated by the central government

In *Orissa Campus Chemist Association* v. *State of Orissa*,[5] the Orissa High Court held that section 3 of the Essential Commodities Act, 1945 provides for powers to control production, supply, and distribution etc of essential commodities. Section 3(1) provides that it is the Central Government who for reasons such as equitable distribution and availability of commodities at fair price, regulate or prohibit the production, supply and distribution of essential commodities and trade and commerce therein. Thus an order made there-under may provide for controlling the price at which any essential commodity may be brought or sold. Sub-section (1) provides that for the purpose of the Act, the essential commodities means the commodities specified under the schedule examination of the schedule appended to the Act reveals drugs is the first item which has been mentioned as an essential commodity. Thus, the prices of any drugs can only be controlled by the central government and the state does not have any jurisdiction to fix the prices of the commodities. With regard to granting discounts, the court held that keeping in view the principles that guide the essential commodities, this court is of the opinion that giving orders to allow discount to the customers by certain types of medicines shops is also an effective steps in regulating the prices of the essential commodities *i.e.*, the drugs.

The state government has the right to devise arrangement for efficient distribution of essential commodities

In *Sunder Lal Sahu* v. *State of M.P*,[6] the petitioners and several other persons have been issued hawker cards under the Madhya Pradesh Kerosene Dealers Licensing Orders, 1979. The said order was amended in the year 1995, pursuant to which definition of "hawker card holder" included dealers, who are not wholesaler or semi wholesaler or retail dealer. Thus hawker cards were issued to the persons such as petitioners throughout the State of Madhya Pradesh. The dealers were supplied around 200 litres kerosene, who, in turn, engaged themselves in distribution of kerosene on retail basis in open market. However, the state government by communication dated February 26, 2014, decided to withdraw the

5 119 (2015) CLT 949; 2015 (I) ILR-CUT 147.

6 AIR 2015MP 15.

said arrangement and instead decided to distribute the kerosene only through PDS operating across the state. The petitioner challenged this order and argued that the (a) state government is obliged to allow distribution of kerosene through mode other than public distribution system and for which reason the reliefs as claimed by the petitioners deserve to be accepted (b) the petitioners further argued that the state government had no authority to delete the entry of hawkers card holder as inserted in the order of 1979 as it would be in the teeth of the distribution scheme envisaged by the central government. With regard to first argument, the court held that the definition of parallel marketing system does not recognize distribution of kerosene by the mechanism of hawker card holders, but, is a completely different dispensation. Suffice it to observe that the petitioners have no subsisting right whatsoever so as to direct the state government to continue to supply kerosene to the petitioners as hawker card holders and to authorize them to engage in retail sale of kerosene in open market in the concerned area. In absence of any legal right, the question of entertaining these petitions much less to grant any relief to the petitioners in exercise of writ jurisdiction under article 226 of the Constitution of India does not arise. With regard to the second argument which stated that the state government had no authority to delete the entry of hawkers card holder, the court held that if this argument is taken to its logical end, it would necessarily follow that even the amendment of 1995 whereby the definition of hawkers card holder came to be inserted will have to be treated as without authority of law. Hence, none of the reliefs claimed by the petitioners was taken forwarded.

Meaning of dealer under the EC Act, 1955

In *Gujarat Ship Breakers Association* v. *State of Gujarat*,[7] the appellant, a non trading corporation was engaged in ship breaking business and is in need of bulk quantity of liquefied petroleum gas (LPG) and therefore applied for supply of LPG. The Central Government accepted the application and issued an order for supply of 1000 metric tonnes every quarter with further conditions that the association would endeavour to set up a bottling plant as early as possible conforming to all safety conditions. Accordingly, the appellant established a bottling plant, purchased cylinders, started refilling cylinders and supplied the same on "no profit no loss" basis to its members. On 30th March, 1993, certain officers from the collectorate and civil supplies department carried out an inspection and found that the appellant did not possess necessary license as well as were not maintaining records as required. The matter was reported to the collector who issued a show cause notice. After hearing the parties, the collector held that the appellant falls within the definition of the term 'dealer' and as the appellant had not procured a license, breach of 1981 Control Order had been committed. Being aggrieved by the said order of confiscation, the appellant preferred an appeal to the state government, which came to be dismissed, therefore, the appellant approached the single judge of the Gujarat High Court. The single judge also dismissed the writ petition. It was argued that the appellant cannot be said to be 'engaged in the business' of purchase of any essential article. It was further

7 AIR 2014 Guj 172; 2014 GLH (3) 197.

submitted that the term 'engaged in the business of' necessarily implies an activity undertaken at least with a view to earn profit, although ultimately one may incur profit or loss. He contended that in the present case when the appellant is engaged in a no profit no loss activity it cannot be said to be 'engaged in business'. The court held while interpreting the definition of dealer, it is clear that a person or association engaged in the business of purchase, sale or storage for sale of any essential activity is a dealer. There can be no doubt that the appellant was functioning as a purchaser by purchasing LPG from the central government and thereafter distributes it to the members for consideration which amounts to selling the same though not for profit. On the contrary, if the interpretation as put forward by the appellant is accepted, then every person shall start his business without any profit or loss without any license which is not the object of the EC Act. LPG without any dispute is an essential commodity and therefore when the appellant is dealing in this essential commodity he is required to procure license for purchase, storage and/or selling of LPG cylinders. The fact that the appellant is bottling the product and selling/distributing the same for monetary returns which may not be for profit cannot be lost sight of. Hence the court upheld the decision of confiscation of cylinders.

III PREVENTION OF BLACK MARKETING AND MAINTENANCE OF SUPPLIES OF ESSENTIAL COMMODITIES ACT, 1980

Quality of elder of Illegal detention under the act

Detention under law is required to prevent the persons accused from continuing the act. In case of the instant law, detention is made so that there can be maintenance of supplies of commodities which are essential to the community. However unlawful detention or prolonged detention without citing reasons affects the fundamental rights of a person. In the case of *Alaguraja* v. *The Additional Secretary to the Government*,[8] the petitioner was branded as a black marketer and was detained with regard to cases filed under section 7(1) (a)[9] of the EC Act. The detenue authority detained him on grounds that he has been engaged in smuggling of rice meant for PDS. It was alleged that he hoarded, smuggled and sold in the black market at higher price with a view to gain profit, thus violating the EC Act. Hence it was important to detain as his activities were prejudicial to the maintenance of supplies of commodities essential to the community. His activities could endanger social security and stability and also pose an imminent threat to social order. Since the normal criminal law did not have the desired effect of effectively preventing him from indulging in such activities, there was a compelling necessity to detain him under the said legislations. The petitioner gave representation to the respondent and since no response came, a writ of habeas corpus was filed. The respondent before the court held that to it was important to detain him so as to prevent him

8 MANU/TN/1704/2014.

9 If any person contravenes any order made under s. 3 (power to control production, supply, distribution of essential commodities) he shall be held liable under the Act.

from indulging in such further activities in future, which are prejudicial to the maintenance of supplies of commodities essential to the community. In the averment made in the counter affidavit before the court, the explanation provided by the respondent was that the detenue's representation has been attended to and a proper reply would be sent. To this the court held that such a reply from the respondent lacks total non application of mind, promptitude and expediency required to be considered in matters of considering the representation. Thus the violation of article 22(5)[10] was per se apparent. The court held that the reason for immediate consideration of the representation is too obvious as the personal liberty of a person is at stake and any delay would not only be an indifferent act on the part of the authorities, but would also be unconstitutional, violating the right enshrined under article 22 (5) of the Constitution of India. The unexplained delay in sending the remarks had the effect of vitiating the continued detention. The habeas corpus petition was allowed and continued detention of the detenu was rendered illegal.

In the case of *R. Parameshwari* v. *The Secretary to Government*[11] the fact is same as that of *Alaguraja* case though in this case it was kerosene that was black marketed. The detenue authority detained the petitioner on the ground that detenu is indulging in activities, which are prejudicial to the maintenance of supplies of commodities essential to the community, the detaining authority, has clamped a detention order. In this case the court held that there was an unexplained delay of four days in sending remarks after receiving the representation of the authority. The court allowing the habeas corpus stated that the reason for immediate consideration of the petition is too obvious to be stressed that the personal liberty of a person is at stake and any delay would not only be an indifferent act on the part of the authorities, but would also be unconstitutional, violating the right enshrined under article 22(5)[12] of the Constitution of India. The unexplained delay in sending the remarks would have the effect of vitiating the continued detention.

In the case of *Jeevaamirtharaj* v. *The Secretary to Government,*[13] the petitioner was detained by the authority but since there was unexplained delay in considering the representation and once personal liberty was at stake the High Court of Madras held that continued detention of the detenue would be illegal. In another case *Vinod Kumar Lalan Roy* v. *State of Gujarat,*[14] the petitioner held a license to run a FPS and was successfully running it since 1988. In 2013, the FPS owned by the petitioner was inspected and his license suspended for 90 days. Hence petitioner was unable to procure commodities. In the meantime the petitioner moved to the

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10 Art. 22(5) reads:

When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

11 MANU/TN/1709/2014.

12 *Supra* note 11.

13 MANU/TN/1518/2014.

14 MANU/ GJ/0109/2014.

court against the detention order on grounds of *mala fide* intention. The respondent party stated that on inspection it was found that the petitioner was found to have kept stocks of wheat and kerosene, later sold to non-card holders at much higher price. Since he was found of black marketing it was important to prevent him and hence the detention order was issued. Already a police case of offence under section 3[15] and 7[16] of EC Act was filed. The suspension order was passed in September 2014 for 90 days. The detenue was given bail in October 2013. The respondent in November 2013 said that the bail order should be quashed as he might indulge in black marketing. The court held that since the suspension order was already passed, how the petitioner could indulge in black marketing in absence of license and in absence of any supply of essential commodities. Hence the court allowed the petition and quashed the detention orders.

In *Laxminarayan Magilal Bansal* v. *State of Gujarat*,[17] the Gujarat High Court held that the petitioner was detained after found indulging in activity of black marketing of essential commodities. But the court allowed the petition and set aside the detention order on ground of delay by the concerned authority to react/ reply to the representation of the petitioner.

In *Navinchand Sukhlal Kandol* v. *State of Gujarat*,[18] the petitioners were holding fair price shops and they claimed that by showing account mistakes false allegations were made against them under the EC Act. Their licenses were also suspended for 90 days. Hence the petitioners under article 226 moved the petition challenging the legality and validity of detention order under the PBMMSEC being illegal, invalid, *mala fide* and misuse of power and violative under article 14, 19 and 21 of the Constitution of India. The High Court of Gujarat observed that the order of detention was passed on the basis of the subjective satisfaction of the detaining authority. But such subjective satisfaction has to be arrived at on two points, *firstly*, on the veracity of facts imputed to the person to be detained and *secondly*, on the prognostication of the detaining authority that the person concerned is likely to indulge again in the same kind of notorious activities. The detention laws are concerned with character of the person who has committed or is likely to commit an offence. The detaining authority has, therefore, to be satisfied that the person sought to be detained is of such a type that he will continue to violate the laws of the land if he is not preventively detained. Failure of the detaining authority to consider the possibility of either launching or pendency of criminal proceedings

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15 S. 3(1) reads:

that if the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of essential commodity, for securing their equitable distribution and availability at fair prices, it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein. Section 3(2) provides that such order under section 3 may include regulation of license.

16 S. 7 provides for penalties in contravention of s. 3 of the EC Act.

17 MANU/GJ/0205/2014.

18 MANU/GJ/0090/2014.

may, in the circumstances of a case, lead to the conclusion that the detaining authority has not applied its mind to the vital question whether it was necessary to make an order of preventive detention. There was an allegation that the order of detention was issued in a mechanical manner without keeping in mind whether it was necessary to make such an order when an ordinary criminal proceedings could well serve the purpose. Hence, the detaining authority must satisfy the court that the question too was kept in mind before the order of detention was made. In the case in hand, the court said that the detaining authority failed to satisfy the court that the detaining authority so bore the question in mind and, therefore, the court is justified in drawing the inference that there was non application of mind by detaining authority to the vital question whether it was necessary to preventively detain the detenue. Hence the detention orders in the instant case were quashed.

Variation in translation reason for quashing detention order

In the case of *M.Anitha* v. *The State of Tamil Nadu*,[19] the petitioner was branded as a black marketer and the detenue authority passed an order satisfied upon the materials placed before him that the activities of the detenue are prejudicial to the maintenance of supplies of commodities essential to the community and hence clamped the order of detention. Challenging the order a *habeas corpus* petition was filed. One of the important arguments placed was that there is variation in translation of vital information, which deprives the detenue from making an effective representation. In the English version, it is given that the detention order shall not remain in force for more than 12 days after making thereof, unless in the meantime, it has been approved by the state government and detenue is also informed that he has a right to make representation in writing against the said detention order to the detaining authority and if any such representation is received by the detaining authority before the approval of the government, the said representation will be duly considered by the detaining authority. In the Tamil version, the words "before the approval of the government" were omitted. The said omission in respect of making representation before the approval of the government, that too, in the language known to the detenu, would definitely deprive the detenu from making an effective representation before the approval of the government. Hence the order was quashed by the High Court of Madras stating that the defective translation vitiates the order of detention.

IV FOOD SAFETY AND STANDARDS ACT, 2006 (FSSA)

In *Rice Millers Association* v. *Union of India*,[20] the petitioner challenged the food authority constituted under the Food Safety and Standards (Licensing and Registration of Food Business) Regulations, 2011 conferring powers under section

19 2014 Cri LJ 3049; 2014 (2) MLJ (Cri) 309.

20 2015 (1) Crimes 559 (Bom).

31(2)[21] and section 92[22] of the Food Safety and Standard Act, 2006 (hereinafter FSSA). The authority in this case defined small scale industry as those whose turnover was 12 lakhs. The court held that section 31 makes it clear that food business has to be carried obey with license. Section 31(2) exempts person who carry food business as petty retailers, hawkers, small cottage and food business. However the definition of small business was not given held that the court regular was with a view to give relief to petty vender/ retailer/ temporary stall holders. The annual amount turnover which was held as 12 lakhs was held reasonable and proper and perfectly justification and the regulatory authority did not transcends its power.

Can cases be simultaneously brought under Food Safety and Standards Act as well as Indian Penal Code

In the case of *Abdul Khader* v. *State of Kerala*,[23] the facts were that people had food poisoning and one died after having food at Salwa Cafe in Thiruvanathapuram. A case was filed under section 273, 328 and 34 of the Indian Penal Code (IPC) read with section 59(iii) of the FSSA. The petitioners submitted that chapter XIV of the IPC deals with offences affecting the public health, safety, convenience, decency and morals section 272 deals with adulteration of food or drink intended for sale and section 278 deals with making atmosphere noxious to death. Section 273 deals with sale of noxious food or drink. Section 3(zz) of the FSSA which came into effect from July 29, 2010 defines 'unsafe good' which includes all types of foods mentioned in section 272 and 273 of the IPC and section 59 of the FSSA deals with punishment which takes in case of death due to sale of unsafe good. Further section 97 of the FSSA deals with repeal of existing laws on this subject. So, even if, it was not specifically mentioned that FSSA repeals the provisions of the IPC dealing with same subject-matter, they are repealed impliedly by virtue of section 6 of the General Clauses Act, 1897. On the other hand, additional director general of prosecutions submitted that the cases under the IPC and FSSA are different and distinct offences and as such there is no bar in proceeding against the person in two different enactments, if they fall under the definition of offences mentioned under each Act. Under the FSSA, only those who are violating the provisions of the Act will be held responsible and not other persons involved in the process. Only the licensee will be proceeded against for violation under the Act. But under the IPC, other persons, who are involved in the

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21 S. 31 provides for licensing and registration of food business. It provides that no person shall commence or carry on any food business except under a licence. Subsection 2 provides exception to a petty manufacturer, petty retailer, hawker, itinerant vendor or a temporary stall holder or small scale or cottage or such other industries relating to food business or tiny food business operator; but they shall register themselves.

22 S. 92 gives regulations making power to the food authority for carrying out the provisions of the Act.

23 2015(1) KHC 285; 2015 (1) KLJ 346.

manufacture, sale and otherwise connected with the act of sale and all who were responsible for the commission of the offence can be proceeded against. It is seen from the allegations in the complaint filed by the food safety officer under the FSSA that only the first petitioner had committed the offence under that Act, as he being the licensee and owner of the restaurant, others who are involved in the commission of the act has not been implicated. But in the case registered by the police apart from the first petitioner, others who are responsible for running the restaurant and preparation of the food and sale of the same were also implicated. The High Court of Kerala held that if the intention of the legislature was to repeal or remove the provisions under the IPC also in respect of the offence relating to food, then they ought to have deleted those provisions also as has been done in respect of giving bribe from the IPC when Prevention of Corruption Act, 1998 was enacted dealing with those acts. That was not done in this case. Further the legislature was very clear when a schedule was added, they only repealed certain enactments which were dealing with sale and manufacture of food earlier and not all the provisions which were dealing with the same subject-matter in the other enactments like IPC also.

In the case of *Haripriya Traders* v. *Union of India*,[24] the importers of betel nut were detained in Cochin Airport by the *Food Safety and Standards* Authority of India (FSSAI) as not meeting prescribed standards under the Act. The petitioner argued that since betel nut is not fit for immediate human consumption without involvement of any intermediary process, it cannot be termed as food under section 3(j) of FSSA. The High Court of Kerala held that any substance which is intended for human consumption can be termed as food. The court further held that betel nut forms a class in itself and the standards for nuts and raisins cannot be applicable in the case of betel nut and hence detained. However, the court held that there is a constitutional duty on the part of the FSSAI when it is certain after undergoing certain processes that these goods cannot be made fit for human consumption. The goods can be detained or can be directed to be re-exported to the country of origin.

In *Union Distributors Incorporation* v. *Union of India*,[25] the importers of guylian chocolates of Belgium were not given NOC with regard to 16 out of 20 types of chocolate. Eight types of chocolates were found non compliant with the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011. The standard of 'chocolate' specified under clause food and additives regulations does not permit any vegetable except cocoa butter in 'chocolate'. It was submitted that from the year 2003, the addition of vegetable fats was allowed upto 5% of the finished product, after deduction of total weight of any other added edible foodstuffs, without reducing the minimum contents of cocoa materials. It was further submitted that whilst vegetable fats were not allowed in the shell of the chocolate, there was no prohibition from using vegetable fats in fillings encased by chocolate. Indisputably, a chocolate which contain vegetable

24 2014 (4) KHC 576: 2014 (4) KLJ 593.

25 AIR 2015 Del 13.

fat beyond the prescribed limit would be non-compliant with the standards as prescribed under the food and additives regulations. In the present case the court held that the chocolate shell itself does not contain any vegetable fat. The vegetable fat was found in the filling and on this basis the FSSAI has found the goods in question to be non-compliant with the said regulation. The court held that the decision of FSSAI cannot be sustained under food and additives regulations as it clearly indicates that in case of filled chocolates "the coating shall be of chocolates that meets the requirement of one or more of the chocolate types" mentioned. The other eight types of chocolates were found non compliant to Food Safety and Standards (Packaging and Labelling) Regulations, 2011. It was submitted by the petitioner contended that the Labelling Regulations are not applicable on the goods of the petitioner as labelling regulations provides that the labelling requirements are not applicable on wholesale packages. A plain reading of the mentioned regulations indicate that it is mandatory for a label to indicate the date of manufacture or packing of the commodity and even where the 'best before or use by date' is mentioned on the label, the date of manufacturing or the month and year of manufacturing is necessary depending upon whether the best before date is more than three months or less than three months. In the present case, admittedly the labels on goods in question indicates the best before date, however, the date of manufacturing is not mentioned on the label. It is also relevant to note that the petitioner is a distributor and the goods in question have been imported in wholesale packages and, therefore, the labelling on the wholesale package is also to conform with the labelling regulations. Since the idea is to ensure that the consumer is duly informed of the product being purchased/consumed by him, a non-detachable sticker providing all information would sufficiently meet this object. With respect to the eight types of chocolates where the labelling was found to be defective, the court directed that the petitioner shall cure the same within the customs warehouse by affixing a non-detachable label giving all particulars as are necessary under the labelling regulations.

Brokers of Mandi Samiti has to register and carry license for dealing with food business under FSSA

In the case of *Trimurti Traders* v. *State of UP*,[26] the petitioners were registered brokers at krishi utpadan mandi samiti, Maudaha, Hamirpur. According to them, in the ordinary course of business, they arrange contracts for the purchase or sale of agricultural produce on behalf of their principals against the payment of commission or remuneration. In December, 2013, the additional district magistrate (Finance and Revenue), Hamirpur, passed an order requiring persons in the food business to be registered under the provisions of the FSSA. The petitioners submitted their objections on 13th January, 2014. The court while examining the matter held that section 31(1)[27] of the FSSA provides that no person shall commence or carry on any food business except under a licence. The expression 'food business' is defined to mean any undertaking, whether public or private and whether for

26 2014 (3) ALJ 187.

27 *Supra* note 21.

profit or not, carrying out any of the activities related to any stage of manufacture, processing, packaging, storage, transportation, distribution of food, import and includes, inter aha, the sale of food or food ingredients. The expression related to is an expression of the widest import. So long as the activities relate to manufacture, processing, package, storage, transportation and distribution of food or the sale of food or food ingredients, it would classify as a food business. The petitioners have stated that they are commission agents who negotiate on behalf of their principals, within the area of the mandi samiti, against the payment of commission for the purchase or sale of agricultural produce. The activities of the petitioners hence fall within the description of those activities which are related to the sale of food ingredients. Moreover, so long as the activities are related to any stage of manufacture, processing, packaging, storage, transportation and distribution of food, the definition of the expression 'food business' would be attracted. The FSSA was enacted to consolidate the law relating to food and, inter alia, to regulate the manufacture, storage, distribution, sale and import and to ensure availability of safe and wholesome food for human consumption and for matters incidental thereto. Having regard to the underlying object, and principles, Parliament has broadly defined the expressions, 'food', 'food business' and 'ingredients'. In this view of the matter, the Allahabad High Court held that the order of the District Magistrate requiring registration did not suffer from any error.

In the case of *Sri Balaji Aqua Products* v. *Union of India*[28], the petitioner was running the business under the name and style of Sri Balaji Aqua Products. The petitioner manufactured and supplied purified block ice, tube ice and ice cubes at Bidar. The respondent having noticed that the petitioner has violated the FSSA and having found that there is deviation in respect of the Bureau of Indian Standards/ Indian Standard Institute certification of FSSA licence issued an improvement notice. This was challenged by the petitioner in this case. The petitioner submits that petitioner manufactures ice blocks and not packaged drinking water and therefore FSSA may not be applicable to the facts of this case. The court held that it is clear that 'package' is pre packed box, bottle, casket, tin, barrel, case, pouch, receptacle, sack, bag or such other things in which an article of food is packed. Undisputedly, ice is made up of water and unless water is clean, ice cannot be clean. The FSSA is enacted for laying down science based standards for articles of food and to regulate their manufacture, storage, distribution, sale and impart and to ensure availability of safe and wholesome food for human consumption and for matters connected therewith or incidental thereto. Ice tubes or ice blocks are manufactured to human consumption only. In other words, they are food only. Under such circumstances, the provisions of the FSSA are applicable.

V PREVENTION OF CORRUPTION ACT, 1988 (PCA)

In *State of MP* v. *Ram Manohar Pandey,*[29] the respondent was placed on deputation with municipal corporation, Ujjain there certain charges of corruption were framed against him. The prosecution sought sanction from the state

28 2014 FAJ 520 (Kar).

29 2014 (13) SCALE 744.:

government to prosecute the respondent but the state government refused to grant sanction. As the matter was pending, the special judge, PCA, Ujjain in 2009 discharged the respondent on the above mentioned ground. Later after the superannuation of the respondent, a fresh challan was filed and the respondent's application for discharge was dismissed by trial court and subsequently by the High Court of Madhya Pradesh. Application under section 19 of PCA which provides previous sanction necessary for prosecution were rejected too. Aggrieved, the respondent filed revision petition wherein the respondent was discharged. Being aggrieved, the appellant filed the Supreme Court SLP. The appellant held that high court committed gross error of law by discharging the respected. But the Supreme Court went with the respondent's claims that sanction once refused by the state cannot be prosecuted after retirement as laid down in *Chittaranjan Das* case[30] in which the court held that "We are of the opinion that in a case in which sanction sought for is refused by the competent authority, while the public servant is in service, he cannot be prosecuted later after retirement, notwithstanding the fact that no sanction for prosecution under the PCA is necessary after the retirement of the public servant. Any other view will render the protection illusory. Situation may be different when sanction is refused by the competent authority after the retirement of the public servant as in that case sanction is not at all necessary and any exercise in this regard would be action in futility."

In *State of Bihar* vs. *Dhirendra Prasad Srivastava,*[31] the respondents who were executive engineer, assistant engineers and junior engineers in the Road Construction Department, Government of Bihar were accused of conspiracy with the contractor to embezzle government funds a]nd permitted withdrawal of payments by the contractor in spite of the works not being executed at all and wherever executed, the same was unsatisfactory and not in accordance with the specifications spelt out. Hence cases were registered under various sections of IPC[32] and under section 13(2)[33] read with section 13(1) (d)[34] of the PCA. The further allegation against the accused respondents was lack of supervision and failure to deduct the penal rates of recovery for excess allotment of bitumen and also failure to deduct sales tax and royalty. An appeal in the Supreme Court was filed against order quashing proceedings registered against respondents under the

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30 *Chittaranjan Das* v. *State of Orissa* (2011) 7 SCC 167.

31 2015 (1) RCR (Cri) 445.

32 S. 406, 409, 420, and 120 B of IPC.

33 Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than one year but which may extend to seven years and shall also be liable to fine.

34 A public servant is said to commit the offence of criminal misconduct if he, - (i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or (ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or (iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest.

aforementioned provisions of IPC. The high court had earlier quashed the proceeding on ground that so far standard of quality of work was concerned, there was no allegation. The Supreme Court mentioned that payments without making deductions were step in process of embezzlement of government funds in connivance with contractor. The court held that the matter was quashed without any observation by the high court on vital matters and hence it was wrong.

In the case of *Vinayak Narayan Deosthali* v. *CBI*,[35] it was alleged that the appellant, Assistant Manager UCO Bank, jointly with a broker (deceased) diverted funds of Engineering Export Promotion Council (EEPC)[36] amounting to Rs. 7.75 crores to the private account of the broker. In this case, though the said funds were transferred back to EEPC, the conduct of the appellant amounted to offences under IPC and section 13 (1) (c)[37] and (d)[38] of PCA, 1988. It was accused that the appellant unauthorisedly credited the amount to the broker's account by abusing his position in conspiracy with the broker. The accused also issued bank receipts for security transactions without physical existence of securities which amounted to forgery. It is thus, safe to infer the abuse of position by the accused-appellant in conspiracy with and to the benefit of the broker. The Supreme Court held that diversion of public funds by the accused amounted to criminal breach of trust by committing forgery/use of forged documents as well as offence under the provisions of the PCA. It was not necessary to prove that the accused had derived any benefit or caused any loss to the bank. The fact remains that action of the appellant involved unauthorized conversion of public funds to private funds of an individual. Issuing of bank receipts for securities without existence of securities could not be justified except for illegal benefit to a private individual. Patent illegality cannot be defended in the name of practice or direction of higher authorities. *Mens rea* is established from the fact that false bank receipts were issued for non-existent securities. Thus, the court held that the offences of conspiracy, forgery, misappropriation and corruption stand established.

In *Narinder Singh* v. *State of Himachal Pradesh*,[39] the accused/appellant was held guilty by the High Court of Himachal Pradesh under section 12 [40] of the PCA, 1988. In this case, the accused tried to give illegal gratification to the assistant

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35 2015 (1) ACR 397 (SC).

36 The EEPC was set up to promote export of engineering goods and services under the Ministry of Commerce.

37 A public servant is said to commit the offence of criminal misconduct if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do.

38 *Supra* note 34.

39 AIR 2014 SC 767.

40 S. 12 provides that whoever abets any offence punishable under s. 7 (Public servant taking gratification other than legal remuneration in respect of an official act) or s. 11 (Public servant obtaining valuable thing, without consideration from person concerned in proceeding or business transacted by such public servant) whether or not that

district magistrate for supply orders of double decker bus. They argued that investigation was done by police officer who was not authorised in terms of section 17[41] and hence the entire investigation was vitiated in law. They claimed that the high court drew erroneous presumption under section 20[42] and that presumption under section 20(2) [43] can be contemplated only when the public servant accepted the illegal gratification. The Supreme Court held that high court discussed the evidence of prosecution and also witness. After that the high court recorded a conclusive finding. The person who investigated the matter was a gazetted officer who was given the task of ASI/IO. Hence it was not illegal and the high court was correct in holding the petitioner guilty.

In the case of *Somabhai Gopalbhai Patel* v. *State of Gujarat*,[44] the accused was convicted by the special judge, Basakantha for offence under section 7[45] read with section 13(d)(i)(ii)(iii)[46] and section 13 (2)[47] of the PCA. The accused/appellant was *talati* cum *mantri* and with regard to some issuance of paper with regard to installing and purchasing bore well, he demanded some bribe. The matter was reported by the complainant to the anti corruption bureau. They laid a bait and the accused was nabbed. The court held the accused/appellant guilty as there was no doubt as to the shadow witness and the prosecution has been able to establish the demand and acceptance of the amount as illegal gratification.

Corruption by court clerk

In *Baljinder Singh* v. *State of Punjab*,[48] the appellant/accused was working as a reader in the office of the Sub-Divisional Magistrate (SDM). The complainant mentioned that when he approached the appellant for sending the file to the copying clerk to enable the latter to issue a copy of the order passed by SDM, the appellant demanded Rs. 1000, later agreed to 500 for doing the needful. The complainant approached the vigilance bureau which laid a trap and trapped the appellant. The trial court found him guilty and punished him with 3 years imprisonment and a

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offence is committed in consequence of that abetment, shall be punishable with imprisonment and fine.

41 S. 17 lists out persons authorised to investigate under the provisions of PCA.

42 S. 20 provides for presumption where public servant accepts gratification other than legal remuneration

43 Where in any trial of an offence punishable under s. 12 or under clause (b) of s. 14, it is proved that any gratification (other than legal remuneration) or any valuable thing has been given or offered to be given or attempted to be given by an accused person, it shall be presumed, unless the contrary is proved, that he gave or offered to give or attempted to give that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in s. 7, or, as the case may be, without consideration or for a consideration which he knows to be inadequate.

44 2015(4) SCJ 561; 2014 (11) SCALE 471.

45 *Infra* note 49.

46 *Supra* note 34.

47 *Supra* note 33.

48 I (2015) CCR 320(SC).

fine of Rs. 3000. The appellant approached High Court of Punjab & Haryana where his petition was dismissed and finally the Supreme Court. The Supreme Court found him guilty as well under section 7[49] of PCA, but owing to the amount, the age and as a result of conviction is already dismissed or bound to be dismissed, reduced sentence to six months which is the statutory minimum.

Mere possession of currency notes will not make a person guilty under the Act

In *M.R. Purushottam* v. *State of Karnataka*,[50] the appellant/accused was working as a surveyor in the office of assistant director of land records, Nagamangla and he demanded illegal gratification of Rs. 500 from complainant for issuance of survey sketch pertaining of Hullonahali village and it was further alleged that the accused inspite of surveying the land was postponing the issuance of survey sketch to force the complainant to bribe. The complainant lodged a complaint with Lokayukta police for offences under section 7[51], 13(1) (d)[52] and 13(2)[53] of PCA. A trap was organized and the complainant produced Rs 500 of 100 each and the currency notes were recorded in front of *panch* witness and were smeared with phenolphthalein powder. After payment, police went to appellant's house and in solution of clean water and sodium carbonate his fingers turned pink and the currencies with the numbers were also lying. In the trial court, the prosecution failed to prove charges and hence was acquitted. On appeal in the high court, it was held that the prosecution failed to prove charge under section 7 but was guilty under section 13(1) (d) read with section 13(2). In the Supreme Court, the complainant did not support the prosecution case and was declared hostile. The Supreme Court held in such type of cases the prosecution has to prove that there is a demand and that there is acceptance of illegal gratification. The complainant did not support, no other evidence was adduced by prosecution. The prosecution did not examine any other witness when money was handed. In such circumstances, mere possession and recovery of tainted currency notes without proof of demand cannot be held guilty under section 7. In the absence of proof of demand, case under section 13(1) (d) (i) (ii), that is, the use of corrupt or illegal means or abuse of position as a public servant to obtain valuable things cannot be established.

Constitutionality of section 19 of the Act

In public interest litigation *Manzoor Ali Khan* v. *Union of India*[54], section 19[55] of the PCA was challenged as unconstitutional. In the petition, the petitioner claimed that several government officials have been charged for corruption but in the absence of requisite sanction, they could not be prosecuted. It is also claimed

49 S. 7 provides for public servant taking gratification other than legal remuneration in respect of an official act.

50 (2015) 3 SCC 247; 2014 (11) SCALE 467.

51 *Supra* note 49.

52 *Supra* note 34

53 *Supra* note 33.

54 AIR 2014 SC 3194.

55 S.19 provides that no court shall take cognizance of an offence punishable under s. 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction.

that central government and state governments used this discretionary provision included in section 19 of PCA to protect dishonest and corrupt police officers. Section 19 deals with previous sanction necessary for prosecution of government officials. Requirement of sanction had salutary object of protecting innocent public servant against unwarranted and mala fide prosecution. It was considered by the Supreme Court that undoubtedly, there can be no tolerance to corruption which undermines core constitutional values of justice, equality, liberty and fraternity but at the same time need to prosecute and punish corrupt was no ground to deny protection to honest officers. Mere possibility of abuse could not be ground to declare provision, otherwise valid, to be unconstitutional. Exercise of power had to be regulated to effectuate purpose of law. Thus while it is not possible to hold that the requirement of sanction is unconstitutional, the competent authority has to take a decision on the issue of sanction expeditiously as already observed. A fine balance has to be maintained between need to protect a public servant against *mala fide* prosecution on the one hand and the object of upholding the probity in public life in prosecuting the public servant against whom *prima facie* material in support of allegation of corruption exists, on the other hand.

Withdrawal of case under PCA only when it serves public interest

In *Bairam Muralidhar* v. *State of AP*,[56] the expose of facts were that the appellant was arrayed as an accused for offences punishable under section 7[57] and section 13(1) (d)[58] and section 13(2)[59] of PCA. When the case came for hearing on charge the public prosecutor filed a petition to withdraw the case on ground that the Government of Andhra Pradesh had issued a notice to withdraw the prosecution against the accused officer wherein it was mentioned that on the due examination, the government had found, regard being had to the good work of the accused in the anti-extremist field and other meritorious service his case be placed before the administrative tribunal for disciplinary proceedings after withdrawal of the prosecution pending in the court of special judge. The trial judge referred to various authorities, adverted to the role and duty of the public prosecutor and the role of the court and further taking note of the nature of the case and grant of sanction by the state government to prosecute the case opined that the public prosecutor really had not applied his independent mind except filing the petition with copy of order issued by state government; that there were no sufficient ground or circumstances for the court to accept the withdrawal of the prosecution case against the officer; and that there was no justification to allow such an application regard being had to the offences against the accused persons, and accordingly, dismissed the petition. The matter on appeal reached the High Court of Judicature of Andhra Pradesh at Hyderabad which concurred with the decision of the trial court. After failing in the high court, the appellant knocked the Supreme Court. The Supreme Court

56 (2014) 10 SCC 380.

57 *Supra* note 49.

58 *Supra* note 34.

59 *Supra* note 33.

held that the evidences adduced showed that the public prosecutor did not show that he really perused materials and applied independent mind. The public prosecutor was totally guided by order of government and had really not applied mind to facts of the case. Further anti corruption bureau found no justification as well. Hence the application of withdrawal was denied by the Supreme Court.

Can employer be compelled to take an employee until conviction annulled

In the case of *Government of A.P* v. *B. Jagjeevan Ram*,[60] the respondent was charge sheeted for offences punishable under section 7[61] and section 13(1)(d)[62] read with section 13(2)[63] of PCA and eventually after trial was convicted and sentenced to rigorous imprisonment of one year. After the conviction, the department of finance issued order dismissing the respondent from service. The correctness of the dismissal was called in question before the Andhra Pradesh State Administrative Tribunal on ground that once there was an order under section 389 (1) of CPC [64] by the high court, the concerned department could not have taken recourse of section 25(1).[65] The tribunal dismissed the petition. The high court on appeal came to hold that when criminal appeal was pending for adjudication and there was suspension of sentence the concerned department could not pass an order of dismissal. The Supreme Court did not agree with the high court and held that regard being had to the aforesaid enunciation of law and keeping in view the expected standard of administration, conviction on the charge of corruption has to be viewed seriously and unless the conviction is annulled, an employer cannot be compelled to take an employee back in service.

Constitutional validity of section 6A of Delhi Police Establishment Act, 1946

In *Dr. Subramanian Swamy* v. *Director, CBI*,[66] the writ petition filed under article 32 challenged the constitutionally validity of section 6A[67] of Delhi Police Establishment Act, 1946. Section 6A was added later to the Act and provided that no investigation or enquiry could be conducted under the Act without the prior

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60 (2015) 1SCC (LS) 346: 2014 (3) SCT 323 (SC).

61 *Supra* note 49.

62 *Supra* note 34.

63 *Supra* note 33.

64 Suspension of sentence pending the appeal; release of appellant on bail. Pending any appeal by a convicted person, the appellate court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.

65 S. 25(1) provides that nothing in this Act shall affect the jurisdiction exercisable by, or the procedure applicable to, any court or other authority under the Army Act. 1950, the Air Force Act, 1950, the Navy Act, 1957, the Border Security Force Act, 1968, the Coast Guard Act, 1978 and the National Security Guard Act, 1986. (2) For the removal of doubts, it is hereby declared that for the purposes of any such law as is referred to in sub-section (1), the court of a special judge shall be deemed to be a court of ordinary criminal justice.

66 AIR 2014 SC 2140.

67 (2014) 8SCC 682.

approval of the central government with regard to offence alleged to have been committed under the PCA. The employees who are exempted should be employee of the central government of the rank of joint secretary and above. Section 6A was challenged as it created a separate class of offenders and protected them from investigation for corruption cases. The government responded by stating that higher bureaucrats in government and government owned corporations are responsible for important decisions fearlessly without worrying about harassment through false criminal cases. The Delhi High Court held that the said provision on the face of it is not valid. It grants absolute protection to corrupt officers from prosecution. On appeal, the Supreme Court held that these officers don't need a shield like this merely because they are likely to be harassed. It pointed to the discrimination that was caused between central government officers working at the level of joint secretary and above and the same level officers working in the States. The Supreme Court declared said that corrupt persons ought to be treated equally under the PCA and warned of serious consequences if any inquiry is hampered now. Hence section 6A was violative of article 14 of the constitution of India.

VI NARCOTICS AND PSYCHOTROPIC SUBSTANCES ACT, 1985

Acquittal as the accused were not owner of the vehicle where the contraband substance found

In the case of *Union of India* v. *Jagvir Singh*,[68] the respondent along with three others were charged under section 8[69] and section 18[70] of the NDPS Act. Around 8.600 kg of opium was recovered and seized from a secret chamber of a mahindra jeep in which they were travelling. The complaint was filed in the court of special judge, Chittorgarh, Rajasthan and after the trial the judge convicted the respondent herein and sentenced him to undergo rigorous imprisonment of 10 years must with fine of Rs.1 lakh. The other three accused were acquitted on the ground that they were not the owners of the jeep and therefore did not know that the opium was contained in the secret chamber in the jeep. Therefore, they were not in conscious possession of the said contraband in question. The respondent challenged his sentence and conviction by approaching the High Court of Rajasthan. In the high court, he mentioned that he has stated on oath that he was not the owner of the jeep and made a complaint from jail to the authorities that he was falsely implicated in the case. The high court observed that in the cross-examination,

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68 MANU/SCOR/22574/2014.

69 S. 8 of NDPS provides for prohibition of cultivation of cocoa plant, opium or any cannabis plant. It further prohibits produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship any narcotic drug or psychotropic substance, except for medical or scientific purposes.

70 S. 18 penalises anyone who in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, cultivates the opium poppy or produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses opium.

he was neither confronted with the alleged complaint made by him from jail nor he was cross examined in regard to his complaint. The high court thus acquitted the respondent. Against the judgment, an appeal was made to the Supreme Court. The Supreme Court mentioned that the trial judge in the impugned judgment made strange observations that the statement of respondent stood falsified from the complaint made by him from jail in which he admitted that he got arrested with the jeep. In the meanwhile the other three were acquitted and were not assailed by the Union of India. There was nothing on record that could establish that the jeep in question was owned by the appellant and he was in conscious possession of the opium. The Supreme Court held that the high court was right in acquitting in the respondent on the ground that the observations of the trial judge were against the record of the case and based on improper appreciation of the statement of appellant as well upon finding that the case of the respondent was at par with and identical circumstanced as the case of the other three accused persons who were acquitted of the charge. The prosecution also failed to establish the charges under section 8 and 18 of NDPS Act against the appellant beyond reasonable doubt.

Section 50 of the NDPS Act relevant only where search of a person is involved and not when goods carried by a person is involved

In *Krishan Kumar* v. *State of Haryana*[71] the appellant was spotted by a police party headed by sub-inspector, carrying a plastic bag in his hand. The appellant tried to conceal himself and the police on suspicion and notice decided to search him. They sought his consent under section 50[72] of the Act as to whether he wanted his plastic bag be searched in the presence of a gazetted officer or a magistrate, to which, the appellant mentioned that he desired that the search is in the presence of a magistrate. Thereupon a *tehsildar* was summoned to the place of recovery and in his presence the search of the bag of the appellant was conducted. Opium weighing 5 kgs was found in the bag which was in possession of the appellant. After the trial, the appellant was convicted of the charge under section 18.[73] The appellant appealed against his conviction to the High Court of Punjab & Haryana. The conviction was set aside on technical ground and the matter was remitted back to the trial court. The ground was that it was not clear as to whether the *tehsildar* in whose presence the search of the bag of the appellant was conducted, was discharging the duties of a magistrate as well or not. The contention of the appellant before the high court was that the *tehsildar* was not discharging the duties of a magistrate and, therefore, there was violation of section 50 of the Act. The opportunity was given to the prosecution as well as the appellant to produce additional evidence. The trial court after recording the additional evidence as aforesaid, considered the matter again and this time it passed judgment acquitting the appellant. The reason for acquittal was that the prosecution could not prove that the *tehsildar* was discharging the duties as a magistrate on the date of recovery of opium. An appeal against the judgment was filed in the high court which rejected

71 (2014) 6 SCC 664.

72 S. 50 provides for conditions under which search of persons shall be conducted.

73 *Supra* note 70.

the contention of the appellant and reversed the finding of the trial court. The matter on appeal reached the Supreme Court where the counsel appearing for the appellant argued that the prosecution could not prove that *tehsildar* was discharging the duties of executive magistrate as well. In the instant case, when the appellant had specifically chosen to get himself searched in the presence of the magistrate and the search was not conducted in the presence of the magistrate, mandatory requirement of section 50 of the Act had been violated and it should have resulted in the acquittal of the appellant. The counsel for the appellant contended that the provision of section 50 of the Act would also apply, while searching the bag, briefcase, *etc.*, carried by the person and its non-compliance would be fatal to the proceedings initiated under the Act. The Supreme Court rejecting the claim of the appellant held that section 50 of the NDPS Act is relevant only where search of a person is involved and the said section is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, briefcase, container, *etc*. does not come within the ambit of section 50 of the NDPS Act. The court went further to mention that even if it was proceeded on the basis that section 50 applies, the requirement of section 50 is fulfilled by the search in presence of a gazetted officer or nearest magistrate. It was not disputed by the counsel for the appellant, at the time of arguments, that *tehsildar* was a gazetted officer. Therefore, even otherwise the requirement of section 50 was fulfilled.

Joint communication of rights available under section 50(1) of NDPS Act frustrates the purpose of section 50

In the case of *State of Rajasthan* v. *Parmanand*,[74] it was held by the Supreme Court that a joint communication of the right available under section 50(1)[75] of the NDPS Act to the accused would frustrate the very purport of section 50. Communication of the said right to the person who is about to be searched is not an empty formality since most of the offences under the NDPS Act carry stringent punishment and, hence the prescribed procedure has to be meticulously followed. The provisions under section 50 are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. Hence the accused must be individually informed that under section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest magistrate. The fact that the respondent did not give his independent consent and only presumption is made that he had authorized the other respondent to sign on his behalf and convey his consent cannot be proper communication. Hence the conviction of the respondent was vitiated.

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74 AIR 2014 SC 384.

75 *Supra* note 72.

Tranships under section 23 means only tranship for the purpose of either import into India or export out of India

In the case of *Union of India* v. *Sheo Shambhu Giri*,[76] the respondent was tried along with two others for offences under section 23[77] and section 29[78] of the NDPS Act. The trial court found him guilty under section 23 though not under section 29 and gave him rigorous imprisonment for 10 years and also to pay a fine of Rs. 1 lakh. The respondent appealed to the High Court of Patna where he claimed that he was charged under section 23 and section 29 but he was acquitted under section 29 as he was not part of the conspiracy but only a carrier at the instance of other person. Moreover there was no proof that the Ganja was imported from foreign land. As per the wordings of the section there must be import of the contraband to attract punishment under section 23 but the prosecution could not prove that the Ganja was of foreign origin. Mandatory provision of, sections 42, 52 and 57 relating to search and seizure in public places, disposal of persons arrested and articles seized, report of arrest and seizure respectively was also not strictly complied. The high court thus acquitted him. In appeal to the Supreme Court, the counsel appearing for the appellant submitted that the high court grossly erred in coming to the conclusion that in the absence of proof that the ganja allegedly seized from the custody of the respondent is of foreign origin and hence section 23 of the NDPS Act is not attracted. On the other hand the respondent mentioned that the expression "tranships" occurring under section 23 must necessarily be understood in the context of the scheme of the section and the preceding expressions of "import into India" and "export out of India" to mean only transhipment for the purpose of either import into India or export out of India. The counsel further submitted that the high court rightly concluded in the absence of any proof that the respondent was carrying contraband either in the course of import into India or export out of India, section 23 is not attracted. The Supreme Court agreed with the respondent and held him not guilty under section 23. The Supreme Court went further and held that the language of the section 9[79] of NDPS that the Central

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76 2014 (6) SCJ 386; 2014 (4) SCALE 58.

77 It provides for punishment for illegal import in to India, export from India or transhipment of narcotic drugs and psychotropic substances.

78 S. 29 provides for punishment for abetment and criminal conspiracy in connection to narcotics and psychotropic substances.

79 S.9 provides power to Central Government to permit, control and regulate production, possession, sale, purchase, transport, import inter-State, export inter-State, use or consumption of coca leaves; the cultivation, production and manufacture of opium and production of poppy straw; the sale of opium and opium derivatives from the Central Government factories for export from India or sale to State Government or to manufacturing chemists, the manufacture of manufactured drugs (other, than prepared opium) but not including manufacture of medicinal opium or any preparation containing any manufactured drug from materials which the maker is lawfully entitled to possess; the manufacture, possession, transport import inter-State, export inter-state, sale, purchase, consumption or use of psychotropic substances; the import into India and export from India and transhipment of narcotic drugs and psychotropic.

Government is authorized to make rules which may permit and regulate various activities such as cultivation, gathering, production, possession, sale, transport, inter-state import or export of various substances like coca leaves, poppy straw, opium poppy and opium derivatives etc. While the Parliament used the expression transport in the context of inter-state import or export of such material in section 9 (1) (a) (vi), in the context of importing to India and export out of India under section 9(1) (a) (vii) the expression transhipment was used. Hence, the high court did not err and was right to conclude that the conviction of the respondent under section 23 of the NDPS Act cannot be sustained.

VII FOREIGN EXCHANGE REGULATION ACT, 1973

Mere confessional statements without independent corroboration through independent sources will not make the accused guilty under section 9(1)(b).

In *A.Tajudeen* v. *Union of India*,[80] the appellant/accused was charged under section 9(1) (b)[81] of FERA, 1973. The fact as mentioned by the enforcement directorate was that the appellant was alleged to have made a statement to the enforcement directorate on April 1989 wherein he acknowledged, that he had received a sum of Rs. 1,40,000 from a person based in Singapore out of which he made some payments to other persons and the rest he retained for himself. In October, 1989 officers of the directorate raided the residential premises of appellant where his wife was also present and an amount worth Rs. 8,24,000 was found. A *mazahar* in presence of two independent witness was made and the appellant and his wife signed statement about receiving the payment from a person in Singapore. Later when the matter came before the additional director, they mentioned they did not receive any amount from any person and the amount recovered was from the income they had through various business they had. They mentioned that the statements that they made were under threat, coercion and undue influence. The additional director was not persuaded by the appellant and held him guilty under section 9(1) (b) of FERA and directed seizure of the sum along with imposing fine of Rs.1,00,000. Aggrieved the appellant approached the Foreign Exchange Regulation Appellant Board. The board held him not guilty and directed the refund of the sum as well as the fine. Aggrieved, the enforcement directorate approached the High Court of Madras which held the appellant guilty. The high court relied on the fact that the appellant when produced before the additional chief metropolitan magistrate, Madras, did not indicate that they were compelled to make statements and that was the primary reasons for the high court in rejecting retractions made by the appellant. Against this decision the matter was appealed to the Supreme Court. The Supreme Court noted that since the appellant has vehemently refuted

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80 (2015) 4 SCC 435; 2014 (9) SCJ 677.

81 S. 9(1) (b) provides that Save as may be provided in, and in accordance with any general or special exemption from the provisions of this sub-section which may be granted conditionally or unconditionally by the Reserve Bank, no person in, or resident in, India shall receive, otherwise than through an authorised dealer, any payment by order or on behalf of any person resident outside India.

executing any statement, hence it was imperative for the enforcement directorate to establish through cogent evidence that the appellant has indeed made the statement. The court was convinced with the argument that if the appellant had made any such statement in April 1989 itself, he would have been proceeded against under section 9(1)(b) of the 1973 Act. The mere fact that he was not proceeded against, prima facie establishes, in the absence of any evidence to the contrary, that the assertion made by the appellant to the effect that he never made such statement, had remained unrefuted. With regard to the *mazahar* the court held that merely because it was attested by two independent witnesses would not lead credibility to the same. Such credibility would attach to the *mahazar* only if the said two independent witnesses were produced as witnesses, and the appellant was afforded an opportunity to cross-examine them. The aforesaid procedure was unfortunately not adopted in this case. The charge against the appellant under section 9(1) (b) of FERA could not be established and hence the Supreme Court decided to set aside the decision given by the high court.

Sale of foreign currency at a higher rate than market rate was not violation of section 6(4), section 6(5), section 7 and 8 of FERA

In *Tulip Star Hotels* v. *Special Director of Enforcement*,[82] the appellant were found guilty under section 6(4), 6(5), 7 and 8 read with section 50 of the FERA, 1973. Under section 6 (4) it is stipulated that a full fledged money changer (FFMC) should strictly comply with the general or special directions or instructions that may be issued by the Reserve Bank of India (RBI) as it is an authorized dealer in foreign exchange and that except with the previous permission of the RBI, these authorized dealers should not engage in any transaction involved in any foreign exchange, which is not in conformity with the terms of his authorization. Under section 6(5) it is provided that an authorized dealer should before undertaking any transaction in foreign exchange should ensure verification on certain aspects in order to ensure that there is no contravention of the provisions of FERA and if the FFMC has any reason to believe that any such contravention or evasion is contemplated by a person who seeks to indulge in any transaction in foreign exchange, the FFMC should report the matter to the RBI. Section 7 deals with RBI's authorisation of persons to deal with foreign currency (money changers). Section 8 of FERA imposes restrictions on dealings in foreign exchange. The said provision imposes restriction to the effect that no person other than the authorized dealer in India, shall purchase or otherwise acquire or borrow any foreign exchange. Under sub-section 2, it is stipulated that except with the previous general or special permission of RBI, an authorized dealer or a money changer should enter into any transaction providing conversion of Indian currency into foreign currency or vice versa, at rates of exchange other than the rates for the time-being authorized by RBI. Paragraph 3 of the Finance Lendor Market[83] (FLM) in question disclose that

82 AIR 2014 SC 1028: (2014) 5 SCC 162

83 Para 3 of the FLM reads:

> Authorised Officials: All money-changers should arrange to forward lists giving full names and designations of their representatives who are authorized to buy and sell

the said paragraph has been issued by the RBI to state as to who can be called as 'authorized officials' of money changers. The said paragraph also imposes a restriction to the effect that other than an authorized representative, nobody else should be allowed to transact money changing business on behalf of the money changer. In the current case, the transaction took place between two licensed FFMCs wholly authorised under FERA as well as Memorandum of FLM issued by RBI. The controversy in this case was related to business transactions or the fact that they were not authorised officials of respective establishments. The issue was with regard to sale affected by appellants on rate higher than market rate. The Supreme Court held that sale affected by appellant at a higher rate was not basis for alleged violation of para 3 of FLM read with aforementioned provisions of FERA.

VIII INCOME TAX ACT, 1961

Proviso to section 276CC available only to genuine cases

In the case of *Sasi Enterprises* v. *Assistant Commissioner of Income Tax*,[84] the primary accusation against applicant was that there was wilful and deliberate failure to file returns for the relevant assessment year and hence charged under section 276 CC[85] of the IT Act. This appeal was a result of the dismissal by the High Court of Madras of a petition which did not reverse the decision of the commissioner of income tax and held them guilty under section 276 CC. The appellant submitted that the high court did not appreciate the scope of section 276 CC of the Act and pointed out that once it is established that on the date of the complaint, the assessment had not attained finality, the complaint became premature as on the date of the complaint and no offence had taken place and all the ingredients of offence under section 276 CC of the Act were not satisfied. It was also mentioned that unless and until it is shown that failure to file the return was wilful or deliberate, no prosecution under section 276CC could be initiated. In fact it was argued that the second accused in her individual return had disclosed that the firm was doing the business and that it had some income and hence, it cannot be said that she had concealed the fact that the firm had any intention to evade tax liability. It was also submitted that whether the assessee had committed any offence or not will depend upon the final assessment of income and tax liability determined by the appropriate authority and not on the assessment made by the

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foreign currency notes, coins and travelers cheques on their behalf together with their specimen signatures, at the end of each calendar year to the office of Reserve Bank under whose jurisdiction they are functioning. Any changes in their list should also be brought to the notice of Reserve Bank. No person other than the authorized representative should be allowed to transact money-changing business on behalf of the money-changer

84 (2014) 5 SCC 139; 2014 (4) SCJ 107.

85 S.276 CC provides that if a person wilfully fails to furnish in due time the return of income which he is required to furnish under sub-section (1) of section 139 or by notice given under Clause (i) of Sub-section (1) of section 142 or section 148, he shall be held liable under the Act.

assessing officer. On the other hand the respondent argued that section 276CC applies to a situation where assessee has failed to file the return of income as required under section139[86] of the Act or in response to notices issued to the assessee under section 142[87] or section 148[88] of the Act. The scope of proviso to section 276 CC protects the genuine assesses who either file their return belatedly but within the end of the assessment year or those who paid substantial amount of their tax dues by pre-paid taxes. The Supreme Court while deciding the matter agreed with respondent that section 276CC applies to situations where an assessee has failed to file a return of income as required under section 139 of the Act or in response to notices issued to the assessee under section 142 or section 148 of the Act. The proviso to section276 CC provides relief by giving further time till the end of the assessment year to furnish return to avoid prosecution.[89] The proviso under section 276CC takes care of genuine assesses who either file the returns belatedly but within the end of the assessment year or those who have paid substantial amounts of their tax dues by pre-paid taxes, from the rigor of the prosecution under section 276CC of the Act. In other words, the proviso would not apply after detection of the failure to file the return and after a notice under section 142(1)(i) or 148 of the Act is issued calling for filing of the return of income. The language of section 276CC, the court held was clear so also the legislative intention. The declaration or statement made in the individual returns by partners that the accounts of the firm are not finalized, hence no return has been filed by the firm, will not absolve the firm in filing the 'statutory return under section 139(1) of the Act. The appellant's contention that since they had in their

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86 S.139 provides that every person, if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income tax, shall, on or before the due date, furnish a return of his income or the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed.

87 S. 142 is titled as inquiry before assessment. It provides that the assessing officer may serve on any person who has made a return under s. 139 or in whose case the time allowed for furnishing the return has expired a notice requiring him to furnish a return of his income or the income of any other person in respect of which he is assessable under this Act, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed.

88 S. 148 provides that before making the assessment, reassessment or recomputation, the assessing officer shall serve on the assessee a notice requiring him to furnish within a stipulated period, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under s. 139.

89 The proviso provides that an assessee gets further seven months' time to complete and file the return and such a return though belated, may not attract prosecution of the assessee .

individual returns indicated that the firm's accounts had not been finalized, hence no returns were filed, would mean that failure to file return was not wilful cannot be accepted. Court in a prosecution of offence, like section 276CC has to presume the existence of *mens rea* and it is for the accused to prove the contrary and that too beyond reasonable doubt. Resultantly, the appellants have to prove the circumstances which prevented them from filing the returns as per section 139(1) or in response to notices under sections 142 and 148 of the Act.

IX CONSERVATION OF FOREIGN EXCHANGE AND PREVENTION OF SMUGGLING ACTIVITIES ACT, 1974

Undue delay in passing detention order not unjustified if the live link nexus is not snapped

In the case of *Sicil Anthony* v. *State of Kerala*,[90] the appellant's husband was alleged to intend to export red sanders through international container transhipment terminal and hence was arrested by Directorate of Revenue Intelligence. The directorate by letter dated December 17, 2014 made recommendations for detention of detenue as well two others under section 3 of the COFEPOSA alleging they were part of the smuggling gang of red sanders. The prejudicial activity which prompted the sponsoring authority to recommend for detention of the detenue under COFEPOSA had taken place on November 17, 2012. The sponsoring authority took some time to determine whether the same and during the inquiry it transpired that the detenu and two others were part of a well-organised gang operating in smuggling of red sanders in India and abroad. It is only thereafter that on December 17, 2012, the sponsoring authority made recommendation for the detention of the detenu and two others under Section 3 of the COFEPOSA. The proposals of the sponsoring authority were received in the office of the detaining authority on of December 21, 2012. The detaining authority upon scrutiny and evaluation decided on of January 25, 2013 to place the proposals before the screening committee. The meeting of the screening committee took place on of February1, 2013 in which the cases of the detenu and the two others were considered. The screening committee concurred with the recommendation of the sponsoring authority. As stated by the respondents in the counter affidavit, the record of the sponsoring authority, the screening committee and other materials consisted of over 1000 pages. As the final call was to be taken by the detaining authority, it was expected to scrutinise, evaluate and analyse all the materials in detail. After the said process, the detaining authority decided on 15th of April, 2013 to detain the detenu and two others. The draft grounds were prepared and approved on of April 19, 2013. As one of the detenu was a Tamilian, the grounds of detention were translated in Malayalam and Tamil which took some time and ultimately sufficient number of copies and the documents relied on were prepared by of May 3, 2013. Thereafter, the order of detention was passed on May 6, 2013. The court observed that COFEPOSA intends to deal with persons engaged in smuggling activities who pose a serious threat to the economy and thereby security

90 ALT (Cri) 222 (SC); 2014 Cri L J 2414; 2014 (7) SCJ 437.

of the nation. The purpose of preventive detention is to take immediate steps for preventing the detenu from indulging in prejudicial activity. If there is undue and long delay between the prejudicial activity and making of the order of detention and the delay has not been explained, the order of detention becomes vulnerable. Delay in issuing the order of detention, if not satisfactorily explained, itself is a ground to quash the order of detention. The test of proximity is not a rigid or a mechanical test. In case of undue and long delay the court has to investigate whether the link has been broken in the circumstances of each case. In the current case, the court held that it cannot be said that there is undue delay in passing the order of detention and the live nexus between the prejudicial activities has snapped. The purpose of the delay was well explained and had it not been done it could have be alleged to be prejudicial. As observed earlier, the question whether the prejudicial activity of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live link between the prejudicial activity and the purpose of detention is snapped depends on the facts and circumstances of each case. Even in a case of undue or long delay between the prejudicial activity and the passing of detention order, if the same is satisfactorily explained and a tenable and reasonable explanation is offered, the order of detention is not vitiated. In the current case there was well explained reason for delay and hence the detention order was sustained.

The appellant in the case of *Bishwanathan Bhattacharya* v. *Union of India*[91] was initially detained under the provisions of the Maintenance of Internal Security Act, 1971 (since repealed) and later under the provisions of the COFEPOSA on the ground that he in collaboration with his brother, who was living in London at that point of time, was indulging in activities which are prejudicial to the conservation of foreign exchange. While he was in custody, he was issued a notice under section 6(1) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (SAFEMA)[92] calling upon the appellant to explain the sources of his income out of which he had acquired the assets, that is, properties. Later the second respondent passed an order under Section 7(1)[93] of the Act forfeiting the properties mentioned in the schedule to the said order. Against this the appellant filed a writ petition stating that the notice issued under Section 6 of

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91 AIR 2014 SC 1003.

92 S. 6(1) provides that if the authority under the act has reason to believe that all or any of such properties of a person are illegally acquired properties , it may serve a notice upon such person calling upon him within such time to indicate the sources of his income, earnings or assets, out of which or by means of which he has acquired such property and give cause why should not be declared to be illegally acquired properties and forfeited to the Central Government under this Act.

93 S. 7(1) provides that the competent authority may, after considering the explanation, if any, to the show cause notice issued under section 6, and the materials available before it and after giving to the person affected a reasonable opportunity of being heard, by order, record a finding whether all or any of the properties in question are illegally acquired properties.

the Act is defective and illegal as the notice did not contain the reasons which made the competent authority believe that the notice scheduled properties were illegally acquired properties. In other words, the reasons were not communicated to the appellant, and, that the forfeiture, such as the one provided under the Act, is violative of article 20[94] of the Constitution of India. The court held that there is no express statutory requirement to communicate the reasons which led to the issuance of notice under section 6 of the Act. The reasons, though not initially supplied along with the notice were subsequently supplied thereby enabling the appellant to effectively meet the case of the respondents. With regard to the second issue the submission of the appellant is that since the Act provides for a forfeiture of the property of the appellant on the ground that the appellant was detained under the COFEPOSA, the proposed forfeiture is nothing but a penalty within the meaning of the expression under article 20 of the Constitution. The court observed that if the forfeiture contemplated by the Act is not treated as a penalty for the alleged violation of law on the part of the appellant, it would be plain confiscation of the property of the appellant by the state without any factual justification or the constitutional authority. Section 6 of the Act authorises the competent authority to initiate proceedings of forfeiture only if it has reasons to believe (such reasons for belief are required to be recorded in writing) that all or some of the properties of the persons to whom the Act is applicable are illegally acquired properties. The conviction or the preventive detention is on basis of the factual basis for a rebuttable presumption to enable the state to initiate proceedings to examine whether the properties held by such persons are illegally acquired properties. It is known that people carrying on activities such as smuggling to make money are very clandestine in their activity. Direct proof is difficult if not impossible. The nature of the activity and the harm it does to the community provide a sufficiently rational basis for the legislature to make such an assumption. More particularly, section 6 specifically stipulates the parameters which should guide the competent authority in forming an opinion, they are; the value of the property and the known sources of the income, earnings *etc*. of the person who is sought to be proceeded against. Even in the case of such persons, an enquiry is limited to such of the assets which the competent authority believes (to start with) are beyond the financial ability of the holder having regard to his known and legitimate sources of income, earnings *etc.* Making the above observations, the court held that this forfeiture and the matter contained therein will not be hit by the prohibition contained under article 20 of the Constitution of India.

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94 Constitution of India, Art. 20:

provides for protection in respect of conviction for offence. (1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. (2)No person shall be prosecuted and punished for the same offence more than once. (3)No person accused of any offence shall be compelled to be a witness against himself.

X DRUGS AND COSMETICS ACT, 1940

In *State of M.P.* v. *Durga Prasad* [95] the learned trial court acquitted accused/respondents from the charges levelled against them under section 27A (i)[96] of the Drugs and Cosmetics Act, 1940. Being aggrieved by the judgment, the appellant/state filed appeal before Chhattisgarh High Court. The facts of the case as per case the appellant/state was that in August, 1988, concerned inspector seized article in question with due procedure of law. Thereafter it was sent for relevant chemical analysis *vide* report dated July 3, 1989. The state after concerned analysis reported that in the sample of Himraj Sunder Hair Oil, acid value was more than the ISI requirement. The counsel appearing on behalf of the appellant vehemently argued that the trial court erred grossly by considering minor omissions and contradictions. Since the sanction was awarded lately, the period of limitation should be counted from the date of sanction. The prosecution argued that it has been proved against the accused/respondents that in the seized article acid value was more the ISI mark which is an offence under relevant provisions of the act and is punishable under section 27A(i) of the Act itself. Hence, order of acquittal be set aside, the accused/respondents be convicted adequately for the offence proved against them. The high court did not go with the appellant and held that the appellant has failed to prove that it filed the complaint within the limitation as required, there was no application for condonation of delay for filing the complaint under the relevant provisions of the Act, hence the trial court rightly acquitted. As per section 27A (i) of the Act, offence is punishable up to 3 years along with fine part. There is no specific limitation prescribed under this Act for the presentation of the complaint before the competent court of law. With this situation, general law is applicable for the case. For general law, there is section 468(2)(c) of the Code Criminal Procedure (Cr PC) which is bar to take cognizance after lapse of the period of limitation which provides three years if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years. As per this general provision which is applicable in the facts of this case within three years charge sheet or the complaint, as the case may be, has to be filed before the competent court and no court shall take cognizance of an offence after the expiry of the period of limitation. There is one more provision under section 473 of the code wherein any court may take cognizance of the act after the expiry of the period of limitation if it is satisfied on the facts and the circumstances of the case that delay has been properly explained or that is necessary to do in the interest of justice. In the present case, no application under section 473 of the code was ever filed before

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95 2015 (1) CGLJ 546.

96 S. 27 (A) (i) reads:

> that whoever himself or by any other person on his behalf manufactures for sale or for distribution, or sells, or stocks or exhibits or offers for sale any cosmetic deemed to be spurious under s. 17D or adulterated under section 17E shall be punishable with imprisonment for a term which may extend to three years and with fine which shall not be less than fifty thousand rupees or three times to value of the cosmetics confiscated, whichever is more.

the trial court for extension of period of limitation. With this, the trial court held that presentation of the complaint was beyond the limitation. The appellant failed to explain as to why the concerned application was not filed on behalf of the complainant. Failing in filing such application may not make the complaint competent for taking cognizance even after limitation. But not filing any such application for condonation of delay or for extension of time for delay as required under section 473 of the code, the high court held that the trial court has rightly acquitted the accused/respondents merely on the point of limitation.

In *Gyan Prakash* v. *State of Bihar,*[97] the petitioner prayed for issuance of writ of mandamus directing and commanding the respondents to pay the petitioner compensation for harassing the petitioner without any valid basis by filing a case under various provisions of IPC and section 18A of the Drugs and Cosmetics Act, 1940. The petitioner submits that without any raid and without any search and seizure he filed complaint case without adopting mandatory provisions of drugs and cosmetics Act. It is contended that, as a matter of fact that all the respondents colluded and filed the above stated complaint case with *mala fide* intention. The petitioner argued that when statute mandates to follow certain provisions before institution of complaint case, the concerned officer is bound to follow mandatory provisions but admittedly in this case the mandatory provisions of the Act were not followed though the respondents were aware about it. As a result of the complaint the petitioner faced humiliation and harassment for more than six years. It is further contended by him that there is violation of article 21 of the Constitution of India and fundamental right of the petitioner has been violated and therefore, this court should direct the respondents to pay damage for sufferings of the petitioner. On behalf of the state it was submitted that power to file complaint case in contravention of provision of Drugs and Cosmetics Act, 1940 is delegated to the drug inspector by the statute itself and admittedly, at the time of filing of the complaint case, one respondent, that is, respondent no. 5 was notified as drug inspector who filed the complaint case in discharge of his official duty. It is further contended by him that if an act is done by a public servant in discharge of statutory function, order for damage of the aforesaid act cannot be passed. The court while deciding the matter observed that initially when the order was passed he did not raise the issue of mala fide intention and hence at a later stage the argument of mala fide intention cannot be raised. The court dismissed the writ petition holding that section 37 of the Act, clearly says that no suit, prosecution or other legal proceedings shall lie against any person for anything which is in good faith done or intended to be done under this Act.

Accused held guilty under section 28 of the Act

In *Zakir Hussain* v. *The State of Bihar,*[98] a drug inspector of Greater Mumbai (Mumbai) drew a sample of Hypower Musli capsule, said to have been manufactured by M/s. Renovision Export Private Ltd., Federal, A & K Road,

97 2014 (3) PLJR 772.

98 2015 Cri LJ 754.

Phulwarisharif, Patna and sent to the government analyst for testing the genuineness of the drug. The test report, issued by the government analyst, disclosed that the drug was not of standard quality and it was a spurious medicine in terms of section 33-EEA (d)[99] of the Act. The proprietor of the said firm was made an accused with a prayer to put him on trial for the offence under the drugs and cosmetics act, 1940. It has been submitted on behalf of the petitioner that there has been a serious breach/violation of the mandatory provision of section 23 of the Act which provides for the procedure to be followed by inspectors when they draw samples and send the samples for testing. The purpose is to avoid the prosecution from taking any sample from anywhere and saddling the manufacturer with any prosecution for keeping or selling spurious drug. The further contention of the petitioner is that even if the report of the government analyst is taken into consideration, the sample cannot be said to be spurious. The definition of "Spurious Drugs" was provided in section 33-EEA of the Act.[100] The counsel for the petitioner further submits that since the analyst's report merely indicates that the sample gives an identification test for the presence of *Tadalafil* and it does not give *Ip* and *Aas* identification, therefore, it is held to be spurious. As has been defined under section 33-EEA of the Act, such a finding of the analyst would not make the sample a spurious drug. That apart, since the place from where the sample has been drawn has not at all been stated, there is no proof of the fact that the sample was the one, which was manufactured by the petitioner's firm or so sold in the open market through the agency of such firm. The court while deciding the matter held that since the drawing of the sample is itself found to be in violation of the requirements laid down under section 23 of the Act, no prosecution could be launched against the petitioner for anyone of the provisions under the Drugs and Cosmetics Act, 1940. The court held that the possibility of such drug, the sample of which was tested, being tampered by some other agency, cannot be ruled out.

In the case of *Anil Kumar Jain* v. *State of Chattisgarh*[101] the applicant was charged under section 27(b)(ii)[102] and 28[103] of the Act. The trial magistrate convicted

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99 S. 33EEA (d) reads:

that an Ayurvedic, Siddha or Unani drug shall be deemed to be spurious if it has been substituted wholly or in part by any other drug or substance.

100 S. 33 EEA provides that Ayurvedic, Siddha or Unani drug is only deemed to be spurious when it is sold, or offered or exhibited for sale, under a name which belongs to another drug; or if it is an imitation of, or is a substitute for, another drug or resembles another drug in a manner likely to deceive, or bears upon it or upon its label or container the name of another drug, unless it is plainly and conspicuously marked so as to reveal its true character and identity.

101 2014 Cri L J 4692.

102 S. 27(b)(ii) provides for that whoever, himself or by any other person on his behalf, manufactures for sale or for distribution, or sells, or stocks or exhibits or offers for sale or distributes any drug without a valid licence as required under clause (c) of section 18, shall be punishable with imprisonment and fine.

103 Penalty for non disclosure of name of manufacturer.

the present applicant. On appeal by sole, the appellate court, accepted the finding of the trial court and, affirming the conviction and sentence, dismissed the appeal. This revision petition was filed against affirming the conviction and sentence awarded to the applicant. In this case the complainant gave a written complaint to Sub-Divisional Officer, Dhamtari who, in turn, forwarded the same to the Deputy Director, Food and Drugs Administration stating that some ointment named and styled as Dinesh Kendua Malham is being sold in the rural area without manufacturing licence number, batch number, manufacturing date, expiry date *etc*. During inquiry of the said complaint, the drug inspector along with in charge senior drug inspector and sample assistant conducted a search in the shop named and styled as M/s. Jai Hind Stores and seized the aforesaid ointment from the commercial stock of the said shop. The drug inspector sought information from the present applicant regarding purchase bills and details of sale of the seized drugs as also regarding drug licence, but the desired information was not submitted by present applicant who was in charge of the store or by proprietor of the store. A complaint-case was filed by Drug Inspector in the Court of Chief Judicial Magistrate, Dhamtari against present applicant, in charge of M/s. Jai Hind Stores, proprietor of M/s. Jai Hind Stores, and M/s. Jai Hind Stores for commission of offence punishable under section 27(b)(ii) of the Act, 1940 for violation of section 18(c)[104] of the Act, 1940 and for commission of offence punishable under section 28 of the Act, 1940 for violation of section 18(a)(vi)[105] of the Act, 1940. The counsel appearing for the applicant submitted that both the courts below have committed a manifest legal error in holding the applicant guilty for the offence under section 27(b)(ii) of the Act, 1940 as the prosecution has completely and miserably failed to bring home the ingredients of section 18(c) of the Act, 1940 and, therefore, the impugned conviction followed by the sentence deserves to be set aside. On behalf of the state it was submitted that the seizure simpliciter of the scheduled drugs from possession of the applicant would bring home the offence against him under section 27(b)(ii) of the Act, 1940 within the meaning of section 18(c) of the Act, 1940 and, therefore, once a scheduled drug is seized from possession of the applicant in his commercial establishment, the conviction of the applicant for the offence under section 27(b)(ii) of the Act, 1940 for violation of section 18 (c) of the Act, 1940 is duly established. The court held that a bare perusal of clause (c) of section 18 of the Act, 1940 would show that it prohibits

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104 S. 18(c) provides that no person shall himself or by any other person on his behalf manufacture for sale or for distribution, or sell, or stock or exhibit or offer for sale, or distribute any drug or cosmetic, except under, and in accordance with the conditions of, a licence issued for such purpose under the Act. The proviso gives exception to small quantities of any drug for the purpose of examination, test or analysis.

105 S 18(a)(vi) reads:

that no person shall himself or by any other person on his behalf manufacture for sale or for distribution, or sell, or stock or exhibit or offer for sale or distribute any drug or cosmetic in contravention of any of the provisions of this Chapter or any rule made thereunder.

any person from manufacturing for sale or for distribution, or selling, or stocking or exhibiting or offering for sale, or distributing any drug or cosmetic which is not of standard quality or is misbranded or adulterated or spurious and which is not in accordance with the conditions of the licence issued for such purpose. Section 27 of the Act, 1940 enumerates three separate categories of the cases; firstly, manufacture for sale; secondly, actual sale; and thirdly, stocking or exhibiting for sale or distribution of a drug. The scheduled drugs were recovered from the possession of the applicant in the shop, but in the statements before the court they have not stated that the scheduled drugs were either actually being sold or they were stocked/ exhibited for the purpose of sale. It appears that there is no evidence to show that the present applicant had either got the possession of aforesaid scheduled drugs for the purpose of sale or was selling the said drugs or had stocked/ exhibited the said drugs for sale and, therefore, the possession simpliciter of the aforesaid scheduled drugs is not punishable under section27(b) (ii) of the Act, 1940. There are uncontroverted documents on record that after seizure of the aforesaid scheduled drugs, two notices were served to the present applicant by registered post and a notice was served to the proprietor of the store by registered post to disclose the source of the purchase-bills, details of sale and drug licence, but neither the present applicant nor the proprietor submitted reply to the notices served to them nor they submitted the bills/drug licence, which the present applicant was obliged to submit. The aforesaid act of the present applicant clearly falls within the ambit of section 28 of the Act, 1940 and, therefore, he has rightly been convicted and sentenced with fine.

When director/chairman of the company to be held responsible under the Act

In *Rahul Sehgal* v. *State of Kerala*,[106] the petition was filed to quash the complaint in Additional Chief Judicial Magistrate Court, Ernakulam, which was filed under section 32 [107]of the Act, against the petitioner and his company for violation of section18(a)(i) of the Act which is punishable under section 27(d) of the Act. From the plain reading of the section 34[108] it is clear that when an offence has been committed by a company, every person who at the time the offence was committed was in charge of and was responsible to the company for the conduct

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106 2014 Cri L J 2399.

107 S. 32 reads:

> Cognizance of offences: No prosecution under this Chapter shall be instituted except by an Inspector; or any gazetted officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government or a State Government by a general or special order made in this behalf by that Government; or the person aggrieved; or a recognised consumer association whether such person is a member of that association or not. Save as otherwise provided in this Act, no court inferior to that of a Court of Session shall try an offence punishable under this Chapter. Nothing contained in this Chapter shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence against this chapter.

108 Offences by companies.

of the business of the company as well as the company shall be deemed to be guilty of the offence. The petitioner was the chairman of the company and simply because a person becomes chairman or a director of the company does not mean that he is fully responsible for the day-to-day affairs of the company. Vicarious liability can be inferred against a company or its directors only after satisfying the condition under section 34 of the Act. Person made liable should be in charge of the company at the relevant time, which cannot be presumed from the complaint. Otherwise it may result in implication of innocent chairman and directors who have no connection with the offence and thereby cause miscarriage of justice. Therefore, the Kerala High Court held it to be a fit case to invoke the inherent jurisdiction under the code to quash the criminal proceedings against the petitioner.

In a similar case, in *State of Goa* v. *Shivani Laboratories*,[109] the appeal was filed against acquittal of respondents by lower court. The respondent claimed that he was not involved in the day to day activities of the company. On behalf of the same two letters were showed, one where he signed on behalf of the company and one partnership deed that specified people who were working partners and they were supposed to take active part and engage themselves in conducting affairs of business of firm. However the court held that there was nothing on record to show as to in what context and for what reason need arose to write letters by specified people which were under evidential scrutiny. Further, same was the case with further letter allegedly written by respondent since signature on same had not been proved to be of respondent. So was the case with the partnership deed. The two letters were, therefore, not beyond suspicion. Since during trial, it was not convincingly proved that respondent was in charge of and responsible for conduct of business of other accused, the appeal was dismissed.

XI CONCLUSION

There were some important judgments given in 2015 having Secural consence ramifications. Particularly in EC Act, it was observed that courts have come to the rescue of dealers of essential commodities from arbitrariness and harassment by authorities under the Act.[110] In matters pertaining to exams for qualifying as dealers in PDS, the court decided that like other public employment in case of PDS scheme as well less weightage should be given to interviews as more marks in interviews give more scope for arbitrary exercise of discretion by appointing authorities. In the PBMMSEC Act, the court took a balanced approach when it came to protecting the fundamental rights of accused *vis-a-vis* passing detention orders to prevent accused from black marketing essential commodities. But the court went a little far in *R.Parameswari* case[111] where detention was held illegal when there was delay of only four days in sending remarks of detention by the authorities concerned. In FSSA important decisions were given in protecting the health of public by

109 2015ALLMR (Cri) 645; 2015(1) Bom CR (Cri) 429.

110 *Taneeru Rama Kotaiah*, *supra* note 2.

111 *Supra* note 11.

strictly prescribing safety and standard norms for all food items. Two cases are worth mentioning here, the first one was *Haripriya Traders*[112] where it was said that although a food item may not come under food items which can be used for immediate human consumption without involvement of an intermediary process, still it will be termed as food and hence the food safety standards has to be adhered to. In another case, it was held by the court that ice cubes are for human consumption and hence it has to meet the standards prescribed under the Act. Under the PCA, two cases are particularly interesting. One is *Manzoor Ali Khan*[113] case and the second one is *Dr. Subramanium Swamy*[114] case. Both the cases dealt with the issue of providing shield to government officials from the PCA Act. In *Manzoor Ali Khan* case the court held that undoubtedly, there can be no tolerance to corruption which undermines core constitutional values of justice, equality, liberty and fraternity but at the same time need to prosecute and punish corrupt was no ground to deny protection to honest officers. A fine balance has to be maintained between need to protect a public servant against *mala fide* prosecution on the one hand and the object of upholding the probity in public life in prosecuting the public servant against whom prima facie material in support of allegation of corruption exists, on the other hand. In *Dr. Subramanium Swamy* case, the court held that section 6 A of the Delhi Police Establishment Act,1946 was discriminatory as it provided shield to central government officers working at the level of joint secretary and above from PCA whereas such protection was not given for the same level officers working in the states. The court said that corrupt persons ought to be treated equally under the PCA and held that section 6A was unconstitutional.

112 *Supra* note 24

113 *Supra* note 54.

114 *Supra* note 66.