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

CRIMINAL WRIT PETITION NO.280 OF 2017

1. Sanjay Nensukhlal Katariya,
Age major, Occu. Business

2. Vijay Ramchandra Munot,
Age major, Occu. Business

Both alleged Partners of
M/s Vijay Medico,
R/o Gala No.8 and 9,
3881/A, Prabhu Apartments,
Juna Bazaar, Ahmednagar .. Petitioners

Versus

The State of Maharashtra,
at the instance of Drug Inspector,
in the office of the Assistant
Commissioner, Food and Drugs
Admin., Rang Mahal, Sarjepura,
Ahmednagar .. Respondent

Mr R.R. Mantri, Advocate with Mr R.R.Sancheti, Advocate for petitioners
Mr M.M. Nerlikar, A.P.P. for respondent-State

**CORAM : S.S. SHINDE AND
A.M. DHAVALE, JJ**

**DATE OF RESERVING
THE JUDGMENT : 26.09.2017**

**DATE OF PRONOUNCING
THE JUDGMENT : 09.10.2017**

JUDGMENT (Per A.M. Dhavale, J.)

1. Rule. Rule returnable forthwith. With the consent of parties, heard finally at the stage of admission.

2. This is petition under Article 226 of the Constitution of India and under Section 482 of Cr.P.C. for quashing of Order dated 28.11.2016 in R.C.C. No.89 of 2003 before Judicial Magistrate, First Class, Court

No.1, Ahmednagar and for quashing of the entire proceedings in R.C.C.No.89 of 2003 and 57 of 2004.

3. Heard learned Advocate Mr R.R. Mantri for the petitioners and Mr M.M. Nerlikar, learned A.P.P. for State. Perused the record produced. The F.I.R. at R.C.C.No.89 of 2003 was filed in the Court of Judicial Magistrate, First Class, Ahmednagar against 34 accused persons, including the applicant no.1 Sanjay and applicant no.2 Vijay (accused nos.1 and 3 respectively) for offences punishable under Sections 465, 467, 420 read with Sec.34 of Indian Penal Code and under Sections 18 (a) (vi), 18 (e) read with Section 65 (5) (1) 65 (5) (3) of the Drugs and Cosmetics Act 1940. It was initiated on the basis of F.I.R. lodged by one Deelip Jagtap and Inspector under Drugs and Cosmetics Act. The main allegation seems to be that the petitioners are partners of a licenced medical shop namely M/s Vijay Medico at Old Bazar, Ahmednagar. They sold to accused nos.4 to 34 injection 'Oxitocin' by issuing a bill for 'Zaroor' W Condoms. Thus, they have prepared false bills and they have cheated the government and public and also committed offences under the Drugs and Cosmectis Act. The accused nos.1 and 2 filed application Exh.99 before the learned Judicial Magistrate, First Class, Ahmednagar. It is contended therein that Vijay Medicos was a partnership firm and accused nos.1 and 2 were partners thereof.

4. There was one additional case No.R.C.C. No.57/2004 filed by the same complainant as a private complaint under Section 18 read with Sec.65 of Drugs and Cosmetics Act. The partnership firm is accused

no.4 whereas accused no.3 was appointed as a competent authority to manage the business of the shop. As per provisions of Drugs and Cosmetics Act, if there was any infringement of provisions of Drugs and Cosmetics Act, the person competent appointed to manage the business should be held responsible and accused nos.1 and 2 who are mere partners cannot be held responsible. Hence, they should be discharged. The learned Magistrate observed that similar to the present application Exh.99, there was one more application filed Exh.92 earlier, which was rejected by his predecessor on 24.10.2005 on merits. The said order was challenged in revision, but it was also dismissed by the Sessions Court, Ahmednagar. The application was moved for protraction. Preferring such application is abuse of process of law and the application was devoid of merit (hence, it was rejected with costs of Rs.10,000/-).

5. Learned Advocate Mr R.R. Mantri has pointed out that on the same facts, the State through Drug Inspector Mr D.K. Jagtap filed R.C.C.No.57 of 2004 against 35 accused for offences punishable under Sections 18(a) (vi) read with Section 65 (5) (1), 65(5) (3) of the Drugs and Cosmetics Act. Learned Judicial Magistrate, First Class Court No.8, Ahmednagar on 9.9.2005 passed order for amalgamation of this case with R.C.C.No.89 of 2003.

6. Mr Mantri argued that earlier application was filed by the accused no.1 on the ground that in view of Section 32 of the Drugs and Cosmetics Act, the Police were not authorised to submit charge-sheet and only Inspector or any other competent authority specified

therein can file complaint. Section 32 of the Drugs and Cosmetics Act reads as under :

> “32. Cognizance of offences :
>
> (1) No prosecution under this Chapter shall be instituted except by—
>
> (a) an Inspector; or
>
> (b) any gazetted officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government or a State Government by a general or special order made in this behalf by that Government; or
>
> (c) the person aggrieved; or
>
> (d) a recognised consumer association whether such person is a member of that association or not.

It was argued that since this provision was mandatory, the filing of charge-sheet and taking cognizance thereof was not according to law. It is also claimed therein that the alleged false representation had no nexus with the delivery of the property and no damage or harm was caused to the property of the complainant. Therefore, ingredients of Section 420 were not attracted. Offences under Sections 465, 467 of Indian Penal Code were non-cognizable and only aggrieved person can file complaint under those Sections.

7. Mr R.R.Mantri, learned Advocate for petitioners relied on **Anita Hada's** case **2012 (4) Mh.L.J.527**, in which it is held that the company (partnership firm) is a necessary party in private complaint. Therefore, the prosecution against applicants no.1 and 2 was not tenable.

8. Secondly, he submitted that there is no necessary averments in the complaint as per Section 34 of the Act that the present applicants were in-charge and were responsible to the firm for the conduct of the business of the firm and in absence of such averment, the complaint was not tenable. He argued that accused no.3 is admittedly appointed as a competent person and, therefore, the petitioners cannot be held liable as per Section 34 of the Act.

9. He also argued that the imposing of costs of Rs.10,000/- was illegal as there was no attempt for protraction. In fact, most of the accused persons were not attending the Court and case is pending since 2000 only for the purpose of securing attendance of the remaining accused persons. He relied on following rulings :

1) **Anita Hada Vs. Godfather Travels, 2012 (4) Mh.L.J.527**

2) **Raj Kapoor Vs. Laxman, 1980 AIR (SC) 605**

3) **Rajendra Vs. State of Maharashtra – Criminal Writ Petition No.846 of 2016** decided by Division Bench of Aurangabad Bench on 3.10.2016, to which one of us (Justice S.S. Shinde) was a member.

10. Mr M.M. Nerlikar, learned A.P.P. pointed out that as per Section 210 of Cr.P.C. the F.I.R. and the charge-sheet have been clubbed together and the firm was made party as accused no.4 in private complaint. He submitted that paragraph 2 of the complaint shows that accused no.1 and 2 are partners of accused no.4 and they are holding drug licence in their name. According to him, these pleadings are sufficient to attract Section 34 of the Drugs and Cosmetics Act against the petitioners.

11. The points for determination with our reasons are as follows :

(I) Whether the charge-sheet in R.C.C.No.89 of 2003 is tenable in the light of Section 32 of the Drugs and Cosmetics Act. If not, what effect ?

(II) Whether the proceedings by way of private complaint R.C.C. No.57 of 2004 deserves to be quashed on account of (a) absence of necessary averment as per Section 34 of the Drugs and Cosmetics Act and (b) appointment of competent person to manage the business of firm.

Just like Section 32 of the Drugs and Cosmetics Act, Section 195 of Cr.P.C. provides that no Courts shall take cognizance of any offence punishable under Sections 172 to 188 of Indian Penal Code and abetments or conspiracy to commit such offences except on the complaint in writing of that Court or by such Officer of that Court as that Court authorises in writing in this behalf.

This provision came for interpretation before the Apex Court in **State of Punjab Vs. Rajsingh, AIR 1998 SC 768 and Manohar M. Galani Vs. Ashok N. Advani, (1999) 8 SCC 737,** it has been held that what is barred is taking of cognizance except on complaint by the specified competent authorities. The said bar is not applicable for registration of F.I.R. and for carrying out investigation, but the Police cannot file charge-sheet. The Police have to supply the material collected by such investigation to the competent authority who can file complaint and can use this material in support of his complaint.

12. Therefore, registration of F.I.R. and investigation of the crime cannot be faulted with but filing of the charge-sheet is certainly against the provisions of law.

13. The copy of complaint in R.C.C. No.57/2004 produced shows that the complainant has filed complaint against the partnership firm Vijay Medico as well as two partners thereof, who are the applicants before us. Therefore, the reliance on **Anita Hada Vs. Godfather Travels, AIR 2012 SC 2795** is misplaced. It is not relevant that the firm was not made a party in the charge-sheet since the filing of charge-sheet itself is against the provisions of law.

14. The offence in this respect is committed by a partnership firm Vijay Medico, who is the owner of the shop by virtue of Section 34 of the Drugs and Cosmetics Act. Every person who at the time of offence was committed, was in-charge and was responsible for the company for the conduct of the business of 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. Applicants no.1 and 2 were admittedly partners of accused no.4 partnership firm. However, this fact by itself is not sufficient to subject them to prosecution. It is essential that the complaint should disclose averment that these partners were in-charge of and were responsible to the company (firm) for the conduct of the business of the company. In the present case, accused no.4 firm was running medical shop for which it is essential to appoint a competent person to manage the shop premises. The shop can be owned by any person, but the competent person must be a Pharmacist. Accordingly, accused no.3 was appointed as competent person and the complaint itself discloses that applicants no.1 and 2 had appointed him as competent person. When the shop was visited, he was in-charge of the shop and the applicants 1 and 2 were not present there. The complaint does not even remotely disclose allegations that the applicants no.1 and 2 were in-charge and were responsible for conduct of business of the firm. In absence of such averment, they cannot be prosecuted by invoking Section 34 of the Drugs and Cosmetics Act. In this regard, we rely upon **State of Haryana Vs. Brij Lal Mittal and ors., 1998 Cr.L.J. 3287 SC.** In **Standard Chartered Bank Vs. State of Maharashtra, AIR 2016 SC 1750,** provisions of Section 141 of Negotiable Instruments Act which is para materia with the provisions of Section 34 of the Drugs and Cosmetics Act came for consideration of the Apex Court. In paragraph 17, relying on number of rulings, it has been held in order to bring case within Section 141 of the Negotiable Instruments Act, the complaint must disclose the necessary facts, which makes a person liable.... In paragraph 18, it is observed thus:

> “18. On the basis of the aforesaid analysis, the Court in this regard concluded that:- "It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied."

Since these material averments are not there and prima facie, accused no.3 is in-charge of the conduct and business of the medical shop, the complaint against applicants no.1 and 2 merely because they are partners of the firm, which owns a medical shop is not maintainable.

The view taken in **Standard Chartered Bank Vs. State of Maharashtra** (cited supra) is again taken in the latest judgment of Supreme Court in **Ashoke Mal Bafna Vs. Upper India Steel Mfg. & Engg. Co.Ltd., AIR 2017 SC 2854,** in which it is held that :

> “ In absence of specific averments in complaint about the role of the accused in activities of company, the proceedings against him are liable to be quashed.”

15. It is also argued that the learned trial Judge imposed heavy costs of Rs.10,000/- on applicants no.1 and 2 claiming that the matter was protracted by the applicants by filing applications Exh.92 and 99. We are informed that the matter has not yet begun and most of the other accused are yet not served, the protraction of the case from 2000 till today is largely on account of inaction of the complainant in taking effective steps for service of summons on the accused persons.

16. It is true that if the petitioners wanted to claim discharge, they should have filed only one application taking all possible grounds in the same, but as we are allowing this writ petition, we find that the ground raised by them was not frivolous or without merits.

17. Though the trial Courts have power to impose costs, it should be proportionate to the costs and the delay caused and the ground on which it is imposed. We find that in the present case, there was no occasion for the trial Judge to impose costs and the costs imposed is exorbitant. The Courts should always remember that the justice should not be only done, but it should also appear to have been done. When the costs imposed is disproportionately high, the parties coming before the Court seeking justice may get a feeling or apprehension that the trial Judge is against them and there will be no fair trial. Thus, the trial Court should observe restraint in imposing costs and should be utmost careful while imposing heavy costs. In the present case, we find imposition of such a heavy costs of Rs.10,000/- was neither justified on merits nor the quantum is proportionate to the conduct of the petitioners. Hence, the same is liable to be set aside.

In the light of above facts, we deem it fit to allow the present petition. Hence, we pass the following order :

ORDER

(I) The Criminal Writ Petition is allowed in terms of prayer clauses (B) and (C) which read thus :

> "B. Call for the record and proceedings of RTC No.89/2003 State vs. Sanjay Nensukhlal Katariya and others, pending on the file of the Judicial Magistrate, First Class, Court No.1 at Ahmednagar, and on perusal of the same, or otherwise, quash and set aside the order Dt. 28.11.2016 below Exh.99 and be pleased to allow the application Exh.99 and quash and set aside the entire proceedings of RTC 89/2003 and 57/2004 qua the petitioners.
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> C. The order saddling the cost of Rs.10,000/- may also be quashed and set aside."

(ii) It is clarified that the complainant may request and use the papers of investigation in support of the complaint as against the other accused.

(A.M. DHAVALE, J.) **(S.S. SHINDE, J.)**

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