M/S ALKEM LABORATORIES LTD. A

v.

STATE OF MADHYA PRADESH AND ANR.

(Criminal Appeal No.1798 of 2019)

NOVEMBER 29, 2019 B

[MOHAN M. SHANTANAGOUDAR AND KRISHNA MURARI, JJ.]

Prevention of Food Adulteration Act, 1954: s.20A – Impleadment of appellant who was marketer of packed food articles 'sugarless Jelly' – The said food article was manufactured by a separate entity – Prosecution case was that Food Inspector-Respondent no.2 purchased packed jars of Jelly from the retailer for testing – As per report of Public Analyst, the Jelly sample contained sugar and therefore was misbranded – Retailer produced a receipt showing that the jelly was purchased from appellant – Complaint filed by respondent no.2 for offence of sale of misbranded food article under s.16(1)(a)(ii) r/w s.2(ix)(g) and 7(ii) – During the course of trial, after closing of prosecution witness, the Retailer examined himself as a witness for the defence under s.315 Cr.P.C. – Subsequently, the Retailer moved an application under s.20A for impleading the appellant as an accused, which was allowed by the Special Magistrate – In the instant appeal, the plea of the appellant was that the application for impleadment under s.20A could not have been made by the Retailer – Held: Plea is not tenable – The provisions of the 1954 Act clearly distinguish between a 'vendor' and 'manufacturer' of a food article – The very purpose of s.20A is to enable the Court to implead the manufacturer or distributor during the trial of the vendor of the food article, so as to detect and punish adulteration at all stages of the supply chain. C D E F

Prevention of Food Adulteration Act, 1954: s.2(ia) and s.2(ix) – Adulterated and misbranded – A comparison of s.2(ia) of the 1954 Act which defines 'adulterated' and s.2(ix) which defines 'misbranded', shows that there is an overlap between the two provisions – s.2(ia)(a) includes within the definition of 'adulterated' a case where a food article is 'not of the nature, substance, or quality which it purports or is represented to be' – Whereas G H

A *s.2(i)(ix)(g) includes within the definition of 'misbranded' the label on the package bearing any statement, design or device regarding the ingredients or the substances contained therein, which is false or misleading in any material particular; or if the package is otherwise deceptive with respect to its contents.*

B *Prevention of Food Adulteration Act, 1954: s.11 – Prior notice to the accused – Held: Under the scheme of the 1954 Act, the accused has to be given prior notice, as provided under s.11, that samples of a food article manufactured and/or sold by them have been sent for analysis, before the Public Analyst prepares report –*
C *The 1954 Act does not envisage a situation such as the present case where the sample is sent for analysis, and the Public Analyst's report is also prepared, but the marketer is informed several years later that prosecution is sought to be instituted against them – During such period, the food article being perishable in nature would most probably be incapable of being sent for re-testing to the Central*
D *Laboratory.*

Prevention of Food Adulteration Act, 1954: s.13(1) to (3) – Whether denial of right to get Jelly sample tested by the Central Laboratory under s.13(2) of the 1954 Act would entitled quashing of proceedings against the appellant for the offence of misbranding
E *– What is the procedure to be followed in cases where proving misbranding requires testing of the relevant food samples but the corresponding charge of adulteration has not been made – Held: It is absurd and discriminatory for the prosecution to, on one hand, rely on the report of the Public Analyst under s.13(1) for proving*
F *the offence of 'misbranding', and on the other hand, claim that the accused cannot avail of their right to challenge the said report as per ss.13(2) and 13(3) because it is not a case of 'adulteration' – In such a scenario, the word 'adulterated' in s.13(2) would have to be read as including 'misbranded' in so far as it relates to the ingredients of the concerned food article, and the relevant clauses of s.13 have*
G *to be complied with in their entirety – Therefore, where examination of the contents/ingredients of the food article is integral to proving the offence 'misbranding', the procedure prescribed under ss.11 to 13 of the 1954 Act has to be complied with, regardless of whether 'adulteration' is alleged or not – This includes the right to obtain a second opinion from the Central Laboratory under s.13(2) – The*
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same test would apply in respect of any other offence for which penalty is prescribed under the 1954 Act – Interpretation of Statutes.

Prevention of Food Adulteration Act, 1954: s.2(ix)(g) – Misbranding – Label on the packaging that the Jelly is 'sugarless' – Case of Respondents based on Public Analyst's Report that the Jelly contained 'sugar/sucrose' – Whether appellant was entitled to get Jelly sample tested by the Central Laboratory under s.13(2) of the 1954 Act – Held: Public Analyst's finding on whether 'sugar' as an ingredient is present in the Jelly sample is crucial to proving the offence of 'misbranding' against the Appellant – Thus, the Appellant ought to have been given opportunity to make an application under s.13(2) for a second opinion from the Central Laboratory on the contents of the Jelly sample.

Interpretation of Statutes: Ambiguity in a penal statute – It is settled principle of statutory interpretation that any ambiguity in a penal statute has to be interpreted in favour of the accused.

Allowing the appeal, the Court

HELD: 1. The Appellant's contention that an application under Section 20A could not have been made by a retailer is misguided. The provisions of the 1954 Act clearly distinguish between a 'vendor' and 'manufacturer' of a food article. The very purpose of Section 20A is to enable the Court to implead the manufacturer or distributor during the trial of the vendor of the food article, so as to detect and punish adulteration at all stages of the supply chain. Admittedly, the prosecution may have to prove, for the purpose of trying the Retailer and the Appellant in a joint trial, that they shared a common object that the misbranded Jelly should reach consumers as food. However, this question need not be looked into at the stage of mere impleadment of the Appellant for the offence of misbranding. [Para 5] [1090-D-F]

Bhagwan Das Jagdish Chander v. Delhi Administration **(1975) 1 SCC 866 : [1975] Suppl. SCR 30 – relied on.**

2. It is explained in the Statement of Objects and Reasons of the 1954 Act that prior to its enactment, there were numerous State legislations on the subject of prevention of adulteration of

food-stuffs but these lacked uniformity. Hence the need for a Central legislation was felt which could *inter alia*, provide for a uniform procedure and the constitution of 'a Central Food Laboratory to which food samples can be referred to *for final opinion in disputed cases*.' [Para 6] [1091-B]

3. Section 11 stipulates the procedure to be followed by Food Inspectors while taking food samples for analysis. The first step of the procedure is to immediately notify on the spot, not only the vendor but also the person whose particulars are disclosed under Section 14A (which would include a distributor/ marketer such as the Appellant), that a sample is being sent for analysis. The sample is then divided into three parts-while the first part is sent to the Public Analyst, the other two are deposited with the Local Health Authority as a contingency in case the first part is lost or damaged. Section 13 of the 1954 Act prescribes the subsequent procedure to be followed after the Public Analyst prepares their report. Therefore, the purpose of Section 13 is to give a second opportunity to accused persons, against whom prosecution is initiated under the 1954 Act based on the Public Analyst's report, to get the relevant food sample tested again by the Central Laboratory. Since the Central Laboratory's report will have precedence over that of the Public Analyst, this is a valuable opportunity for accused persons to claim exoneration from criminal proceedings. Under the scheme of the 1954 Act, the accused has to be given prior notice, as provided under Section 11, that samples of a food article manufactured and/or sold by them have been sent for analysis, before the Public Analyst prepares their report. The 1954 Act does not envisage a situation such as the instant case where the sample is sent for analysis, and the Public Analyst's report is also prepared, but the marketer is informed several years later that prosecution is sought to be instituted against them. During such period, the food article being perishable in nature would most probably be incapable of being sent for re-testing to the Central Laboratory. [Paras 6, 7] [1091-E-G; 1092-F-H; 1093-A-B]

Municipal Corporation of Delhi v. Ghisa Ram, **AIR 1967 SC 970;** *Girishbhai Dahyabhai Shah v. C.C. Jani* **(2009) 15 SCC 64 : [2009] 12 SCR 229 – relied on.**

4. Upon a comparison of Section 2(ia) of the 1954 Act which defines 'adulterated' and Section 2(ix) which defines 'misbranded', there is an overlap between the two provisions. [Para 7] [1093-E]

5. The question which arises then is, what is the procedure to be followed in cases where proving 'misbranding' requires testing of the relevant food samples, but the corresponding charge of 'adulteration' has not been made? Section 13(2) is unfortunately silent in this regard. It is a settled principle of statutory interpretation that any ambiguity in a penal statute has to be interpreted in favour of the accused. It is absurd and discriminatory for the prosecution to, on one hand, rely on the report of the Public Analyst under Section 13(1) for proving the offence of 'misbranding', and on the other hand, claim that the accused cannot avail of their right to challenge the said report as per Sections 13(2) and 13(3) because it is not a case of 'adulteration'. In such a scenario, the word 'adulterated' in Section 13(2) would have to be read as including 'misbranded' in so far as it relates to the ingredients of the concerned food article, and the relevant clauses of Section 13 have to be complied with in their entirety. Hence where examination of the contents/ ingredients of the food article is integral to proving the offence 'misbranding', the procedure prescribed under Sections 11-13 of the 1954 Act has to be complied with, regardless of whether 'adulteration' is alleged or not. This includes the right to obtain a second opinion from the Central Laboratory under Section 13(2). This rule would not apply if proving the offence does not necessarily require sampling of the food article. [Para 8] [1094-C-H]

6.1 Applying the above-mentioned test to the instant case, it has to be seen whether *first*, the Appellant was entitled to apply for testing of the Jelly by the Central Laboratory under Section 13(2); *second*, whether the denial of the right was the Respondents' fault and *third*, whether such denial is prejudicial to the Appellant's case. With respect to the first point, the Respondents have relied upon the Public Analyst's Report which states that the Jelly contains 'sugar/sucrose', so as to institute a complaint for misbranding under Section 2(ix)(g) of the 1954 Act.

This is because the label on the packaging claims that the Jelly is 'sugarless'. Hence, the Public Analyst's finding on whether 'sugar' as an ingredient is present in the Jelly sample is crucial to proving the offence of 'misbranding' against the Appellant. Thus, the Appellant ought to have had the opportunity to make an application under Section 13(2) for a second opinion from the Central Laboratory on the contents of the Jelly sample. [Para 9] [1095-B-D]

6.2 With respect to the second point, Respondent No. 2 erred in not making query to the Retailer, at the first instance, about the marketer of the Jelly, as she was empowered to do under Section 14A of the 1954 Act. If she had done so, the Appellant could have been notified in 2008 itself that the Jelly is being taken for analysis. Even if this lapse is condoned, once the Retailer had intimated the Respondents that the Appellant was the marketer of the Jelly, they ought to have made more efforts in notifying the Appellant of the alleged irregularity found in the Jelly sample, as per Section 13(2). There is no merit in the Respondents' submission that the delay in informing the Appellant was because the Appellant was deliberately avoiding service of notice. Even if the address produced by the Retailer was of the Appellant's Indore Branch, the label on the packaging of the Jelly clearly indicated that the official address for communication would be "Alkem House, … Mumbai..". Hence even if no response was being received from the Indore branch, the Respondents could have attempted to send the details of the Public Analyst's Report to the Appellant's Mumbai address. Thus, it is clear that the Appellant lost their chance to get the Jelly sample re-tested under Section 13(2) on account of the Respondents' negligence. Finally, with regard to the third point, it is true that non-compliance with Section 13(2) would not be fatal in every case, if it is found that the sample is still fit for analysis. However the Respondents have not disputed that the shelf life of the Jelly sample would have, in all probability, expired at this stage. Hence that this is a fit case for quashing of proceedings against the Appellant on account of denial of their valuable right under Section 13(2). The impugned judgment and the impleadment order are set aside. [Paras 9 and 10] [1095-E-H; 1096-A-C]

T. V. Usman v. *Food Inspector*, *Tellicherry Municipality, Tellicherry* **(1994) 1 SCC 754 – relied on.**

Case Law Reference

[1975] Suppl. SCR 30	**relied on**	**Para 5**
AIR 1967 SC 970	**relied on**	**Para 7**
[2009] 12 SCR 229	**relied on**	**Para 7**
1994) 1 SCC 754	**relied on**	**Para 9**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.1798 of 2019

From the Judgment and Order dated 11.04.2018 of the High Court of Madhya Pradesh, Principal Seat at Jabalpur in Criminal Miscellaneous Case No.1003 of 2018.

C.U. Singh, Anupam Lal Das, Sr. Advs., Arun Siwach, Kunal Cheema, Anirudh Singh, Krishanu Barua, Ms. Ila Sheel, Amjid Maqbool, Ms. Vidushi, Advs. for the Appellant.

Parthiv K. Goswami Rahul Kaushik, Advs. for the Respondents.

The Judgment of the Court was delivered by

MOHAN M. SHANTANAGOUDAR, J.

1. Leave granted.

2. This appeal by special leave arises out of judgment dated 11.04.2018 of the High Court of Madhya Pradesh at Jabalpur, dismissing the Appellant's application under Section 482 of the Criminal Procedure Code ('CrPC') for quashing of order dated 01.09.2015 of the Special Magistrate (Prevention of Food Adulteration Act), Bhopal.

3. The facts giving rise to this appeal are as follows: The Appellant was the marketer of packed food article 'Orange Tammy Sugarless Jelly' ('Jelly'). The Jelly was manufactured separately by one Cachet Pharmaceuticals Private Limited ('Manufacturer'), which is not connected to the Appellant entity. On 3.10.2008, Respondent No. 2 Food Inspector, (from the Food and Drugs Administration, Bhopal District), conducted inspection in Valecha Enterprises in Bhopal, the proprietor of

A which is one Mr. Dinesh Valecha ('Retailer'). Respondent No. 2 purchased three company packed jars of the Jelly, weighing 350 grams each, from the Retailer and the said samples were deposited with the State Food Testing Laboratory ('State Laboratory') and the Local Health Authority, Bhopal for the purpose of testing. At this stage, the Retailer did not have receipt of purchase from the Appellant/marketer and stated B that they would produce it before Respondent No. 2 at a later stage.

The Local Health Authority by letter dated 26.11.2008 informed Respondent No. 2 that the Report of the Public Analyst, State Laboratory had found 'sugar' in the Jelly sample, hence the Jelly was misbranded. Notably, it was *pursuant to this letter* that, Respondent No. 2 made C further query and the Retailer produced a receipt showing that the Jelly was purchased from the Appellant. Respondent No. 2 sent a letter to the Local Health Authority and to the Indore branch of the Appellant company, for information as regards the Manager/Director/Partner or nominee of the Appellant. However, as the Respondents claim, the D Appellant did not respond to this query and the letter was received back. The attempts of Respondent No. 2 to obtain information about the Appellant from the Office of the Deputy Director, Food and Drugs Administration and the Commissioner, Nagar Nigam, Indore also failed.

Consequently, Respondent No. 2 filed a complaint in the Court of E the Judicial Magistrate, First Class, Bhopal for the offence of selling a misbranded food article under Section 16(1)(a)(ii) read with Sections 2(ix)(g) and 7(ii) of the Prevention of Food Adulteration Act, 1954 ('1954 Act'). During the course of the trial, after the closing of the prosecution evidence, the Retailer examined himself as a witness for the defence under Section 315 of the CrPC. Subsequently on 26.8.2014, the Retailer F moved an application under Section 20A of the 1954 Act for impleading the Appellant as an accused, which was allowed by the Special Magistrate (Prevention of Food Adulteration Act), Bhopal by order dated 1.9.2015. Hence the Appellant approached the High Court under Section 482 of the CrPC for quashing the said order.

G The High Court in the impugned judgment held that firstly, *mens rea* was not an ingredient of the offence under Section 7 of the 1954 Act. Therefore the Appellant could not avail of the defense that since they were only the marketer of the Jelly, they were not privy to the ingredients thereof. Secondly, that the Appellant could not have availed H of the right to get the sample re-tested by the Central Food Laboratory

('Central Laboratory') under Section 13(2) of the 1954 Act as the same was only available to the vendor of an 'adulterated' food article and not a 'misbranded' one. Hence the denial of the said right would not prejudice the case against the Appellant.

Thirdly, that the delay of 5 years in arraying the Appellant as co-accused would also not be fatal inasmuch as Respondent No. 2 had made best attempts to contact the Appellant, and the Appellant's name was probably omitted to avoid delay in filing the complaint. Lastly, that the application under Section 20A was maintainable as the Court may be satisfied on the basis of evidence adduced by either of the parties, including the prosecution, that the distributor/dealer of a food article is also concerned with the offence and such evidence need not be adduced by the applicant only. In any case the applicant/Retailer had given his evidence prior to impleadment. Hence the High Court declined to exercise its inherent powers under Section 482 of CrPC and quash the impleadment order dated 01.09.2015. However, this Court has directed stay of proceedings before the trial court against the Appellant during pendency of this appeal.

4. Learned senior counsel for the Appellant, Mr. C.U. Singh argued that the application for impleadment under Section 20A was not maintainable at the outset as such an application can only be made by a person who is not the 'manufacturer, distributor or dealer' of the food article, and the Retailer would be included in the phrase 'manufacturer, distributor or dealer'. That in any case, as a catena of decisions dealing with the 1954 Act as well as similar legislations such as the Seeds Act, 1966 and the Insecticides Act, 1968 have held, where an accused is denied their statutory right to get a sample re-tested by a Central testing laboratory on account of delay, such denial will render prosecution of the offence futile. He argued that the right under Section 13(2) of the 1954 Act is not restricted to cases of 'adulterated' food articles but applies to testing of samples for other offences under the 1954 Act as well; hence the order impleading the Appellant is liable to be quashed.

Further, that the delay in impleading the Appellant was attributable to the Respondents' negligence as the label on the packaging of the Jelly clearly stated that their registered office was in Mumbai whereas the Respondents' communications were addressed to their Indore branch which is an old address.

A *Per contra*, learned counsel for the Respondents stressed that a plain reading of Section 13(2) shows that the right available thereunder is only in respect of 'adulterated' food samples. Whereas in other provisions of the 1954 Act, where a provision is meant to be additionally applicable to misbranded food articles, the word 'misbranded' has been separately mentioned after 'adulterated'. Hence, the legislative intent to B exclude misbranding from the purview of re-testing by the Central Laboratory is clear. Further that though the packaging on the Jelly stated that the Appellant had their office in Mumbai, the food license produced by the Retailer before Respondent No.2/Food Inspector showed that their address was in Indore and the cause title of the Appellant's C application under Section 482, CrPC states that their branch office/ manufacturing unit is located at Indore; hence they cannot be blamed for the delay in impleading the Appellant. In any case, the High Court's powers under Section 482 against an interlocutory order are to be exercised sparingly, and it was open to the Appellant to prove their innocence at the stage of trial.

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5. At the outset, it must be noted that the Appellant's contention that an application under Section 20A could not have been made by a retailer is misguided. The provisions of the 1954 Act clearly distinguish between a 'vendor' and 'manufacturer' of a food article. The very purpose of Section 20A is to enable the Court to implead the manufacturer E or distributor during the trial of the vendor of the food article, so as to detect and punish adulteration at all stages of the supply chain. Admittedly, the prosecution may have to prove, for the purpose of trying the Retailer and the Appellant in a joint trial, that they shared a common object that the misbranded Jelly should reach consumers as food, as per this Court's F decision in ***Bhagwan Das Jagdish Chander* v. *Delhi Administration***, (1975) 1 SCC 866. However, we find that this question need not be looked into at the stage of mere impleadment of the Appellant for the offence of misbranding.

It is pertinent to note that in ***Bhagwan Das Jagdish Chander***, G M.H. Beg J. in his majority opinion directed quashing of charge against the Appellant distributor on the ground that on account of long passage of time since the initiation of prosecution, it would be difficult for the Appellant to challenge the correctness of the Public Analyst's Report. Hence the primary issue which arises for our consideration is whether the denial of the right to get the Jelly sample tested by the Central

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Laboratory, under Section 13(2) of the 1954 Act, would entitle quashing of proceedings against the Appellant for the offence of 'misbranding'?

6. Before we turn to the substantial question of law involved in the appeal, it may be useful to refer to the relevant provisions of the 1954 Act. It is explained in the Statement of Objects and Reasons of the 1954 Act that prior to its enactment, there were numerous State legislations on the subject of prevention of adulteration of food-stuffs but these lacked uniformity. Hence the need for a Central legislation was felt which could *inter alia*, provide for a uniform procedure and the constitution of 'a Central Food Laboratory to which food samples can be referred to *for final opinion in disputed cases*.'

Section 8 of the 1954 Act provides for the appointment of Public Analysts by the Central or the State Government as the case may be, for the purpose of carrying out analysis and testing of food samples in a given local area. Section 9 provides for the appointment of Food Inspectors for the purpose of *inter alia*, carrying out inspection of establishments where food articles are manufactured or sold, and seizing food articles which require analysis. Section 14A mandates vendors of food articles to disclose the name and other particulars of the person from whom the food article was purchased, if the Food Inspector so requires.

Section 11 stipulates the procedure to be followed by Food Inspectors while taking food samples for analysis. It is important to note that the first step of the procedure is to immediately notify on the spot, not only the vendor but also the person whose particulars are disclosed under Section 14A (which would include a distributor/marketer such as the Appellant), that a sample is being sent for analysis. The sample is then divided into three parts-while the first part is sent to the Public Analyst, the other two are deposited with the Local Health Authority as a contingency in case the first part is lost or damaged.

It is this backdrop that Section 13 of the 1954 Act prescribes the subsequent procedure to be followed after the Public Analyst prepares their report:

> "(1) The public analyst shall deliver, in such form as may be prescribed, a report to the Local (Health) Authority of the result of the analysis of any article of food submitted to him for analysis.

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

(2B) On receipt of the part or parts of the sample from the Local (Health) Authority under sub-section (2A), the court shall first ascertain that the mark and seal or fastening as provided in clause (b) of sub-section (1) of section 11 are intact and the signature or thumb impression, as the case may be, is not tampered with, and despatch the part or, as the case may be, one of the parts of the sample under its own seal to the Director of the Central Food Laboratory who shall thereupon send a certificate to the court in the prescribed form within one month from the date of receipt of the part of the sample specifying the result of the analysis.

(3) The certificate issued by the Director of the Central Food Laboratory under sub-section (2B) shall supersede the report given by the public analyst under sub-section (1)."

F Therefore the purpose of Section 13 is to give a second opportunity to accused persons, against whom prosecution is initiated under the 1954 Act based on the Public Analyst's report, to get the relevant food sample tested again by the Central Laboratory. Since the Central Laboratory's report will have precedence over that of the Public Analyst, this is a valuable opportunity for accused persons to claim exoneration from G criminal proceedings.

7. It can be seen from the above-mentioned provisions that under the scheme of the 1954 Act, the accused has to be given prior notice, as provided under Section 11, that samples of a food article manufactured and/or sold by them have been sent for analysis, before the Public Analyst H

prepares their report. The 1954 Act does not envisage a situation such as the present case where the sample is sent for analysis, and the Public Analyst's report is also prepared, but the marketer is informed several years later that prosecution is sought to be instituted against them. During such period, the food article being perishable in nature would most probably be incapable of being sent for re-testing to the Central Laboratory.

Thus, it has been settled by this Court in ***Municipal Corporation of Delhi* v. *Ghisa Ram***, AIR 1967 SC 970, that where inordinate delay in instituting prosecution has resulted in denial of the right under Section 13(2), it is deemed to have caused serious prejudice to the accused such that their conviction on the basis of the Public Analyst's report cannot be upheld. In ***Girishbhai Dahyabhai Shah* v. *C.C. Jani***, (2009) 15 SCC 64, this Court affirmed that a delay in sending a report of the Public Analyst to the accused, such that he is no longer in a position to apply for re-testing under Section 13(2) of the 1954 Act, would entitle quashing of criminal proceedings under Section 482 of the CrPC. However the above-mentioned decisions dealt with the offence of adulteration *simplicitor* and did not touch upon the question of the consequence of non-compliance with Section 13(2) in cases involving other offences.

However, upon a comparison of Section 2(ia) of the 1954 Act which defines 'adulterated' and Section 2(ix) which defines 'misbranded', we find that there is an overlap between the two provisions. Section 2(ia)(a) includes within the definition of 'adulterated' a case where a food article is 'not of the nature, substance, or quality which it purports or is represented to be.' Whereas Section 2(i)(ix)(g) includes within the definition of 'misbranded' the following:

> "if the package containing it, or the label on the package bears any statement, design or device regarding the ingredients or the substances contained therein, which is false or misleading in any material particular; or if the package is otherwise deceptive with respect to its contents."

Therefore for example, in cases where it is found that a food article contains an additional ingredient which is not advertised on its packaging, or *vice versa*, where a food article is found to be missing an ingredient which is purported to be included in the contents thereof in the labelling/packaging of the article; or where the food article has used

A an inferior quality substitute but the labelling purports to use the superior quality original ingredient, it would be a case of both adulteration and misbranding.

This is not an exhaustive list of examples, but it suffices to say that in certain situations, even for the purpose of proving the offence of B 'misbranding', samples of the article would have to be taken according to the procedure prescribed under Sections 11-13 of the 1954 Act. This is because in such cases it would not be possible to conclude whether or not the manufacturer, marketer or vendor has put a deceptive label/ package on the food article, without making a finding as to whether there has been any adulteration in the contents thereof.

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8. The question which arises then is, what is the procedure to be followed in cases where proving 'misbranding' requires testing of the relevant food samples, but the corresponding charge of 'adulteration' has not been made? Section 13(2) is unfortunately silent in this regard. It is a settled principle of statutory interpretation that any ambiguity in a D penal statute has to be interpreted in favour of the accused. It would be absurd and discriminatory for the prosecution to, on one hand, rely on the report of the Public Analyst under Section 13(1) for proving the offence of 'misbranding', and on the other hand, claim that the accused cannot avail of their right to challenge the said report as per Sections E 13(2) and 13(3) because it is not a case of 'adulteration'. In such a scenario, the word 'adulterated' in Section 13(2) would have to be read as including 'misbranded' in so far as it relates to the ingredients of the concerned food article, and the relevant clauses of Section 13 have to be complied with in their entirety.

F Hence we are of the considered opinion that where examination of the contents/ingredients of the food article is integral to proving the offence 'misbranding', the procedure prescribed under Sections 11-13 of the 1954 Act has to be complied with, regardless of whether 'adulteration' is alleged or not. This includes the right to obtain a second opinion from the Central Laboratory under Section 13(2). The same test G would apply in respect of any other offence for which penalty is prescribed under the 1954 Act.

It is needless to say that this rule would not apply if proving the offence does not necessarily require sampling of the food article. For

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example, if the offence is one of 'bearing the name of a fictitious individual or company as the manufacturer or producer of the article' under Section 2(ix)(h) it may not be necessary to analyse the contents of the food article to prove the offence so long as the prosecution is able to establish that the real manufacturer has deceptively concealed their identity.

9. Applying the above-mentioned test to the present case, it has to be seen whether *first*, the Appellant was entitled to apply for testing of the Jelly by the Central Laboratory under Section 13(2); *second*, whether the denial of the right was the Respondents' fault and *third*, whether such denial is prejudicial to the Appellant's case. With respect to the first point, the Respondents have relied upon the Public Analyst's Report which states that the Jelly contains 'sugar/sucrose', so as to institute a complaint for misbranding under Section 2(ix)(g) of the 1954 Act. This is because the label on the packaging claims that the Jelly is 'sugarless'. Hence, the Public Analyst's finding on whether 'sugar' as an ingredient is present in the Jelly sample is crucial to proving the offence of 'misbranding' against the Appellant. Thus, the Appellant ought to have had the opportunity to make an application under Section 13(2) for a second opinion from the Central Laboratory on the contents of the Jelly sample.

With respect to the second point, we are of the view that Respondent No. 2 erred in not making query to the Retailer, at the first instance, about the marketer of the Jelly, as she was empowered to do under Section 14A of the 1954 Act. If she had done so, the Appellant could have been notified in 2008 itself that the Jelly is being taken for analysis. Even if this lapse is condoned, once the Retailer had intimated the Respondents that the Appellant was the marketer of the Jelly, they ought to have made more efforts in notifying the Appellant of the alleged irregularity found in the Jelly sample, as per Section 13(2). We do not find merit in the Respondents' submission that the delay in informing the Appellant was because the Appellant was deliberately avoiding service of notice. Even if the address produced by the Retailer was of the Appellant's Indore Branch, the label on the packaging of the Jelly clearly indicated that the official address for communication would be "Alkem House, Senapati Bapat Marg, Lower Parel, Mumbai-400013". Hence even if no response was being received from the Indore branch, the Respondents could have attempted to send the details of the Public

A Analyst's Report to the Appellant's Mumbai address. Thus it is clear that the Appellant lost their chance to get the Jelly sample re-tested under Section 13(2) on account of the Respondents' negligence.

Finally, with regard to the third point, it is true that non-compliance with Section 13(2) would not be fatal in every case, if it is found that the
B sample is still fit for analysis (***T. V. Usman* v. *Food Inspector*, *Tellicherry Municipality, Tellicherry***, (1994) 1 SCC 754). However the Respondents have not disputed that the shelf life of the Jelly sample would have, in all probability, expired at this stage. Hence we find that this is a fit case for quashing of proceedings against the Appellant on account of denial of their valuable right under Section 13(2).
C

10. The appeal is allowed, and the impugned judgment dated 11.04.2018 and the impleadment order dated 01.09.2015 are set aside, in the above terms.

Devika Gujral Appeal allowed.