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

CRIMINAL WRIT PETITION NO. 207 OF 2010

Rajesh s/o. Jugalkishor Agrawal
and others **....Petitioners.**

Versus

The State of Maharashtra and Anr. **....Respondents.**

Mr. D.S. Bharuka, Advocate for petitioners.
Mr. S.A. Ambad, APP for State.

CORAM : T.V. NALAWADE, J.
DATED : 6th July, 2015.

ORDER :

1) The petition is filed for relief of quashing of proceeding filed against the petitioners in the Court of Judicial Magistrate, First Class, Aurangbad. The relief of setting aside the order of issue process made in that matter is also claimed. The Magistrate has issued process against accused No. 1 for the contravention of section 7 [i] r/w. section 2 [ia][a] punishable under section 16[1][a][ii], section 7[i] r/w. section 2[ia][m] punishable under section 16[1][a][i], section 7[i] r/w. section 2[ia][j] punishable under section 16[1][a][i] section 7[iii] r/w. Rule 50[1] punishable under section 16[1][a][ii] and as against accused Nos. 2 to 12 for contravention 7 [i] r/w. section 2 [ia][a]

punishable under section 2[ia][m] punishable under section 7[i] r/w. section 2[ia] [j] punishable under section 16[1][a][i] and section 17 of the Prevention of Food Adulteration Act, 1954 [hereinafter referred to as the 'Act' for short] and Rules thereunder. The challenge is only on one ground viz. there are no specific allegations as against the petitioners about the role played by them in the management of the partnership business. Both the sides are heard.

2) The contents of the complaint and submissions show that sample of 'Badi-Saunf' was collected by Food Inspector from accused No. 1, vendor, who is the retailer from his shop by name Sachin Tobacco Stores, Aurangabad. Accused No. 1 has not filed any such proceeding and he is facing the trial. Other information was collected by the Food Inspector, by issuing notice under section 14-A of the Act, by using the power given to him under the Act. The Food Inspector formed opinion that food article was supplied to accused No. 1 by accused No. 4. Accused No. 4 is described as M/s. Aggrawal and Brothers, resident of 5-22-24, Tilak Path, Aurangabad. Accused Nos. 2 and 3 are partners of this firm and they are real brothers interse and they are also residents of the same address. It is not the case of accused Nos. 2 to 4 that they had appointed nominee under section 17 (2) of

the Act.

3) The accused No. 6 is the main dealer of the manufacturer of the aforesaid food article. As per the information collected, which was given by accused No. 6, accused No. 5 was appointed as nominee of accused No. 6 partnership firm. The name of this dealer firm is M/s. Kashmiri Enterprises, 9/4-B, Kashimri Colony, Yerwada, Pune 411 006. The name of the nominee is Nandkishor Kashmirilal Agrawal resident of 9/4-B, Kashimri Colony, Yerwada, Pune 411 006, the same address which is the address of accused No. 6, dealer firm. So far as the accused Nos. 5 and 6 are concerned, it can be said that there was no scope to them to take the defence of aforesaid nature. Thus, on the face of it, this Court has no hesitation to observe that no relief of quashing of proceeding filed against them can be given.

4) No document like copy of partnership agreement is produced by accused Nos. 2 and 3 to show that the business of accused No. 4 firm was conducted either by accused No. 3 or accused No. 2. In ordinary course, the business of partnership firm is conducted by all the partners unless the other partners authorized one of them to conduct the business. As accused

Nos. 2 and 3 are real brothers interse and they are residing at the same address and information is given against them by the vendor, no fault can be found in the order issued against them by the learned J.M.F.C. Thus, quashing of proceeding filed as against accused Nos. 2 and 3 is not possible.

5) Accused No. 12 is also a partnership firm and it is the manufacturer of adulterated food article. Accused Nos. 7 to 11 are its partners. These accused are real brothers interse and aforesaid description of the partner of dealer firm shows that accused No. 5 is also real brother of accused Nos. 7 to 11. The addresses of accused Nos. 7 to 11 are the same and they show that they are residing at the same address viz. Chetna Industrial Estate, Nagar Road, Pune. There are specific allegations against these accused in the complaint that all these partners were manufacturing the food article and they distributed food article to the dealer and thereby they contravened the provisions of the Act and the Rules framed thereunder.

6) The learned counsel for the petitioners placed reliance on the cases reported as **2008 ALL MR (Cri) 701 [Ghanshyam Mulchand Keshwani & Anr. Vs. State of Maharashtra & Anr.], 2011 CRI.L.J. 1012 [Pepsico India**

Holdings Pvt. Ltd. Vs. Food Inspector and Anr.] and 2015 ALL MR (Cri) 812 (S.C.) [Sunil Bharti Mittal Vs. Central Bureau of Investigation].

7) The first case cited supra is on the effect of sale of packed food item and then disclosure of the name of manufacturer by the vendor with proof of bills. In this reported case, the High Court has discussed the provision of section 14 of the Act. This provision is for the benefit of the vendor and vendor is not before this Court as the petitioner. Vendor needs to prove such defence during trial. There is no need to discuss the rights of the vendor in the present matter.

8) The third case cited supra of **Sunil Mittal** is altogether on different point. In that matter, of 2G spectrum, there was allegation of conspiracy and the case was filed for offences punishable under sections 13 (1) (d) r/w. 13 (2) of Prevention of Corruption Act, 1988 and other provisions. The point involved was whether directors can be held vicariously liable in such case and so, the Apex Court held that there needs to be some material of conspiracy as against the directors. The object behind the provisions of the Act is different and different procedure is provided by the Act for the investigation and for

collecting the material against the accused. There is special provision in this special Enactment like provision of section 17 of the Act which provides for fastening of vicarious liability. In view of these circumstances, the third case cited supra is of no help to the petitioners in the present case.

9) Copy of oral judgment delivered by this Court (other Hon'ble Judge) in **Criminal Writ Petition No. 916/2011 [Vishwas s/o. Dadasaheb Chitalkar and Ors. Vs. State of Maharashtra and Anr.] dated 24th June 2014** is produced by the learned counsel for the petitioners. In that case, the provision of section 141 of Negotiable Instruments Act was considered by this Court and law developed on this point was used in a matter filed under the provisions of present Act. This Court had occasion to discuss the provisions of the Act and also the point involved in the matter in the case reported as **2013 (4) Bom.C.R. (Cri.) 63 [Vilas Marutrao Tanpure and Ors. Vs. State of Maharashtra and Ors.].** The observations made by this Court in paragraph Nos. 4 to 16 are 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 INIDA [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 aways 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."

In addition to aforesaid observations, this Court has no hesitation to observe that the provision of section 141 of N.I. Act is not comparable with the provision of section 17 of the Act as it is altogether different provision and different procedures are provided under the two Acts.

10) The observations made by this Court in the case cited supra are applicable to the present case. It is already observed that the partners of various firms like main dealer and manufacturer are real brothers interse and no record at all is produced by them to show that they had delegated the power to any of the director of accused No. 12 firm. There are allegations of nature already quoted. In view of the position of law discussed above and the specific allegations made against the directors that they were manufacturers, this Court holds that it is not possible to quash and set aside the proceeding filed against the

remaining partners.

11) Before parting with the case, some facts of the present matter need to be mentioned. The case was filed by Food Inspector in the year 1997 and the writ petition came to be filed in the year 2010. The proceeding filed for quashing was not prosecuted and so, it was dismissed in the year 2010 itself. The proceeding then came to be restored in the year 2015. Even though there was no stay from 2010 to 2015 to the proceeding pending before the learned J.M.F.C. and there was no matter in this Court till the year 2015, the case pending before the J.M.F.C. did not make any progress. These circumstances show that only when the matter became ready, the accused rushed to this Court to see that proceeding is stalled. It is noticed that after filing of the proceeding in this Court, submissions are made before J.M.F.C. that it is not desirable for J.M.F.C. to proceed with the matter as the proceeding is filed in High Court. The learned Judges of the subordinate Courts are apprehensive of action from the High Court and so, they avoid to touch the matters when the proceeding like present one are pending in the High Court. Thus, the provisions made are misused and every attempt is made by the persons like present petitioners to see that the case filed against them is not heard and decided.

12. In the result, the petition stands dismissed.

[T.V. NALAWADE, J.]

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