

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 68 OF 2015

Sadashivrao s/o. Bhikaji Pachpute
and others

....Petitioners.

Versus

The State of Maharashtra & Anr.

....Respondents.

Mr. D.S. Bharuka , Advocate for petitioners.

Mr. P.N. Mule, APP for State.

CRIMINAL WRIT PETITION NO. 69 OF 2015

Jamshid J. Appu and others

....Petitioners.

Versus

The State of Maharashtra & Anr.

....Respondents.

Mr. D.S. Bharuka , Advocate for petitioners.

Mrs. R.K. Ladda, APP for State.

CORAM : T.V. NALAWADE, J.

DATED : 29th June, 2015.

ORDER :

1) The proceeding bearing Criminal Writ Petition No. 68/2015 is filed for relief of quashing of the proceeding of S.C.C. No. 102/2010 (Old No. RCC 218/2005), which is pending in the Court of Judicial Magistrate, First Class, Aurangabad to the extent of accused Nos. 2 to 11. The proceeding bearing Criminal Writ Petition No. 69/2015 is filed for similar relief in respect of

accused Nos. 2 to 4 from S.C.C. No. 73/2011 (Old No. RCC 1625/2014) which is pending in the Court of J.M.F.C., Aurangabad. Both the proceedings are complaints filed by Food Inspector, public servant, for the offences under sections 7 (i) r/w. section 2 (ia) (a), 2 (ia) (m) punishable under sections 16 and 17 of the Prevention of Food Adulteration Act, 1954 [hereinafter referred to as 'the Act' for short] and the Rules framed thereunder. Both the sides are heard.

2) Accused Nos. 12 and 7 of the aforesaid private complaints are private limited companies and they are in the business of milk and manufacturing of ice cream, respectively. Petitioners of both the proceedings are directors of the two private companies. It is the case of petitioners that in the aforesaid complaints, there are no specific allegations made against them that in a particular way, they were incharge of the business of the company and they were looking after the business of the company on the date of offence. It is contended that it was necessary to mention the exact role played by each director in conducting the business of the company and there is no such averment in the complaint and so, the Magistrate ought not to have issued process in the matter against the present petitioners. In the first proceeding, it is contended that by the

directors that the entire work of the company was being looked after by accused No. 1 - Bandu Navale as a Supervisor and only he can be held responsible for the offence, if any, committed. In the second proceeding, it is contended that accused No. 1 - Shailesh Hundekar was working as a Depot Manager of this company for Waladgaon, Pandharpur from where the samples were collected by the Food Inspector and only this person, officer of the company can be held responsible for the offence, if any, committed.

3) The learned counsel for petitioners has placed reliance on the following cases :-

(i) The facts of the case reported as **2004 (1) FAC 68 [Nalin Thakur and Ors. Vs. State of Maharashtra]** show that there was nomination under section 17 (2) of the Act and according to the complainant, the nomination was not valid. It was held by the Apex Court that during trial, if there was material made available, it was possible to make manufacturer, directors also accused in view of the provisions of section 17 (a) (ii) or section 17 (4) of the Act. The High Court had quashed the complaint against those directors and the Apex Court had refused to

interfere in the decision of the High Court.

(ii) In the case reported as **1998 All India Prevention of Food Adulteration Journal 269 SUPREME COURT OF INDIA [State of Haryana Vs. Brij Lal Mittal & Ors.]**, the Apex Court held that there were bald allegations against the directors. The High Court had quashed the proceeding and Supreme Court refused to interfere in the order of High Court in the S.L.P.

(iii) In the case reported as **2002 (1) FAC 294 BOMBAY HIGH COURT [Keki Bomi Dadiseth and ors. Vs. The State of Maharashtra]**, there was nominee appointed under section 17 (2) of the Act and the High Court held that it was necessary to make specific allegations against the directors for using provision of section 17 of the Act.

(iv) In the case reported as **AIR 1983 SUPREME COURT 67 [Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and ors.]**, the Supreme Court refused to interfere in the decision of the High Court when the High Court had quashed the

proceeding which was filed against the directors. It was observed that the contents of the complaint were not sufficient to constitute the offence against the directors.

(v) In the cases reported as **1997 (2) Prevention of Food Adulteration Cases 107 SUPREME COURT OF INDIA [M/s. Pepsi Foods Limited and another Vs. Special Judicial Magistrate and others]** and **2011 CRI.L.J. 1012 SUPREME COURT [Pepsico India Holdings Pvt. Ltd. Vs. Food Inspector and Anr.]** also it is observed that the specific role of the directors in the management of the company needs to be mentioned in the complaint.

4) The private complaint from the first proceeding shows that the samples were collected by the Food Inspector from the accused No. 1, who was working with accused company. The Food Inspector had given notice under section 14[A] of the Act and information was collected by the Food Inspector by exercising the power given by the Act. The information was also collected by the Food Inspector against the

directors from Licensing Authority, Food and Drug Administration, Ahmednagar. On the basis of this information, accused Nos. 2 to 11 are made accused as directors of the accused company.

5) The private complaint from the second proceeding shows that accused No. 1 was found in the depot of the accused company from where samples were collected by the Food Inspector to whom notice under section 14[A] of the Act was given by the Food Inspector and accused No.1 had supplied information regarding the manufacturer. It was informed that no nominee was appointed for this depot by the company. The information collected revealed that the licence was issued to accused No. 7, company. Though accused No. 5 was appointed as nominee by the company, but he was for Goa. The Licencing Authority had informed that accused Nos. 2 to 5 were shown as directors for the aforesaid depot unit of the company, but no nominee was appointed for accused No. 6, aforesaid depot of the company. Thus, in the second case also, the directors were made accused on the basis of information collected by the Food Inspector by using the powers given to him under the Act.

6) This Court had opportunity to refer most of the

aforesaid cases for deciding the point involved in the present two matters. In the case reported as **2013 (4) Bom. C.R. (Cri.) 63 [Vilas Marutrao Tanpure & Ors. Vs. State of Maharashtra & Ors.]**, this Court has mentioned the law developed on the relevant provisions of the Act at paragraph Nos. 4 to 16 which run as under :-

"4. In both the cases, the J.M.F.C. has issued process for aforesaid offences. In both the cases, the complainant had not nominated accused No. 1 or any other person under section 17 (2) of the Act as nominee. It is contended that accused no. 1 from each case was looking after the business of respective company and so, the petitioners Directors cannot be prosecuted for aforesaid offences. It was also submitted for the petitioners that there are no specific allegations in the complaint against the petitioners that they were incharge of the business of the Company and they were responsible for conducting day-to-day business of the Company. In both the complaints, the petitioners are mentioned as Directors of the Manufacturing Company.

5. Reliance was placed by the learned counsel for the petitioners on many reported cases. In the case reported as AIR 1983 SUPREME COURT 67 [Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and ors.], the Apex Court has

discussed the difference between the powers of the Court under section 397 (2) and 482 of Cr.P.C. It is observed that section 482 can be used by High Court for quashing of a proceeding of criminal case. It is observed that :-

"10. It is, therefore, manifestly clear that proceedings against an accused in the initial stages can be quashed only if on the face of the complaint or the papers accompanying the same, no offence is constituted. In other words, the test is that taking the allegations and the complaint as they are, without adding or subtracting anything, if no offence is made out then the High Court will be justified in quashing the proceedings in exercise of powers under Section 482 of the present Code."

Thus, the justification for exercise of powers under section 482 in view of the facts of the case is discussed by Hon'ble Apex Court. There were no clear allegations against Directors that they were responsible for conducting of the business of the disputed sample and so, it was held that the High Court was justified in quashing the proceeding.

6. The powers of High Court under Article 227 of the Constitution of India and section 482 of Cr.P.C. are discretionary in nature. In the present cases, the J.M.F.C. has only taken cognizance of aforesaid offences. There is power under section

20-A of the Act to implead manufacturer, distributor or dealer when during trial from the evidence it reveals that such person was also concerned with the offence. However, in the case like present one, when the Directors of the Company are involved, the specific provision given under the Act like section 17 needs to be used. It cannot be said that when aforesaid offences are committed and the Directors are impleaded from the beginning as the accused, as the persons who are vicariously liable, the Criminal Court has no jurisdiction to try the said persons. The power under aforesaid provisions is extraordinary power and it is discretionary in nature. At the time of consideration of any provision of the Act, this Court is required to keep in mind the object behind the Act. The object is to reach to the real culprit and prevent adulteration of food article. In view of the facts and circumstances of the present case, it cannot be said that there is no case at all against the petitioners. It needs to be ascertained in each and every case whether petitioner's case is exceptional in nature and the discretionary powers given by aforesaid provisions need to be used.

7. In the case reported as 1998 F.A.J., 269 SUPREME COURT OF INDIA [State of Haryana Vs. Brij Lal Mittal and Ors.], the Apex Court has compared the provision of section 34 (1) of Drugs and Cosmetics Act, 1940 with the provisions of

section 17 (1) of the Act. In view of the similarity, the Apex Court has observed that vicarious liability of the Director in manufacturing Company for being prosecuted under section 27 of the Drugs and Cosmetics Act can be inferred, if at the material time, the Director was incharge of and was also responsible to the Company for conduct of the business as per the section 34 (1) of Drugs and Cosmetics Act. If sub-sections to section 17 of the Act are taken into consideration, it can be said that there is some difference between section 17 of the Act and section 34 of the Drugs and Cosmetics Act. Under section 17 (2) of the Act, the Company can appoint nominee and in that case, the Directors will be absolved from the liability in such cases and there can be prosecution and conviction of such nominee. The Apex Court held in view of the facts of the reported case that the quashing of the criminal proceeding was possible.

8. The facts of the case reported as 1985 (5) Bom.C.R. 426 (S.C.) : 1997 (2) F.A.C. 107 : 1998 (5) S.C.C. 749 Supreme Court of India [M/s. Pepsi Foods Limited and another Vs. Special Judicial Magistrate and others] were altogether different. The appellants of this reported case had not played any role in manufacturing activity of the beverage which was found to be adulterated. The appellants had given their brand name to other Company for bottling the beverage 'Lahar Pepsi'.

The appellant Company had no licence of manufacturing the offending beverage. In view of the facts of the case, the Apex Court held that the proceeding can be quashed by using provision of Article 227 of Constitution of India and section 482 of Cr.P.C. The difference between Article 226 and 227 is also discussed by the Apex Court. As the proceeding was pending before the subordinate Court, it is observed that Article 227 can be used to correct the error committed by the Criminal Court.

9. In the case reported as 2011 (2) Bom.C.R. (Cri.) 427 (S.C.) : 2011 CRI.L.J. 1012 (SUPREME COURT) [Pepsico India Holdings Pvt. Ltd. Vs. Food Inspector and Anr.] 4, the Apex Court has again held as follows :-

"39. It is now well established that in a complaint against a Company and its Directors, the Complainant has to indicate in the complaint itself as to whether the Directors concerned were either in charge of or responsible to the Company for its day-to-day management, or whether they were responsible to the Company for the conduct of its business. A mere bald statement that a person was a Director of the Company against which certain allegations had been made is not sufficient to make such Director liable in the absence of any specific allegations regarding his

role in the management of the Company."

Similar observations are made by this Court in the cases reported as 2002 (Cri.Supp) Bom.C.R. 434 (A.B.) : 2000 (4) Mh.L.J. 674 [Pannalal Sunderlal Choksi and ors. Vs. State of Maharashtra and anr.] and 2002 Bom.C.R. (Cri.) (B.B.) : 2001 (1) FAC 294 [Keki Bomi Dadiseth and ors. Vs. The State of Maharashtra].

10. This Court has gone through the provisions of Companies Act and the Act. Under section 17 (2) of the Act, the right is given to the Company to appoint a nominee, who can be the Manager or Director of Company. If that is not done, the other portion of section 17 like section 17 (1) (a) (ii) can be used against 'every person', who was in charge of and was responsible to the Company for the conduct of the business of Company and he shall be deemed to be guilty of that offence. The proviso to this sub-section gives right to such person to show that offence was committed without his knowledge and he exercised all due diligence to prevent commission of such offence. Sub-section (4) of section 17 starts with words "notwithstanding anything contained in forgoing subsections". The wording of this sub-section shows that this sub-section is independent of the provisions of sub-section (1) and (2) of section 17 of the Act. It shows that the

prosecution has right to prove that the offence has been committed with the consent, connivance of or is attributable to any neglect on the part of Director and he shall be deemed to be guilty of the offence. This sub-section is there to make director, manager, secretary or other officer of company liable. In this sub-section the words 'every person' are not used.

11. The aforesaid sub-sections of section 17 with relevant explanation in the Act are as follows :-

"17. Offences by Companies -- (1) Where an offence under this Act has been committed by a company--

(a) (i) the person, if any, who has been nominated under sub-section (2) to be in charge of, and responsible to, the company for the conduct of the business of the company (hereafter in this section referred to as the person responsible), or (ii) where no person has been so nominated, every person who at the time of offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company; and

(b) the company, shall be deemed to be guilty of the offence and shall be liable to be

proceeded against and punished accordingly :

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of such offence.

(2) Any company may, by order in writing, authorise any of its directors or managers (such manager being employed mainly in a managerial or supervisory capacity) to exercise all such powers and take all such steps as may be necessary or expedient to prevent the commission by the company of any offence under this Act and may give notice to the Local (Health) Authority, in such form and in such manner as may be prescribed, that it has nominated such director or manager as the person responsible, alongwith the written consent of such director or manager for being so nominated.

Explanation.- Where a company has different establishments or branches or different units in any establishment or branch, different persons may be nominated under this sub-section in relation to different establishments or branches or units and the person nominated in relation to any establishment, branch or unit shall be deemed to

be the person responsible in respect of such establishment, branch or unit.

(3) The person nominated under sub-section (2) shall, until-

(i) further notice cancelling such nomination is received from the company by the Local (Health) Authority; or

(ii) he ceases to be a director or, as the case may be, manager of the company, or

(iii) he makes a request in writing to the Local (Health) Authority, under intimation to the company, to cancel the nomination [which request shall be complied with by the Local (Health) Authority], whichever is the earliest, continue to be the person responsible:

Provided that where such person ceases to be a director or, as the case may be, manager of the company, he shall intimate the fact of such cesser to the Local (Health) Authority :

Provided further that where such person makes a request under clause (iii) the Local (Health) Authority shall not cancel such nomination with effect from a date earlier than the date on which the request is made.

(4) Notwithstanding anything contained in the foregoing sub-sections, where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company not being a person nominated under sub-section (2) such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

12. Section 291 of the Companies Act, 1956 runs as under :-

"General powers of Board.

291. (1) Subject to the provisions of this Act, the Board of directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do :

Provided that the Board shall not exercise any power or do any act or thing which is directed or required, whether by this or any other Act or by the memorandum of articles or the company or otherwise, to be exercised or done by the

company in general meeting :

Provided further that in exercising any such power or doing any such act or thing, the Board shall be subject to the provisions contained in that behalf in this or any other Act or in the memorandum or articles of the company, or in any regulations not inconsistent therewith and duly made thereunder, including regulations made by the company in general meeting.

(2) No regulation made by the company in general meeting shall invalidate any prior act of the Board which would have been valid if that regulation had not been made."

13. The provisions regarding constitution of Board of Directors and powers of the Board of Directors and restrictions on the powers of the Board of Directors show that the Company is expected to act through some human agency. The Articles of Association can designate any natural person or a body of natural persons to be that human agency. Thus, for carrying on the business, a Director or Managing Director becomes the agent of the Company. It is up to the Directors to show that under the constitution of Company, they have power to delegate the powers of Board of Directors to others like Managing Director and that has been done. It is the liability of the Directors to

exercise such degree of scale and diligence as would amount to reasonable care which an ordinary man might take on his own behalf. In view of these provisions, the question arises as to whether the Food Inspector is expected to collect aforesaid information from the Company. For that, one needs to go through the provisions of the Act which give powers to the Food Inspector. In this regard, there is only provision of section 14-A of the Act. As the samples were collected from the manufacturer/ its employees, it can be said that there was no question of seeking more information from the vendor, accused No. 1 with regard to manufacturer, distributor or dealer. In such a case, it needs to be presumed that as per the information supplied by employee of the Company like accused No. 1, from whom sample of milk was purchased, the Food Inspector took further action and filed proceeding against the petitioners.

14. In the present case, servant of Company was found in possession of adulterated cow milk. There is specific allegation that servant was carrying polythene pouches containing milk of the Company. There is sufficient material on such case of Food Inspector. The Company becomes liable for such offence in view of the wording of section 7 read with section 16 of the Act. The relevant portion of section 7 of the Act is as follows :-

"7. Prohibition of manufacturer, sale, etc., of certain articles of food.-- No person shall himself or by any person on his behalf manufacturer for sale or store, sell or distribute--

(i) any adulterated food;

(ii)"

15. The definition of 'person' given in section 11 of Indian Penal Code can be used and it shows that Company is covered under the definition. The prohibition given in section 7 of the Act is complete and it is applicable to servants and agents. Thus, the Company becomes liable for acts of servants. In view of the provisions of Companies Act and the provisions of section 17 of the Act, already quoted, which need to be read together, Directors of Company can be held jointly liable with the Company and also with employee like accused No. 1. The Directors in such a case need to be treated in vicarious relationship, not only with the Company, but also with such employee.

16. The aforesaid discussion shows that it will be matter of evidence and Directors will be required to show that the servant had acted out of the scope of his entrustment in duty. They will also

be required to show that they were acting in good faith and they had taken preventive action that can be reasonably be taken. The initial burden may be on the prosecution to lay down foundation, to make case to satisfy the requirements of provisions of section 17 (1) (a) (ii) or under section 17 (4) of the Act, but, after giving evidence which can form basis, the Directors will have to say about their or other's liability. In view of the aforesaid provisions and the wording of section 17 (4) of the Act, this Court holds that opportunity needs to be given to the prosecution to discharge such initial burden. If that is not done, in no case the prosecution will be successful in tracing the real culprit. Persons like the petitioners form Company not for social purpose, but for making money. This always needs to be kept in mind by the Courts. As there is question of health of public in general and of kids in particular as the milk is being used for kids, the adulteration of milk cannot be taken lightly. In view of the aforesaid provisions and the circumstances, this Court holds that no case is made out for interference either under Article 227 of Constitution of India or under section 482 of Cr.P.C."

7) The relevant facts of the present case are already quoted. In view of the provisions of law discussed by this Court in the case cited supra and the facts of the present two cases,

this Court holds that it is not possible to quash the proceedings filed against the present petitioners.

8) One more circumstance needs to be specifically mentioned in this order. The petitioners/accused from these cases filed the proceeding after about 10 years of the order of issue process. This circumstance shows that the petitioners, directors want to protract the hearing of the cases filed against them. In such cases, tactics are played and such proceeding is filed only when the matter comes up for hearing.

9) In view of the aforesaid circumstances, this Court holds that quashing of the proceedings filed against the petitioners is not possible. Both the petitions stand dismissed.

[T.V. NALAWADE, J.]

ssc/