

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

*Reserved on: 16<sup>th</sup> April, 2013*  
*Pronounced on: 09<sup>th</sup> May, 2013*

+ **CRL.M.C. 1767-68/2006**

**DR.R.VENKATACHALAM & ANR.** ..... Petitioners

Through: Mr. Rajeev K. Virmani, Sr. Advocate  
with Mr. Vaibhav Bhadana, Adv.  
Mr. Shreyansh Mardia, Adv.  
Mr. Abhay Pratap Singh, Advocates

versus

**STATE & ANR.** ..... Respondents

Through: Ms. Reeta Kaul, Advocate for the  
Respondent/State with Dr. R.S. Sharma,  
Ex.Joint Director, GOI, CIL, Faridabad &  
Insecticide Inspector Karambir Singh.

**CORAM:**

**HON'BLE MR. JUSTICE G.P.MITTAL**

### **J U D G M E N T**

**G. P. MITTAL, J.**

1. The Petitioners invoke inherent powers of this Court under Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.) for quashing of the criminal complaint preferred against them for an offence punishable under Sections 29(1) (a) of the Insecticides Act, 1968 (the Act).
2. The gravamen of the Petitioners challenge before this Court is that on 30.01.1997 Respondent No.2 took a sample of mosquito repellent mats having insecticide d-trans allethrin 2% W/W, batch No.KPB/105/M, manufacturing date 8/96 and expiry date 7/98. The Director, Central Insecticides Laboratory (CIL) Faridabad's report dated 18.03.1997 declared the sample to be misbranded. As per the report the sample was tested as per IS:13439-1992. The Insecticide Inspector issued a notice to

the second Petitioner requiring it to show cause as to why legal proceedings may not be initiated against it as the sample of its mosquito repellent mat was found to be sub-standard. The Petitioners disputed the validity of the report and requested for a re-sampling at Petitioners' costs and expenses.

3. Not convinced with the Petitioners' response, a complaint for an offence punishable under Section 29 of the Act was filed against the Petitioners. The first Petitioner filed an application for dismissal of the complaint for non compliance of Section 22 (6) (2) of the Act as the second sample was not produced. The Petitioners filed another application dated 15.12.1999 seeking discharge on the ground, inter alia, that Petitioner No.1 was not in employment of Petitioner No.2 on the date of taking of the sample and that the Bureau of Indian Standard (BIS) had not laid down any standard for d-trans allethrin whereas the CIL report purported to have adopted the specifications as laid down by BIS for analyzing the sample taken from Petitioner No.2. According to the Petitioners, Respondent No.2 filed another report dated 29.12.2000 from CIL making interpolation in the earlier report dated 18.03.1997 issued by the CIL.
4. The Petitioners seek quashing of the complaint on the following grounds:-
  - (i) Respondent No.2 was very well aware that Petitioner No.1 joined Petitioner No.2 only on 11.11.1997 whereas sample in question was lifted on 30.1.1997. Thus, apart from the fact that there is not even a whisper in the complaint that the first Petitioner was in charge of and responsible for the conduct of the business of the second Petitioner, he could not have been prosecuted as being

vicariously liable under Section 33 of the Act as he joined Petitioner No.2 much after the date of lifting of the sample.

(ii) The sample in question was got analyzed by Respondent No.2 from the Director of the CIL. As per the procedure for drawing a sample, its analysis and the prosecution in case the sample is found to be not conforming to the standard is that one portion of the sample (container) is required to be given to the person from whom the sample is taken; the second is required to be sent to the Insecticide Analyst for test or analysis and the third one is to be produced in the Court before which the proceedings, if any, are being instituted. It is contended that in the instant case, the sample was directly got analyzed from CIL and thus the valuable right conferred on the person from whom the sample is drawn to get the sample retested from CIL was frustrated. The complaint is therefore liable to be quashed and the Petitioners are entitled to be discharged.

(iii) The Insecticide Inspector lifted the sample of mosquito repellent mat having insecticide d-trans allethrin 2% W/W whereas the same was tested for allethrin 2% W/W as per IS:13439-1992. Thus, the report is valueless as IS:13439-1992 issued by the BIS is not applicable in case of d-trans allethrin and the same is not even disputed by Respondent No.2.

5. The Petition is resisted by the Respondents. The learned counsel for Respondent No.2 did not dispute that Petitioner No.1 was not in employment of Petitioner No.2 on 30.01.1997. She, however, stated that since the name of the person who was incharge of and responsible for looking after the business of Respondent No.2 was not given and it was

stated that Petitioner No.1 was working with Petitioner No.2 since 11.11.1997, he was prosecuted being the person incharge of the quality control.

6. Referring to sub-Section 4 of Section 24 of the Act, the learned counsel for Respondent No.2 urges that the person from whom a sample of any chemical is taken or for that matter an accused is entitled to get the sample retested from Director of CIL only if the sample has earlier been not analyzed by the Director CIL. In the instant case, since the sample had already been tested by the Director, CIL, the Petitioners would not be entitled to get the same retested and there is no question of prejudice to the Petitioners in view of the provision of Section 24 (4) of the Act.
7. The learned counsel for Respondent No.2 concedes that allethrin and d-trans allethrin are two separate substances. She, however, urges that there was a clerical mistake in the report dated 18.03.1997 which was subsequently rectified by a letter dated 29.12.2000 and the sample had infact being analyzed for d-trans allethrin and it was only on account of clerical mistake that the word 'd-trans' could not be mentioned in the initial report dated 18.03.1997.
8. The Petition is liable to succeed on all the three grounds, which I shall be dealing one by one.

### **POINT No.1**

9. Admittedly, by a letter dated 10.07.1998 copy of which has been placed on the paper book by the Petitioners, Petitioner No.2 was required to file an Affidavit disclosing the name and designation of the person responsible for quality control on behalf of the firm, that is, Petitioner No.2. Petitioner No.2 was reminded of its obligation to reply the earlier

said letter by a communication dated 05.08.1998. The Petitioners filed an affidavit dated 11.08.1998 informing that Petitioner No.1 was working as General Manager (Research) and QA with Petitioner No.2 since November 11, 1997 and that he was responsible for the quality control. By a letter dated 09.09.1998 Respondent No.2 again told Petitioner No.2 that inspite of the letter dated 10.07.1998 and 05.08.1998 no response had been received from Petitioner No.2.

10. It is important to note that by letter dated 10.07.1998, the Respondent No.2 simply required Petitioner No.2 to *“intimate in Affidavit the name and designation of the responsible person for quality control on behalf of your firm for office purpose and record.”* Thus, Respondent No.2 never asked Petitioner No.2 to disclose the name of the person who was incharge and responsible for the quality control of Petitioner No.2 company as on the date of the lifting of the sample, that is, 30.01.1997. They simply wanted the name of the person who was looking after the quality control. The only inference that could be drawn from the letter dated 10.07.1998 and the subsequent reminder is that Respondent No.2 only wanted to know the name of the person who was currently incharge of the quality control. I would deal a little later as to how far a person incharge of the quality control can be prosecuted under Section 33 of the Act. At this stage, suffice it to say that Respondent No.2 was in possession of the Affidavit which showed that Petitioner No.1 had joined Petitioner No.2 only on 11.11.1997 and thus, he could not be incharge of or responsible for the conduct of the business of the company nor the offence could be committed with his consent or in connivance. Thus, there is no manner of doubt that he could not be prosecuted.

11. Although, it is well established that Petitioner No.1 was not even in employment of Petitioner No.2 on the date the sample was drawn, even otherwise, the averments in the complaint do not disclose any ground for prosecuting Petitioner No.1 instead what is mentioned in the title of the complaint is *Dr. R. Venkatachalam, being a General Manager of Petitioner No.2.*
12. It is no longer *res integra* that where a director or any officer of an accused company is sought to be made vicariously liable on the ground that he/she is in charge of and responsible for the conduct of its business to the company, it has to be clearly averred in the complaint as to how and in what manner the director/officer is responsible to the company for the conduct of its business. In *National Small Industries Corporation Ltd. v. Harmeet Singh Paintal & Anr.*, (2010) 3 SCC 330, the Supreme Court analysed the provisions of Section 141 of the Negotiable Instruments Act, 1881 (the N.I. Act) and observed that mere repetition of the words as given in Section 141(2) of the N.I. Act will not be enough to make a director or an officer vicariously liable for the act of the company. Para 38 of the report is extracted hereunder:

*“38. But if the accused is not one of the persons who falls under the category of “persons who are responsible to the company for the conduct of the business of the company” then merely by stating that “he was in charge of the business of the company” or by stating that “he was in charge of the day-to-day management of the company” or by stating that “he was in charge of, and was responsible to the company for the conduct of the business of the company”, he cannot be made vicariously liable under Section 141(1) of the Act. To put it clear that for making a person liable under Section 141(2), the mechanical repetition of the requirements under Section 141(1) will be of no assistance, but there should be necessary averments in the complaint as to how and in what manner the accused was guilty of consent and*

*connivance or negligence and therefore, responsible under sub-section (2) of Section 141 of the Act.”*

13. To the same effect are the observations of the Supreme Court in *Central Bank of India v. Asian Global Limited & Ors.*, (2010) 11 SCC 203. The Supreme Court held that although the managing director or a joint managing director of the company would be admittedly in charge of the company and responsible for the conduct of its business, the same yardstick would not apply to a director. It was stated that for making a director vicariously liable for the act of the company, there has to be clear and unambiguous averments as to the part played by the director in the transaction in question and how they were in charge of and responsible to the company for the conduct of its business. Paras 17 to 19 of the report are extracted hereunder:

*“17. The law as laid down in S.M.S. Pharmaceuticals Ltd. case [(2005) 8 SCC 89 : 2005 SCC (Cri) 1975] has been consistently followed and as late as in 2007, this Court in N.K. Wahi case [(2007) 9 SCC 481 : (2007) 3 SCC (Cri) 203] , while considering the question of vicarious liability of a Director of a company, reiterated the sentiments expressed in S.M.S. Pharmaceuticals Ltd. case [(2005) 8 SCC 89 : 2005 SCC (Cri) 1975] that merely being a Director would not make a person liable for an offence that may have been committed by the company. For launching a prosecution against the Directors of a company under Section 138 read with Section 141 of the 1881 Act, there had to be a specific allegation in the complaint in regard to the part played by them in the transaction in question. It was also laid down that the allegations had to be clear and unambiguous showing that the Directors were in charge of and responsible for the business of the company. This was done to discourage frivolous litigation and to prevent abuse of the process of court and from embarking on a fishing expedition to try and unearth material against the Director concerned.*

*18. In this case, save and except for the statement that the respondents, Mr Rajiv Jain and Sarla Jain and some of the other*

*accused, were Directors of the accused Companies and were responsible and liable for the acts of the said Companies, no specific allegation has been made against any of them. The question of proving a fact which had not been mentioned in the complaint did not, therefore, arise in the facts of this case. This has prompted the High Court to observe that the Bank had relied on the mistaken presumption that as Directors, Rajiv Jain, Sarla Jain and the other Directors were vicariously liable for the acts of the Company.*

*19. Admittedly, except for the aforesaid statement, no other material has been disclosed in the complaint to make out a case against the respondents that they had been in charge of the affairs of the Company and were responsible for its action. The High Court, therefore, rightly held that in the absence of any specific charge against the respondents, the complaint was liable to be quashed and the respondents were liable to be discharged.”*

14. There is a latest report of the Supreme Court in *Anita Malhotra v. Apparel Export Promotion Council & Anr.* (2012) 1 SCC 520, wherein it was laid down that reproduction of the statutory requirement (as laid down in Section 141(2) of the N.I. Act) by itself would not be sufficient to make director of a company liable. The complainant should specifically spell out as to how and in what manner the director was in charge and responsible to the accused company for conduct of its business. Relying on *National Small Industries Corporation Ltd.*, the Supreme Court held as under:

*“22. This Court has repeatedly held that in case of a Director, the complaint should specifically spell out how and in what manner the Director was in charge of or was responsible to the accused company for conduct of its business and mere bald statement that he or she was in charge of and was responsible to the company for conduct of its business is not sufficient. (Vide National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal [(2010) 3 SCC 330 : (2010) 1 SCC (Civ) 677 : (2010) 2 SCC (Cri) 1113] .) In the*

*case on hand, particularly, in Para 4 of the complaint, except the mere bald and cursory statement with regard to the appellant, the complainant has not specified her role in the day-to-day affairs of the Company. We have verified the averments as regards to the same and we agree with the contention of Mr Akhil Sibal that except reproduction of the statutory requirements the complainant has not specified or elaborated the role of the appellant in the day-to-day affairs of the Company. On this ground also, the appellant is entitled to succeed.”*

15. Thus, in the absence of any averment in the complaint as to how Petitioner No.1 was being made vicariously liable he could not have been prosecuted. Since Respondent No.2 was well aware that Petitioner No.1 joined Petitioner No.2 much after lifting of the sample, it is a case of malicious prosecution, vis-à-vis Petitioner No.1.

## **POINT NO.2**

16. To appreciate the contention raised by the learned counsel for the parties, it would be appropriate to go into the scheme of lifting of a sample and its analysis by various authorities. Section 18 of the Act prohibits sale etc. of certain insecticides. Section 19 deals with the appointment of Insecticide Analysts whereas Sections 20 and 21 deal with the appointment and powers of Insecticide Inspectors. As per Section 21 (3) of the Act an Insecticide Inspector is empowered to take sample of any insecticide and send the same for analysis to the Insecticide Analyst to be tested in the prescribed manner. Section 22 deals with the procedure to be followed by the Insecticide Inspector while taking a sample. As per Section 22(5) the sample is to be divided into three portions. Section 22(6) deals with the manner how three portions of the sample are to be dealt with by the Insecticide Inspector. Section 22(6) of the Act is extracted hereunder:-

***“22. Procedure to be followed by Insecticide Inspectors.***

*(6) The Insecticide Inspector shall restore one portion of a sample so divided or more one container, as the case may be, to the person from whom he takes it and shall retain the remainder and dispose of the same as follows:*

*(i) one portion or container, he shall forthwith send to the Insecticide Analyst test or analysis; and*

*(ii) the second, he shall produce to the court before which proceedings, if any, are instituted in respect of the insecticide.”*

17. Section 24 deals with the time within which a report is to be sent by an Insecticide Analyst, the time within which the report of the Insecticide Analyst is to be challenged and the manner thereof. Section 24 of the Act is extracted hereunder:-

***“24. Report of Insecticide Analyst***

*(1) The Insecticide Analyst to whom a sample of any insecticide has been submitted for test or analysis under sub-section (6) of Sec.22, shall, within a period of thirty days, deliver to the Insecticide Inspector submitting it a signed report in duplicate in the prescribed form.*

*(2) The Insecticide Inspector on receipt thereof shall deliver one copy of the report to the person from whom the sample was taken and shall retain the other copy for use in any prosecution in respect of the sample.*

*(3) Any document purporting to be a report signed by an Insecticide Analyst shall be evidence of facts stated therein, and such evidence shall be conclusive unless the person from whom the sample was taken has within twenty-eight days of the receipt of a copy of the report notified in writing the Insecticide Inspector or the Court before which any proceedings in respect of the sample*

*are pending that he intends to adduce evidence in contravention of the report.*

*(4) Unless the sample has already been tested or analysed in the Central Insecticides Laboratory, where a person has under sub-section (3) notified his intention of adducing evidence in controversion of the Insecticide Analyst's report, the Court may, of its own motion or its discretion at the request either of the complainant or of the accused, cause the sample of the insecticide produced before the Magistrate under sub-section (6) of Sec. 22 to be sent for test or analysis to the said laboratory, [which shall, within a period of third days, which shall make the test or analysis] and report in writing signed by, or under the authority of, the Director of Central Insecticides Laboratory the result thereof, and such report shall be conclusive evidence of the facts stated therein."*

*(5). .... "*

18. The learned counsel for the Petitioners submit that the purpose of handing over one portion of the sample to the person from whom the same has been taken after it has been sealed etc. and depositing one portion of the sample with the Court before which proceedings are instituted is only with a view to enable a person who is not satisfied with the report of Insecticide Analyst to get the same retested from the Director, CIL. It is urged that since the sample in the instant case was directly sent to the Director, CIL, the Petitioners were deprived of their valuable right to get the sample retested and thus the proceedings are liable to be quashed. In support of his contention, the learned senior counsel for the Petitioners places reliance on a judgment of the Rajasthan High Court in *Hindustan Ciba Geigy Ltd. & Ors. Etc. v. State of Rajasthan & Ors.* 1995 CrL.L.J. 618 and a report of the Supreme Court in *Medicamen Biotech Limited & Anr. v. Rubina Bose, Drug Inspector* (2008) 7 SCC 196.

19. I have already extracted hereinbefore the scheme of the Act particularly, Section 22(6) and Section 24. The purpose of handing over of one part of the sample to the person from whom the sample is taken and attaching conclusiveness to the report of the Insecticide Analyst unless the report is challenged within 28 days on receipt of its copy either by approaching the Inspector or the Court before which the proceedings have been instituted, confers a valuable right to the person from whom a sample is taken to get the same retested. The contention raised on behalf of Respondent No.2 that the person from whom the sample has been taken cannot have such a right where the sample is analysed by the Director, CIL is misconceived.
20. Sub-section (4) of Section 24 has to be read in conjunction with Section 22(6) and Section 24(1) (2) and (3) of the Act. Sub-Section (4) of Section 24 has to be interpreted so as to give full operation to the provision of Section 22 (6) and Section 22 (1) (2) and (3) of the Act. There may be circumstances where after receipt of the report of Insecticide Analyst the sample is tested or analysed in CIL either at the instance of the Insecticide Inspector or otherwise. In that case the person from whom the sample is drawn cannot complain of any prejudice.
21. In *Hindustan Ciba Geigy Ltd.* while holding that the Insecticide Inspector is not entitled to directly get the sample analysed from the CIL, the Court observed as under:-

*“18. A close and careful perusal of Sections 21 and 22 of the Act and Rules 27 and 28 of the Rules also reflect in most unambiguous, clear and cogent terms that the Insecticide Inspector is duty bound to send the sample of the Insecticide for test or analysis to the insecticide Analyst only and that he is not authorized or empowered to sent the sample for test or analysis, directly to the CIL because, as per the provisions of Section 24(4) of the Act, the power of sending the second portion of the sample for reanalysis to*

*the CIL is given to the court where the criminal proceedings are pending. If the sample is directly sent by the Insecticide Inspector and got analysed from the CIL, then positively the accused persons facing prosecution under the provisions of the Act shall be deprived of their valuable right to controvert the analysis report by getting the other sample tested or red-analysed from the CIL. As mentioned earlier, the State of Rajasthan has already declared the Assistant Agricultural Chemist (Quality Control), Durgapura, Jaipur, as Insecticide Analyst under Section 19 of the Act. Therefore, in such circumstances, the Insecticide Inspector was duty bound to have sent the sample for test or analysis to the said Insecticide Analyst in the State Insecticide Laboratory at Durgapura, Jaipur. If the Insecticide Inspector send the sample of the Insecticide for test or analysis directly to the CIL, it will negate, frustrate and defeat the very purpose of Section 24(4) of the Act, which confers an important and valuable right to the accused to get the sample re-tested or red-analysed in the CIL because the accused shall not get any opportunity for controverting the contents of the analysis report.”*

22. In the case of *Medicamen Biotech Limited* while interpreting the provisions of Section 25(4) under the Drugs and Cosmetics Act, 1940 which are parameteria with the provision of Section 24(4) of the Act, the Hon'ble Supreme Court held that the right of retesting given to the person from whom the sample is taken is a valuable right and if such a person is deprived of his valuable right by filing a complaint after the expiry of the shelf life of the drug, the proceedings would be liable to be quashed.
23. In the instant case, not only the prosecution has been launched after the shelf life of the sample article has expired but the right of getting the sample retested has been frustrated by getting the sample analysed from the Director, CIL by the Respondent No.2. Hence, the criminal complaint is liable to be quashed.

### **POINT NO.3**

24. It is not disputed that Respondent No.2 drew a sample of mosquito repellent mat having insecticide d-trans allethrin 2% W/W. It is also not in dispute that as per the initial report the sample was tested on the premise that it was allethrin 2% W/W mat and the protocol of test applied was IS:13439-1992. In response to the letter dated 23.06.1999 written by the second Petitioner, the Bureau of Indian Standard informed that the “*Indian Standard is yet to be printed on the subject d-trans allethrin*”. In fact, when an application for discharge was moved by the Petitioners, Respondent No.2 in its reply dated 11.09.2000 took up the plea that d-trans allethrin 2% W/W is the technical/chemical name of allethrin 2% W/W. The relevant portion of the reply is extracted hereunder:-

*“..... There is no other insecticides by the name of Allethrin 2% WW. Thus the word d-trans Allethrin 2% WW is the technical/chemical name of the Allethrin 2% WW. There is no Insecticides any other chemical which non by the name d-trans. The base of the chemical insecticides is Allethrin and by adding the word d-trans is basic character cannot be changed. The word Allethrin 2% WW have been mentioned as a chemical name of the word d-trans Allethrin 2% WW. Thus the complaint is against the Insecticides of which sample were lifted/purchased from the accused persons.*

*There is nothing wrong or illegal in using the word Allethrin 2% WW instead of the word d-trans Allethrin 2% WW. Thus, the complaint is maintainable.”*

25. However, during pendency of the complaint, Respondent No.2 took a contradictory stand and obtained a fresh report dated 29.12.2000 whereby the words ‘d-trans’ were added in the earlier report wherever the words allethrin 2% W/W had been written in the report. The protocol of test applied that is IS:13439-1992 was also changed with the words “protocol

specifications”. This amounts to interpolation and supersession of the report, where after three years the sample was sent again depriving the person from whom the sample is taken, of his valuable right to get the sample retested.

26. In view of the above discussion, prosecuting the complaint would amount to abuse of the process of the Court. The same, therefore, has to be quashed. I order accordingly.
27. Pending Applications stand disposed of.

**(G.P. MITTAL)**  
**JUDGE**

**MAY 09, 2013**  
vk