

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

Criminal Writ Petition No. 288 of 2015

Lalankumar Singh S/o Shri Udit
Narayan Singh & Others.

.. Petitioners.

Versus

The State of Maharashtra.

.. Respondent.

Shri. R.N. Dhorde, Senior Advocate, instructed by J.P.
Associates, for petitioners.

Smt. R.K. Ladda, Additional Public Prosecutor, for
respondent.

CORAM: T.V. NALAWADE, J.

DATE : 25th JUNE 2015

ORDER:

1) The petition is filed by accused Nos.5 to 8 of R.C.C. No.233/2009 which is pending in the Court of the Chief Judicial Magistrate, Beed. The order of issue process made in this matter was challenged by the petitioners by filing Criminal Revision No.115 of 2013 in the Sessions Court and this revision is dismissed. Both the sides are heard.

2) In view of the nature of challenge to the order of issue process, not only the facts in brief of the case but the conduct of the petitioners and developments in the matter also need to be stated in brief. A Drugs Inspector, public servant, has filed the aforesaid complaint and order of issue process has been made for offences punishable under sections 18(a)(1) read with sections 16 and 34 punishable under section 27(d) of the Drugs and Cosmetics Act, 1940 (hereinafter referred to "the Act") against the manufacturer, accused Nos.4 to 10 and also authorised dealer appointed by the manufacturer, accused Nos.1 to 3. M/s Cachet Pharmaceuticals is a private limited company (accused No.4) and has manufacturing unit at Thana Baddi, Tehsil Nalagath, District Solan (Himachal Pradesh). This company is having its Head Office at Worli Mumbai. Accused Nos.5 to 8, petitioners, are Directors of this company. Accused No.9 is Assistant Manager Production and approved manufacturing chemist. Accused No.10 is Assistant Manager Quality Assurance and approved quality control chemist. Dealer, accused No.3, is public limited company and is selling pharmaceutical products of accused No.4 through the

branches of accused No.3 which are spread all over.

3) On 30-8-2006, the Drugs Inspector appointed under the Act collected samples of Hemfer syrup bottles having description on labels as manufacturing licence No.MB/05/268 B.No.HMS/6015 CMfg date May-2006 manufactured in India by Cachet Pharmaceuticals Pvt. Ltd. VPO Thana (Baddi) District Solan marketed by Alkem Laboratories Ltd. Mumbai from the premises of M/s Priya Agencies Beed Maharashtra under the provisions of the Act. Sample was sent to Maharashtra State Drug Control Laboratory, Maharashtra State, Mumbai for testing and analysis on 31-8-2006. On 26-2-2007 the complainant, Drugs Inspector, received the report dated 16-2-2007 in respect of the sample and the report is to the effect that the drug was not of standard quality for the reason that content of cyanocobalamin in the samples was less than 39% quantity mentioned on the label of the drug. By visiting the premises of the Priya Agencies, the Drugs Inspector supplied copy of the report of the analysis on 26-10-2007. On the same day during inquiry made by the Drugs Inspector with Priya Agencies information was

supplied about main dealer and the name of accused No.3, M/s Alkem Laboratories was supplied by the retailer.

4) On 13-3-2007 copy of report of analysis was sent to accused No.3 by the Drugs Inspector as provided under sections 25(2) and 23(4)(iii) of the Act. On 29-3-2007 the head office of accused No.4 company requested the Drugs Inspector to send second sample for analysis as provided under the Act. Then application was moved by accused No.4 in the Court of the Chief Judicial Magistrate on 12-4-2007 for sending the second sample to Central Laboratory. The learned Chief Judicial Magistrate made order to send second sample on 24-4-2007 and sample was sent to the Central Drugs Laboratory Kolkatta. The Central Drugs Laboratory sent report dated 10-7-2007 and this report is consistent with the report given by the Maharashtra State Drug Control Laboratory. Thus as against the quantity of 39% MCG/15 MM of the aforesaid substance mentioned on the label, the substance of 2.925 MCG/15 MM was found in the drug.

5) Copies of the report of the Central Laboratory were supplied to the main dealer, the manufacturer and retailer. On 16-10-2008 the Drugs Inspector visited the depot of accused No.3 dealer. The dealer informed that it had purchased 13000×200 ml of bottle of the drug from a particular batch, the batch from which sample was collected. The dealer informed that all the bottles were already distributed by it.

6) On 21-8-2008 the Drugs Inspector sent letter to the manufacturing unit of accused No.4 from Himachal Pradesh and requested to supply information regarding quantity of aforesaid drug manufactured in the unit and also other information as needs to be provided under the Act. In the letter dated 12-9-2008, the Manufacturer contended that copy of report supplied by the Drugs Inspector was not signed by the Director of Central Laboratory and it was bearing signature of in charge Director and so it wanted to have copy signed by the Director. The Drugs Inspector informed that it was open to the manufacturer to approach learned Chief Judicial Magistrate as sample was sent by the Chief Judicial

Magistrate to the Central Laboratory. Ultimately on 12-2-2009 accused No.4 supplied the information regarding the quantity of the drug produced under the said batch and some other information regarding names of the Directors etc. was supplied. Copy of agreement made with accused No.3 dealer was also supplied. Here itself it needs to be mentioned that in the information supplied, there is some information about the label but that information is not in consistent with the information collected by the Drugs Inspector. However, this point is not argued in the present matter. Even if information supplied by accused No.4 is accepted as it is, in view of the report of the Central Drugs Laboratory the material *prima facie* makes out the aforesaid offences.

7) The correspondence made by accused No.4 shows that most of the letters were sent by so called authorized signatory but the name of the authorized signatory was not written initially. The letter with which information was supplied (letter dated 12-2-2009) shows that it was signed by one Shri. A.P. Gupta (V.P. Technical). Copy of resolution of the Board of Directors of accused

No.4 company was supplied to show that AP Gupta was given power to sign correspondence of the company. Copy shows that it was signed by Chairman but the name of the Chairman was not mentioned. Accused No.8 Rajeshkumar, a Director, has signed the copy of the resolution to certify that it was true copy of the resolution. Similarly, there is signature of accused Rajeshkumar on the agreement made with accused No.3, dealer.

8) To the Drugs Inspector, list of directors was supplied showing that accused Nos.5 to 8 were the Directors of the accused No.4 company. Names of one manufacturing chemist and quality assurance chemist were also supplied. Copy of licence was supplied to show that these three experts / officers were shown on the licence for concerned work. The record supplied shows that initially two Directors like Dr. D.N. Singh and Shri. S. Singh were on the record as Directors of respondent No.4. Copy of Articles of Association is supplied and it shows that it was open to the directors to appoint one or two managing directors. To the Managing Directors power could have been given, delegated by Board of Directors.

However, the petitioners, Directors, have not come with the case that any Managing Director was appointed and some power was given or delegated by the Board of Directors to him.

9) The aforesaid information needs to be kept in mind while considering the grounds on which the order of issue process is challenged. Some grounds which were not raised in the revision filed in the Sessions Court were also argued in the present proceeding. It was submitted by the learned Senior Counsel for the petitioners that on the certified copy of the complaint supplied to the petitioners, there is no formal order of issue process. Though, it is true that on the certified copy produced by the petitioners there is no such formal order but copy of Roznama (daily notings of the proceeding) shows that such order was made on 30-3-2009. The Roznama dated 30-3-2009 reads as follows :

- (i) Complaint filed by Vilas Vishwanath Dusane.
- (ii) Copy of list of documents containing 44 document. Order was made on Exhibit 1 (of issue process). Take

entry in register of criminal cases and issue summons against accused. List the matter for appearance of accused on 18-6-2009.

This record is sufficient to infer that the order of issue process was made and after that summons were issued against accused to ask them to appear in the Court.

10) Roznama dated 2-11-2009 shows that subsequently also summons were sent but no accused turned up. This Court has gone through the Roznama dated 16-6-2010, 6-8-2010 and all the Roznamas written upto 8-11-2014. These notings show that accused had the knowledge but they preferred not to appear in response to the summons issued by the learned Chief Judicial Magistrate. It appears that for the accused, copy of stay order made by the Sessions Court in the aforesaid revision was produced and then proceeding was stayed. After dismissal of the revision, the present matter came to be filed and this Court also for some time stayed the proceeding and there is entry of such stay in the Roznama. The contents of revision petition filed in the

Sessions Court show that present petitioners had the knowledge about filing of the proceeding and of the order of issue process. It does not look probable that they had no knowledge that the complaint was filed against the company as there was no question of non service of summons on the company. In view of these circumstances, this Court did not call original record of the proceeding. Calling of the proceeding again protracts the hearing of the case and it prevents the trial Court from making progress in the matter.

11) Learned Senior Counsel for the petitioners drew attention to provision of section 34 of the Act. He has placed reliance on reported and un reported cases. He submits that in view of provision of Section 34 of the Act it was necessary for the complainant to make specific allegations against the petitioners, Directors to show the exact role played by them in the conduct of the business of the company. This Court has already referred to the material which is collected by the Drugs Inspector. The record shows that the business of the company was conducted by the Board of Directors consisting the

petitioners. This Court is quoting the portion of the complaint also hereinafter to show the exact allegations made against the petitioners in the complaint.

12) In view of nature of aforesaid grounds raised by the learned Senior Counsel it is necessary to make some discussion about the provision of Section 34 of the Act and the law developed under this provision. The provision of section 34 runs as under :

"34. Offences by companies.-- (1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as 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 or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), 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, 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.

Explanation.-- For the purposes of this section -

- (a) "company" means a body corporate, and includes a firm or other association of individuals, and
- (b) "director" in relation to a firm means a partner in the firm."

13) Learned Senior Counsel for the petitioner has placed reliance on following reported and un-reported cases :

- (1) **2003 Bom CR (Cri) 1522 (Umesh Sharma v. State of Maharashtra);**
- (2) **2002 (Cri. Supp) Bom CR 434 (Pannalal Sunderlal Choksi v. State of Maharashtra);**
- (3) **1997 BCI 103 (Shri Shyam Madanmohan Ruia v. M.R. Mahakalkar);**
- (4) **AIR 1998 SC 2327 (State of Haryana v. Brij Lal Mittal);**
- (5) **2011 AIR SCW 341 (Pepsico India Holdings Pvt. Ltd v. Food Inspector);**

- (6) **2010 AIR SCW 5899 (Dinesh B. Patel v. State of Gujarat);**
- (7) **Criminal Petition NO.15263/2011 (Ritesh Yogendrapal Sharma v. The State of Karnataka) decided on 19-11-2011;**
- (8) **Criminal Application No.2466/1997 (Charandas Vallabhadas Mariwala v. State of Maharashtra) decided on 10-7-2014;**
- (9) **AIR 2005 SC 3315 (ICICI Bank Ltd. v. Municipal Corporation);**
- (10) **AIR 2013 SC 1433 (GHCL Employees Stock Option Trust v. India Infoline Ltd.);**
- (11) **2014 Cri. L.J. 2071 (Dr. Tera Chinnappa Reddy v. Government of Andhra Pradesh).**

The facts of the first case (cited supra) show that the order of issue process was challenged by the Managing Director and this order was quashed by this Court (other Hon'ble Judge). The second case was however in respect of director of a company and relief was granted to them on the aforesaid ground. In the third case (supra) the Apex Court held that there were no allegations in the complaint to indicate even *prima facie* that the accused were in charge of the business of the company and they are also responsible to the company for conduct of business. The matter was decided in favour of the accused by the High Court and in view of the facts of that case, the

Apex Court refused to interfere in the order made by the High Court. In the other decisions given by the High Court similar observations are made. The case of Pepsico India Holdings (cited supra) was under the provisions of Prevention of Food Adulteration Act.

14) On the other hand, learned Additional Public Prosecutor has placed reliance on following two reported cases - (i) **2000 (2) FAC 58 (U.P. Pollution Control Board v. M/s Mohan Meakins Ltd.)**; and, (ii) **2001 Drugs Cases 168 (Amery Pharmaceuticals v. State of Rajasthan)**. The Sessions Court has referred to some observations made by the Apex Court in the case reported as **2010 AIR SCW 5899 (Dinesh B. Patel v. State of Gujarat)**.

15) In some cases decided by this Court (cited supra) provision of Section 17 of the Prevention of Food Adulteration Act, 1954, provisions of Cable Television Network (Regulation) Act, 1955, provisions of Standards & Weights Measurement (Enforcement) Act are also considered and discussed.

16) In view of the observations made by the Hon'ble Apex Court, it can be said that the provision of section 34 of the Act and section 17 of the Prevention of Food Adulteration Act are similar to some extent. The object behind both the enactments is similar. However, the forms and contents of the licences under these two Acts are different in view of the nature of use of the things covered under the two Acts. For getting licence under the present Act, manufacturer is expected to give names of the experts, like manufacturing chemist, analysis chemist, quality control chemist etc. and only after that he gets the licence to manufacture. Learned Senior Counsel for the petitioners made a submission that as names of three experts were supplied for obtaining licence by accused No.4, these experts can only be held responsible under the provision of Section 34 of the Act and the prosecution cannot lie against the directors. This submission is not at all acceptable. In view of provision of section 34 of the Act not only directors but also its officers who are involved in the manufacture of such substance can be prosecuted. The purpose behind appointments of such chemists, officers is different and that is a condition of licence.

The business however, is conducted by directors and not the officers. The provisions of Negotiable Instrument Act cannot be compared with the provisions of the Act as there is separate and different procedure which needs to be followed before filing the complaint. The object is also different.

17) Section 47 of the Water (Prevention and Control of Pollution) Act, 1974 relating to offences of companies is also similar to the provision of section 34 of the Act. The Hon'ble Apex Court had occasion to consider the requirements of necessary averments in a complaint filed against the company and directors under the provisions of the Water Pollution Act in the case reported as 2000 (2) FAC 58 (cited supra). At para 12 of this judgment relevant contents of the complaint are quoted and these averments were held to be sufficient to take cognizance of offence against directors. The relevant portion is as under :

"12. In the above context what is to be looked at during the stage of issuing process is whether there are

allegations in the complaint by which the Managers or Directors of the Company can also be proceeded against, when the company is alleged to be guilty of the offence. Paragraph 12 of the complaint reads thus :

"That the accused persons from 2 to 11 are directors/managers/partners of M/s Mohan Meakin Distillery, Daliganj, Lucknow, as mentioned in this complaint are responsible for constructing the proper works and plant for the treatment of their highly polluting trade effluent so as to conform the standard laid down by the Board. Aforesaid accused persons are deliberately avoiding to abide the provisions of Sections 24 and 26 of the aforesaid Act which are punishable respectively under sections 43 and 44 of the aforesaid Act, for which not only the company but its directors, managers, secretary and all other responsible officers of the accused company, responsible for the conduct of its business are also liable in accordance with the provisions of Section 47 of the Act".

The appellant has further stated in paragraph 23 of the complaint that "the Chairman, Managing Director and Directors of the company are the persons responsible for the act and, therefore, they are liable to be proceeded against according to the law."

18) In the case of Dinesh (supra) the Apex Court has compared the facts of Dinesh case with the facts of

Brij Lal Mital's case reported as **1998 (5) SCC 343**.

Relevant paragraphs are paragraphs 5,7 and 8 and they are as under :-

"5. Para 6 of the complaint reads as under :-

"Looking to the testing report of above medicine Denilyte M 506072, presence of fungus is noted, hence it has been declared as uneven. Therefore, by manufacturing of this medicine for sale, firm of M/s. Denis Chem Lab. Ltd., Chhatral, Ta. Kalol, District Gandhinagar and its Directors have made breach of this Act. Therefore, this is punitive offence at first sight."

In para 8 of the complaint, it has been contended as under :-

"thus, I request to carry out legal proceedings against above accused M/s. Denis Chem Lab Ltd., Block No.457, Chhatral, Ta. Kalol, District Gandhinagar and its directors."

Earlier to that, in para 4 of the complaint, the complainant had referred to the written representation given by accused No.1 director of the firm and accused No.2 Himanshu C. Patel and Quality Assurance Manager Mr. Mehul M. Rao during the inspection to the inspecting authorities. That representation is not before us.

7. In our opinion, the factual situation in both the matters is quite different which is apparent from the fact that firstly the controversy of the complaint not having any necessary averments was not present before the High Court in the reported decision. Secondly, in that case, there was only a bald statement that the respondents were directors of the manufacturers. In the present matter, however, the respondents were not arrayed only because they were the directors. That is certainly one reason. However, in addition to that, a statement has been made in paragraph 6 of the complaint that by manufacturing of the concerned medicine for sale, the company and its directors had committed the breach of the Act. Thus, there was an allegation that the directors were privy to the manufacturing of medicine by the company.

8. In our opinion, the averments in paras 4,5,6 and 8 of the complaint cannot be described as the bald statements. The emphasized portion in para 6 of the complaint suggests manufacturing of the medicine by the company and its directors. The averments in all these paras would have to be read together and the para 6 of the complaint would have to be read in the light of the other averments. It seems that in the reported decision in the complaint, there was no link pleaded in the directors and the manufacturing process. That is not the situation here. This was the case of the manufacture of the drug for human consumption and after it was tested in laboratory, was found to be defective since there was a growth of fungus, which is a very serious matter related to public health."

In the present matter, to ascertain the exact averments against the directors, paras 3, 25 and 30 of the complaint can be referred to and they are as under :

"3. That, Accused no.5 to 8 are the Directors of the M/s Cachet Pharmaceuticals Pvt. Ltd. village Thana Baddi, Tehsil Nalagarh Dist Solan (H.P.) Pin code 173205 head office-415, Shahanahar, Worli Mumbai-400018 and looking after day to day activities of the company.

That, Accused no.4 is the pvt. Ltd. company and is doing the business of manufacturing, buying, selling, importing and exporting of and or dealers in Pharmaceutical, Cosmetics, Beauty aids, Oils, Chemicals, Food products and provisions, Veterinary and Surgical Equipments, Medicinal preparations including Spirit.

That, Accused no.4 has mfg. unit at no.(1) Village Thana Baddi, Tehsil Nalagarh Dist. Solan (H.P.) Pin code 173205 and no.(2) at C-582, Ricco Ind. Area Bhiwadi, Dist Alwar, Rajasthan.

That, accused no.4 are holding drug mfg. Licence No. MNB/05/267 in form 25 and licence no.MB/05/268 in form 28 granted on 17.3.2006 valid upto 16.3.2011.

25. That, on 12-2-2009, the complainant visited and inspected the premises of M/s Cachet Pharmaceuticals Pvt. Ltd. village Thana Baddi, Tehsil Nalagarh Dist Solan (H.P.)

Pin code 173205 that is accused no.4. At the time of inspection, Shri Ajay Prakash Gupta Vice President Technical, accused no.9 and 10 were present. During enquiry, it was revealed that Accused no.4 to 10 manufactured 'Hemfer syrup Mfg Lic. No.MB/05/268 B. No.HMS/6015 CMfg Date May-2006 which has been declared to be NOT OF STANDARD QUALITY at the premises of M/s Cachet Pharmaceuticals Pvt. Ltd. village Thana Baddi, Tehsil Nalagarh Dist Solan (H.P.) Pin code 173205 that is accused no.4 under licence No.MB/05/268 and sold the above said drugs to M/s Priya Agencies Behind Dr. Vaidya Hospital, Jalna Road, Beed, Dist Beed through M/s Alkem Laboratories Ltd. situated at reality warehousing Pvt. Ltd. Gut No.2323/1 property no.115, Pune Nagar road, At Post Wagholi, Tal. Haveli, Dist Pune - 412207. The list of the said drugs has been duly approved by licensing authority Food and Drug Administration, Shimal (HP) and includes permission to manufacture "Hemfer Syrup" granted on 17.3.2006.

The manufacturing record of the said drug in question revealed that -

I. That, the said drug has been started to manufacture on 9th May 2006. It was completed on 13-5-2006 under the personal supervision and technical guidance of approved manufacturing chemist Shri. Ashok Kumar that is accused no.9.

II The said drug has been tested and analysed by Accused No.10 i.e. Shri Naresh Roy who is approved for

quality control chemist in Chemical and instrumental analysis.

III. The Batch size of the said drug is 6000 Ltrs. total qty. packed 29640 x 200 ml. The pack size of drug is 200 ml.

IV. The said batch of the drugs in question was release for sale on 13-5-2006 as per the analytical report no.605N/0015 dated 13.5.2006 the said report bears the signature of M.K. Sharma as analyst and Shri. Naresh Roy as a quality assurance chemist. accused no.10.

30. That, the complainant, therefore, charges that Accused no.4 to 10 on or before 30.8.2006 did manufacture for distribution, distribute and sold 'Hemfer syrup Mfg. Lic. No.MB/05/268 B.No.HMS/6015 CMfg. Date May-2006 which is declared to be Not of Standard quality vide Certificate of test or analysis by Govt. Analyst, Maharashtra State drugs control laboratory, Mumbai - 51. Report no.M-4600/2006 dated 13.2.2007 in form no.13 and certificate of test or Analysis by the Central Drugs Laboratory no.2-1/2007-P & P/CC-16/177 dated 10-7-2007 in form no.2 to M/s Priya Agencies Behind Dr. Vaidya Hospital Jalna Road, Beed, Dist Beed through M/s Alkem Laboratories Ltd. situated at reality warehousing Pvt. Ltd., Gut No.2323/1 property no.115, Pune Nagar road, At Post Wagholi, Tal. Haveli, Dist Pune - 412207 i.e. accused no.3 and thereby committed an offence under section 18(a) (1) read with section 16 and

34 punishable under section 27(d) of the drugs and cosmetics act 1940."

19) The sum and substance of the allegations mentioned in the present complaint is that accused Nos.4 to 10 had manufactured the substance -"Hemfer syrup", the sample of which was collected by the Drugs Inspector. Information as against the directors was collected by the Drugs Inspector as provided under sections 18A, 18B and 22 of the Act. Whatever record was supplied for accused No.4 is already mentioned by this Court. Even from that record it can be said that all the directors were conducting business of the company and so they were involved in the manufacturing process. Thus there is no force in the submissions made by the learned Senior Counsel that there are no specific allegations against the present petitioners. Not only the allegations made in the complaint but the record which is mentioned in the complaint need to be considered by the Criminal Court for taking cognizance of the matter. The Court cannot ignore provision of Section 34(2) of the Act. Though under section 34 power is given to the Court to subsequently

add the manufacturer during trial, the accused have no right to say that they can be added subsequently after leading of the evidence when material of the aforesaid nature is already available.

20) This Court had occasion to consider and decide similar point in a case reported as **2013(4) Bom CR (Cri) 63 (Vilas v. State of Maharashtra)**. This case was under the provisions of Prevention of Food Adulteration Act, 1954. The provision regarding commission of offence by company and its directors under the said Act was considered by this Court and the facts of the said case were similar. The observations are applicable in this case. Relevant observations are at paragraphs 4 to 16 and they 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 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."

21) For the aforesaid reasons this Court holds that it is not possible to interfere in the decision given by the Sessions Court and it is not possible to set aside the order of issue process made against the petitioners. Learned Senior Counsel requests for grant of stay for some period as this Court is dismissing the proceeding. This Court hold that such relief also cannot given.

22) Relevant noting of the Roznama of the case is discussed. The case is of 2009, petitioner have not yet appeared, they have not even applied for bail and they have not given even bonds for appearance. The order of issue process can be challenged but that does not mean that persons like present petitioners can be allowed to avoid even appearance in the criminal case and giving bail bonds. It is already observed that till 2013 the petitioners avoided to appear in the matter and they came with a case that first time, in the year 2013 they came to know about

the present proceeding. These contentions are not at all acceptable. The case against the present petitioners is a glaring instance of the manner in which rich and influential persons can avoid the trial of a case of serious nature like the case filed under the Drugs Act. In view of these circumstances, this Court holds that further stay cannot be granted.

23) In the result, the petition stands dismissed.

Sd/-
(T.V. NALAWADE, J.)

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