IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 247 OF 2005

1. Ashok s/o Murarilal Agrawal,
Age 53 years, Occ. Business,
(Partner, Jenirik Products, 119/C,
Katedan Industrial Estate, Hyderabad)
R/o. 318, Madhuban My Home,
Srinagar Colony, Pangagutta,
Hyderabad (A.P. State).

2. Rameshchandra s/o Murarilal Agrawal,
Age 56 years, Occ. Business,
(partner, Jenirik Products, 119/C,
Katedan Industrial Estate, Hyderabad),
15, D.K. Nagar, Jubali Hills, Road No.51,
Hyderabad (A.P. State)

3. Jenirik Products,
119/C, Katedan Industrial Estate
Hyderabad A.P. State) ...Petitioners

versus

The State of Maharashtra
Through the Drugs Inspector,
Food and Drugs Administration
(M.S.) Beed ...Respondent

.....

Mr. Rajendra Deshmukh, advocate for the petitioners
Mr. S.W. Munde, A.P.P. for respondent-State

.....

CORAM : V. K. JADHAV, J.

**Date of Reserving
the Judgment : 09.12.2016**

**Date of pronouncing
the Judgment : 11.01.2017**

JUDGMENT:-

1. Being aggrieved by the order dated 8.8.2002 passed by the learned Chief Judicial Magistrate, Beed, below Exh.16 in R.C.C. No. 648 of 1996 and the judgment and order passed by the 4th Adhoc Additional Sessions Judge, Beed dated 12.4.2005, in criminal revision application No. 69 of 2004, thereby confirming the order passed by the Chief Judicial Magistrate, Beed, original accused persons approached this Court by filing present writ petition.

2. Brief facts, giving rise to the present writ petition, are as follows:-

a) On 26.6.1995, the complainant/Drug Inspector had drawn a sample of “Mixin Plus Suspension”, Batch No. 32-94, manufacturing date August 1995 and expiry date July, 1997 from Gajanan Agency, situated at Beed, Tq. and District Beed, for the purpose of test/analysis as per the provisions laid down under the Drugs and Cosmetics Act 1940 (for short referred to as “the Act of 1940”) and the Rules thereunder. On 27.6.1995, the complainant Drug Inspector, sent one sealed portion of the said sample to the Government Analyst, (M.S.), Drug Control Laboratory, Bombay as per the procedure laid down in the Act of 1940 and the Rules thereunder. The Government Analyst (M.S.) Bombay, vide his report

dated 28.02.1996 in Form No.13, alongwith manufacturers method for analysis sent a report and the same was received by the complainant Drug Inspector, on 7.3.1996. The said report has declared that the sample was not of standard quality and the content of Furazolidone was more than Schedule “V” limits when tested as per manufacturers method. (248.57%) of labelled amount.

b) On 7.3.1996, the complainant Drug Inspector referred one copy of the report of the aforesaid Government Analyst to the partner/competent person of said Gajanan Agency, Beed with instructions to stop distribution of the Drug in question and further asked for discloser of name, address and other particulars of the person/firm from whom they acquired the said drug. It was revealed that said Gajanan Agency, Beed has procured the drug in question from Raghuveer Enterprises, Jalna. Meanwhile, on 2.3.1996, the Joint Commissioner (Aurangabad Division), Food and Drugs Administration, (M.S.) ordered the Assistant Commissioner, Food and Drugs Administration (M.S.) Beed to prosecute the manufacturer of the drug in question as per the provisions of the Act of 1940. The said order was received by the complainant Drug Inspector on 11.03.1996.

c) On 18.4.1996, the complainant Drug Inspector alongwith

Drug Inspector, Jalna had visited the premises of the said firm M/s. Raghuvir Enterprises and it was revealed that the said firm had purchased the drug in question from Tradelinks, Nagpur. On visiting the aforesaid firm at Nagpur, it was revealed that the said firm Tradelinks, had purchased the said drug from Invinex Pharmaceuticals Pvt. Ltd. Hyderabad. It was thereafter revealed during the course of investigation that the said Invinex Pharmaceuticals Pvt. Ltd. Hyderabad had purchased the drug in question from the petitioner accused No.3 on 31.8.1994 in various quantities.

d) On 12.8.1996 and 13.8.1996, the complainant Drug Inspector alongwith Drug Inspector, Nanded and Drug Inspector, Hyderabad visited the premises of the petitioner original accused No.3 for further investigation. The complainant Drug Inspector vide his letter dated 12.08.1996 forwarded one sealed sample portion of the said drug alongwith one copy of certificate of test or analysis alongwith details of results of test or analysis with protocols of the test applied to petitioner No.1 original accused No.1 and obtained its receipt on the office copy of the said letter. Further, on 18.8.1996 and 13.8.1996, a request was also made to furnish the documents regarding manufacturing, analysis, distribution of the drug in question and also the documents regarding constitution of the firm and accordingly

petitioner accused No.1 produced the certified photo copies of necessary documents. It was revealed that said drug was manufactured by petitioner No.3 original accused No.3 firm for sale or for distribution and sold it to said Invinex Pharmaceuticals Pvt. Limited, Hyderabad and subsequently it was distributed, as detailed above, to Gajanan Agency at Beed.

e) The complainant Drug Inspector had thereafter filed a complaint before the learned Chief Judicial Magistrate, Beed vide R.C.C. No. 648 of 1996 dated 2.12.1996 and as per the order passed by the learned Chief Judicial Magistrate, Beed, the complainant also deposited the sealed sample portion of the Drug alongwith letter dated 25.9.1996 and also copy of application received from the petitioner original accused No.3 contending therein that the petitioner accused intends to adduce evidence in contravention with the analyst's report. It has alleged in the complaint that the petitioners original accused Nos. 1 and 2 on behalf of the petitioner original accused No.3 manufactured the said drug for sale or distribution which is not of standard quality and thereby contravened the provisions of Section 18(a) (i) r.w. Section 16 and 34 of the Act of 1940, punishable under Section 27(d) of the said Act.

f) On appearance, the petitioners accused filed an application

Exh.16 before the learned Chief Judicial Magistrate, Beed seeking discharge and for dismissal of complaint for want of territorial jurisdiction. The learned Chief Judicial Magistrate, by its impugned order dated 8.8.2002 below Exh.16 rejected the said application. Being aggrieved by the same, the petitioners preferred criminal revision application No. 69 of 2004 and the learned 4th Adhoc Additional Sessions Judge, Beed, by its impugned order dated 12.4.2005 dismissed the revision application by confirming the order passed by the Chief Judicial Magistrate, Beed. Hence this writ petition.

3. Learned counsel for the petitioners submits that, the complaint is conspicuously silent as to how the cause of action for filing complaint has arisen within the jurisdiction of learned C.J.M. Beed. Mere drawing of sample within the jurisdiction of C.J.M. Beed does not give any cause of action to file the complaint at Beed. The petitioners accused have not sent/delivered/sold the sample to any of the agency at Beed, but it is the said Raghuveer Enterprises, Jalna which had sold the said drug at Beed. In absence of aforesaid agency being arrayed as an accused to the complaint, the complaint against present petitioners, who are admittedly permanent residents of Hyderabad (A.P.) and also manufacturing the drugs at Hyderabad (A.P.), is not tenable for want of territorial jurisdiction in the court at

Beed.

The learned counsel for the petitioners submits that the Drug in question with the earlier formula of which the sample was drawn in the present case had already been stopped under the stop production order issued by the Drug Control Administration, Hyderabad (A.P. State), and as such, the petitioners are required to stop and not to manufacture the said drug w.e.f. 27.3.1996 and as such, no further criminal/penal action is warranted. The petitioners had also withdrawn the remaining stock of said drug from the market as per the instructions of the competent authorities and further destroyed the same.

4. Learned counsel for the petitioners submits that the petitioners original accused Nos. 1 and 2 are partners of petitioner No.3 firm, who have no actual concern with the production activities or with quality control activities and as such, they cannot be held responsible for the alleged lapse. There is no averment in the complaint to the effect that the petitioners original accused Nos. 1 and 2 were in charge and responsible for the conduct of business of the petitioner original accused No.3 in view of the provisions of Section 34 of the Act of 1940 and no case is made out against the petitioner original accused Nos. 1 and 2.

The learned counsel for the petitioners submits that the said drug in question is supposed to be stored at 'cool and dry place' by the concerned retailer and wholesalers. There is no document to show that the said drug was kept in cool place from where the sample was drawn. The Form 13 was handed over to the petitioner firm on 12.8.1996 and for near about 6 months, the drug in question remained under the custody of the Drug Inspector. It is nowhere explained in the complaint that the sample of drug was stored in proper condition. Even there is no record to show that before sending the sample to CDL Calcutta, the drug in question was kept in proper storage condition. If the sample drug in question is kept lying in improper condition, it loses its potential value.

5. Learned counsel for the petitioners submits that when the sample is sent to the Government analyst, the standard of operative procedure should be followed. After completion of standard operative procedure, the junior scientific Officer used to sign the record, however, the said record was not produced before the court. The same procedure is also required to be followed by CDL Calcutta. These primary reports were not at all collected and produced before the court. Thus, Form 13 and Form 2 are not valid. Further, no notification has been produced on record to show that the person, who has drawn the sample and filed the complaint, was authorized to

do so. The complainant Drug Inspector has violated the mandatory provisions of Sections 20 and 21 of the Act of 1940. Learned counsel submits that both the courts below have not appreciated this legal position correctly and erroneously rejected application Exh. No.16.

Learned counsel for the petitioners in order to substantiate his contentions, placed reliance on the following judgments:-

1. State of Haryana vs. Brij Lal Mittal and others, reported in AIR 1998 SC 2327,

2. Municipal Corporation of Delhi vs. Ram Kishan Rohtagi and others, reported in 1983 CRI.L.J. 159,

3. Sabitha Ramamurthy and another vs. R.B.S. Channabasavaradhya, reported in IV (2006) CCR 8 (SC),

4. M/s Bhawar Inc Corporation and others vs. State of Karnataka, Judgment of Karnataka High Court in criminal petition No. 4744 of 2008 decided on 10.6.2009,

5. M/s. Food World Super Markets Ltd. and others vs. State at the instance of the Drugs Inspectors, Bangalore, Judgment of Karnataka High Court in criminal petition No. 4818 of 2005 decided on 12.12.2007,

6. Narendrakumar Dani and others vs. The State of

Maharashtra and another, reported in 2001 Drugs Cases 531,

7. Merind Limited vs. State of H.P. and others, reported in 2007 Drugs Cases 518,

8. D.P. Soni and another vs. State of Rejasthan, reported in 2007 Drugs Cases 148,

9. Venkateshwaran Narayanan Ayyar and others vs. State of M.P. reported in 2006 Drugs Cases 532,

10. M/s. Cadila Health Care Limited and others vs. The State of Rajashtan and others, reported in 2007 Drugs Cases 222,

11. R.K. Khandelwal and another vs. State, reported in 1965 (2) Cri. L.J. 439,

12. State of Maharashtra vs. R.A. Chandawarkar and others, reported in 1999 Drugs Cases 94,

13. Mrs. Kavita Mittal and another vs. The Drugs Inspector, Ludhiana and State of Punjab, judgment of Punjab and Haryana High Court in criminal misc. No. 4603-M of 1993 decided on 29.07.1993,

14. Ashok H. Maheshwari and others vs. State of Rajasthan reported in 2005 Drugs Cases 143,

15. M/s. Vishal Pharmaceuticals and another vs. State of

Madhya Pradesh, reported in 1999 Drugs Cases 363,

16. Ashok Kumar Tyagi vs. State of H.P. and others, reported in 2015 (1) Drugs Cases 185,

17. State of Karnataka vs. M/s Channakeshawa Medicals and others, reported in 1993 Drugs cases 56,

18. Vetcha Venkata Raju vs. State of Andhra Pradesh, reported in 1994 Drugs Cases 94,

19. M/s. Prem Pharmaceuticals and others vs. State of M.P. reported in 1999 Drugs Cases 357,

20. State of Goa vs. Tejpal P. Pandia, Proprietor and another reported in 2007(2) EFR 109 (SC)

21. State of Punjab vs. Nohar Chand, reported in AIR 1984 SC 1492,

22. Judgment in the case of State of Gujarat vs. Agro Chemical and Animal, decided by Gujarat High court on 29.1.1979,

23. M/s. Shivraj Tobacco Company and others vs. State of Maharashtra, reported in 1982 (1) Prevention of Food Adulteration Cases, 314

6. Learned A.P.P. for the respondent State submits that, the drug in question was sold/distributed by the petitioner manufacturer

to M/s. Gajanan Agency, Beed through various dealers, distributors. In view of the provisos of Section 18(A) (i) of the Act of 1940, no person shall himself or by any other person on his behalf manufacturing for sale or distribution or sell or stock or exhibit or offer for sale or distribute any drug which is not of standard quality, or is misbranded, adulterated or spurious and thus, in terms of the said provisions the complaint filed before the court at Beed is maintainable. The learned A.P.P. submits that subject drug was for pediatric use and it is a matter of serious nature. The complaint is maintainable before the court at Beed as the petitioners are responsible for distribution of the said drugs which was not of standard quality. As per the provision of Section 179 of Cr.P.C. the offence is triable by the Court within whose jurisdiction the act is done or where the consequence has ensued. The said drug was manufactured for the purpose of sale to the consumers and the consumers of the said drug, which is not of standard quality, would face the consequences thereof. This consequence is in fact integral part of the manufacture since manufacture of said drug without its sale, has no meaning. The substandard drugs having delirious and dangerous consequence on the consumer, may spread in various parts of the Country. As per the Pharmacopeia of the relevant year in respect of the drug, which is subject matter of the present petition, in the condition of storage, the cool and dry place is not mentioned.

It appears from the relevant Pharmacopeia of India of this particular drug that the storage condition is “store in well closed, light resistant containers”. Learned A.P.P. submits that the report of the Government Analyst, Bombay as well as report of CDL Calcutta nowhere adversely commented on the container of the said drug. Learned A.P.P. submits that both the courts below, therefore, have rightly rejected application Exh.16. No interference is required. There is no substance in the writ petition. Writ petition is thus liable to be dismissed.

Learned A.P.P., in order to substantiate his contentions, placed reliance on the judgments in the following cases:-

I) M/s. Medisearch Laboratories and others vs. State of Goa, reported in, 1997 Drgus Cases 94;

ii) Order dated 25.6.2015 of this Court in criminal writ petition No. 288 of 2015.

iii) Copy of Pharmacopeia of India of the relevant year.

iv) Dinesh B Patel and others Vs. State of Gujarat and others reported in (2010) 11 Supreme Court Cases 125.

7. The Drug “Mixin Plus Suspension”, manufactured by the petitioner accused No.3 at Hyderabad and the sample was drawn by

the complainant Drug Inspector from Gajanan Agency, Beed on 26.6.1995 for the purpose of test and analysis. It was revealed that the said drug was supplied by M/s Raghuvir Enterprises, Jalna. It was also revealed in the further enquiry that the drug was purchased by M/s. Raghuvir Enterprises, Jalna from Tradelinks, Nagpur. It was also revealed that said drug was purchased by Tradelinks, Nagpur from Invinex Pharmaceuticals Pvt. Ltd. Hyderabad. After due enquiry, it was revealed that said drug was purchased by the said Invinex Pharmaceuticals Pvt. Limited, Hyderabad from the petitioner original accused No.3, who has manufactured the said drug.

8. Learned counsel for the petitioners vehemently submitted that entire complaint is silent as to how the cause of action for the complaint has arisen within the jurisdiction of Court at Beed. Merely drawing of sample within the jurisdiction of the court at Beed, does not give any cause of action and in absence of the party from which the sample is taken by the Drug Inspector as an accused to the complaint, the complaint only as against the petitioners original accused Nos. 1 to 3, who are permanent residents of Hyderabad (A.P.) and also registered as firm at Hyderabad, is not tenable for want of territorial jurisdiction. It is an admitted position that on 26.6.1995 respondent No.2 complainant, Drug Inspector, took sample of the drug “mixin plus suspension” manufactured by the

petitioner accused No.3, from Gajanan Agency, Beed. Learned counsel submits that the complainant Drug Inspector has not made said Gajanan Agency, M/s. Raghuvir Enterprises, Jalna, M/s. Tradelinks, Nagpur and M/s. Invinex Pharmaceuticals Pvt. Limited, Hyderabad as an accused and thus, the court of C.J.M. at Beed has no territorial jurisdiction to entertain the complaint.

9. Learned counsel for the petitioners has placed his reliance on the judgment in the case of ***State of Punjab vs. Nohar Chand (supra)***. It was a case of manufacturing of sub standard fertilizer and the Supreme court held that where the sub standard fertilizer is marketed will equally have jurisdiction to try the manufacturer of the sub standard fertilizer whose manufacturing activity is at a different place. In para Nos. 5, 6 and 7 of the judgment, the Supreme Court has made the following observations:-

> *"5. The respondent, the manufacturer of the sub-standard fertilizer is to be tried alongwith those who marketed the sub-standard fertilizer manufactured by him as his agents. The question is whether the court where the sub-standard fertilizer is marketed would have jurisdiction to try the manufacturer of the sub-standard fertilizer whose manufacturing activity is at a different place. This very argument was posed before the Division Bench of the High Court. The High Court after referring to Sections 179 and 180 of the Code of Criminal Procedure, 1973 held that the court where sub-standard fertilizer was found to be marketed will have the*

jurisdiction to try the manufacturer of sub- standard fertilizer even if the manufacturing activity is at an entirely different place. The Division Bench held that the manufacturer as well as the dealer can be tried at a place where the consequences of the manufacturing and selling of sub-standard fertilizer had ensued as envisaged in Sections 179 and 180 of the Code of Criminal Procedure. That in our opinion appears to be the correct view in law.

6. *Section 179 provides that when an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a court within whose local jurisdiction such thing has been done or such consequence has ensued. Section 180 provides that where an act is an offence by reason of its relation to any other act which is also an offence or which would be an offence if the doer were capable of committing an offence, the first-mentioned offence may be inquired into or tried by a court within whose local jurisdiction either act was done.*

7. Now if manufacturing sub-standard fertilizer is by itself an offence and marketing the sub-standard fertilizer is itself a distinct offence but they are so inter-connected as cause and effect, both can be tried at one or the other place. If one manufactures the sub-standard fertilizer, wherever it is marketed the inter-relation or casual connection is of cause and effect. The situation will be adequately covered by Secs. 179 and 180 of the Code of Criminal Procedure. We are in agreement with the later decision of the Division Bench rendered on March 9, 1983 that the court where the sub-standard fertilizer is being marketed will equally have the jurisdiction to try the manufacturer of sub-standard fertilizer. This is so obvious that any further discussion appears to us to be superfluous."

10. Learned A.P.P. has vehemently submitted that in view of the provisions of Section 179 of Cr.P.C. the offence is triable where the act is done or where consequences have ensued. The sub standard drugs having delirious and dangerous consequences on the consumer may spread in various parts of the country. It is not possible to take view that the manufacturer can be prosecuted only at the place of manufacture of the drugs and such stand may lead to escape the defaulting manufacturer from the prosecution. The learned A.P.P. has placed his reliance on the judgment in the case of ***M/s. Medisearch Laboratories and others vs. State of Goa (supra)*** wherein earlier cases on this point have been referred including the judgment in the case of ***State of Punjab vs. Nohar Chand (supra)***. The learned Single Judge of this Court has also referred to other judgments on the point under consideration i.e. (I) State vs. Nathumal Damumal, 1979 Drugs Cases 11 and (ii) Smt. Sunder Ben and another vs. State of Maharashtra (Criminal Revision application No. 117 of 1983). In para 11 of the judgment, this Court has made following observations:-

> *"11. The matter can be looked at from another angle. The drugs are manufactured for the purpose of sale to the consumers and the actual consequence of misbranded manufactured drug is on*

the consumer. This consequence is in fact integral part of manufacture since manufacture of drug without its sale, has no meaning. The misbranded drugs having delirious and dangerous consequence on the consumer, may spread in various parts of the Country. It is not possible to take the view that the manufacturer can be prosecuted only at the place of manufacture of drugs, because such stand may lead to escape of defaulting manufacturers from prosecution. There may be cases where the prosecution is satisfied that in view of Section 19(3) of the Act, the seller is not liable for prosecution. Drug Inspectors, under Section 22 of the Act, are empowered to take samples within local limits of the area in which they are appointed. They can file complaints only in the Court having jurisdiction over the local limits of the area in which they are appointed. In such eventualities, if the seller cannot be prosecuted in view of Section 19(3) of the Act, the drug inspector will have no power to file complaint in the Court in whose jurisdiction the adulterated drug was manufactured. This would mean that the manufacturers of drugs would not be subject to prosecution in the State in which the adulterated drug is found for the purpose of sale and distribution. Moreover, under Section 32 of the Act even aggrieved consumer can file complaint where the adulterated drug was sold. It is the consumer who ultimately bears the brunt of such drug. In the absence prosecution of seller, who may be protected under Section 19(3) of the Act, the consumer will be forced to file the complaint at the place where the drug in question was manufactured which may be far off place. Moreover, even though initially the prosecution may be launched against both, the manufacturer and the seller, but in the course of trial, the seller may establish that he is protected under Section 19(3) of the Act and, in such eventualities, the trial against the manufacturer may also be questioned on this count.

11. Section 3(f) of the Drugs and Cosmetics Act 1940 defines the term manufacturer which reads as under:-

> *"**3. Definitions**- In this Act, unless there is anything repugnant in the subject or context,-*
>
> *(a) to (e) .....*
> *(f) "manufacture" in relation to any drug or cosmetic includes any process or part of a process for making, altering, ornamenting, finishing, packing, labelling, breaking up or otherwise treating or adopting any drug or cosmetic with a view to its sale or distribution but does not include the compounding or dispensing of any drug, or the packing of any drug or cosmetic in the ordinary course of retail business; and "to manufacture" shall be construed accordingly;*

12. Section 18 (a) (i) of the Act of 1940 prescribes the prohibition of manufacturer for sale or for distribution, or sell, or stock or exhibit or offer for sale or distribute any drug which is not of a standard quality, or is misbranded, adulterated or spurious. In view of sub-section (3) of Section 19 of the Act of 1940 though the distributor or dealer is also liable under Section 18, however, the defence under Section 19 of the Act of 1940 would be available to the dealer or distributor which are not available to the manufacturer. In the instant case, in terms of the report submitted by the Government Analyst, Bombay, the complainant Drug Inspector was satisfied that in view of section 19(3) of the Act of 1940, the seller is not liable for prosecution. The report of the Government Analyst refers that the

same is not of a standard quality for the reason that the contents of Flurazolidone is more than Schedule “V” limits when tested as per the manufacture method (248.57%) of the labelled amount. In the backdrop of the above, it appears that the complainant Drug Inspector filed the complaint against the manufacturer alone. In view of the provisions of Section 22 of the Act of 1940, the Drug Inspector is empowered to take samples within the local limits or area in which he is appointed. In such contingency, if seller cannot be prosecuted in view of the provisions of Section 19(3) of the Act of 1940, it is difficult to accept the submission made on behalf of the petitioners that the Drug Inspector will have no power to file complaint in the court, in whose jurisdiction adulterated drug was not manufactured. In view of the provisions of section 32 of the Act of 1940, even an aggrieved person can initiate the prosecution under the provisions of Act of 1940.

13. In view of the above discussion, I do not find any substance in the submission made on behalf of the petitioners that learned Chief Judicial Magistrate, Beed has no territorial jurisdiction to entertain the complaint. Both the courts below have considered this legal aspect and rejected application Exh.16.

14. Learned counsel for the petitioners submits that in cause title

of the complaint, M/s. Jeneric Products is mentioned as accused No.3 and it is not mentioned as to who represents the accused No.3 company. Except the bald statement that petitioner Nos. 1 and 2 are partners of the firm, there are no allegations to indicate that even prima facie that they were at the relevant time, in charge and responsible for conduct of the business of the firm. Learned counsel submits that the case under Section 34 of the Act of 1940 against the petitioners accused Nos. 1 and 2 is not made out. Learned counsel in order to substantiate is contentions, placed reliance on the cases as mentioned in foregoing paragraphs.

15. In the case of State of Haryana Vs. Brij Lal Mittal and others., (supra) reported in AIR 1998 Supreme Court 2327, three respondents/ directors were being prosecuted with the aid of Section 34(1) of the Act of 1940 and referring the case of Delhi Municipality vs. Ram Kisan, reported in AIR 1983 SC 67 in the facts of the said case, agreed with the view taken by the High Court that no case against directors has been made out ex-facie on the allegations made in the complaint and the proceedings against them are rightly quashed.

16. In the case of ***Sabitha Ramamurthy and another vs. R.B.S. Channabasavaradhya*** (supra) wherein the vicarious liability

of the directors is considered in respect of dishonour of cheque and it is observed that the said vicarious liability can be inferred so far as the company registered or incorporated under the Companies Act, only if requisite statements, which are required to be averred in complaint petition are, made so as to make accused therein vicariously liable for offence committed by company and further there is no statement that those directors were in charge of the business of the company.

17. In the case of M/s Bhawar Inc Corporation Vs. State of Karnataka in Criminal petition No. 4744 of 2008, the Karnataka High court in absence of averments in the complaint against the other partners that they are responsible for the conduct of business of the partnership firm, quashed the proceedings under the penal provisions of the Drugs and Cosmetics Act 1940.

18. In the case of M/s Food World Super Markets Ltd., Vs. State at the instance of the Drugs Inspector Circle-II (supra) in Criminal petition No. 4818 of 2005 wherein the Karnataka High court had an occasion to consider the question whether all directors are responsible for the offence of Essential Commodities Act and held that in absence of any allegations made in the complaint, they are not responsible for the alleged offence.

19. In the case of Narendrakumar Dani and others vs The State of Maharashtra and another (supra) reported in 2001 Drugs Cases 531, wherein the question of prosecution of all partners was involved and it is observed that there is no even averment in the complaint that they are in-charge of the business of the company and thus, this Court quashed the proceedings against the partners of the manufacturing company by relying upon the Supreme Court judgment in the case of State of Haryana vs. Brijlal Mittal (supra).

20. In the case of Merind Limited Vs. State of H.P. and others reported in 2007 Drugs Cases (DC) 518 Himachal Pradesh (supra), High court has taken similar view and considered the vicarious liability of the directors in absence of the allegations and the statement in the complaint that they were in-charge of the company or responsible for the company for the conduct of its business, and held that the proceedings against them at the threshold are not maintainable. Similar view is also taken in the case of D.P.Soni and another vs. State of Rajasthan (supra) reported in 2007 Drugs Cases (DC) 148 by Rajasthan High Court and Madhya Pradesh High Court has also taken similar view in the case of Venkateshwaran Narayanan Ayyar and others vs. State of M.P. (supra) reported in 2006 Drugs Cases (DC) 532 and in case of M/s Cadila Health Care

Ltd., and others Vs. The State of Rajasthan and others reported in 2007 Drugs Cases (DC) 222 Rajasthan High Court has also taken similar view.

21. In the case of R.K.Khandelwal and another Vs. State (supra) reported in 1965 (2) Cri.L.J. 439 Allahabad High Court held that no director or the partner of the company can be convicted of the offence under Section 27 of the Act of 1940 unless it is proved that the substandard drug was sold with his consent or connivance or was attributable to any neglect on his part, or it is proved that he was a person in charge of, and responsible to the Company for the conduct of the business of the Company. In the case of State of Maharashtra vs R.A.Chandawarkar and others (supra) reported in 1999 Drugs Cases 94, the Single Judge of this court has also taken similar view.

22. In the case of Mrs. Kavita Mittal and another vs The Drugs Inspector, Ludhiana and State of Punjab (supra) in Criminal Misc. No. 4603 of 1993, the Punjab and Haryana High Court and in the case of Ashok H. Maheshwari and others vs State of Rajasthan (supra) reported in 2005 Drugs Cases (DC) 143 the Rajasthan High Court and in the case of Ashok Kumar Tyagi vs State of H.P. Reported in 2015 (1) Drugs Cases (DC) 185 Himachal Pradesh High

Court, in the facts of the said cases, have also taken similar view.

23. In all the cases, relied upon by the learned counsel for the petitioners, various High Courts and the Supreme Court held that, in absence of any specific averments in the complaint that the directors or the partners at the relevant time, were in charge and responsible to the company for conduct of its business, proceedings against them under the provisions of the Act of 1940 are not maintainable.

24. In the instant case, in para 16 of the complaint, it has contended that during the visit of premises of the manufacturer i.e. the petitioner accused No.3 on 18.8.1996 and 13.8.1996 a request was made to furnish the documents regarding manufacturing analysis/distribution of the drugs in question and also the documents regarding constitution of the firm. The petitioner accused No.1 M/s. Ashokkumar s/o Muralilal Agrawal one of the partner of the firm, produced the certified photo copy of necessary documents. In the backdrop of this, in para 23 of the complaint, it has contended that the petitioners-original accused Nos. 1 and 2, on behalf of accused No.3 manufacturer, did manufacture for sale or distribution, not of a standard quality of drug viz. Pediatric Mixin plus suspension batch 32/94 manufacturing date August 1994 and expiry date July, 1997, manufactured in India by petitioner No.3 Firm at 119/C Katedan

Industrial Estate, Hyderabad marketed by Invinex Pharmaceuticals Pvt. Limited, Hyderabad and thereby contravened the provisions of section 18(a) (i) r.w. section 16 and 34 of the Act of 1940 punishable under Section 27(d) of the said Act. It has specifically averred in para 24 of the complaint that the complainant also alleged that the petitioner accused Nos. 1 and 2 on behalf of accused No.3 i.e. firm, on or before 10.4.1995, did distribution at Beed drug of Paediatric Maxin Plus suspension and thus contravened the above provisions of the Act of 1940. It thus appears that there are specific allegations made against petitioner original accused Nos. 1 and 2.

25. In the case of Dinesh B. Patel and others vs. State of Gujarat and another (supra) reported in (2010) 11 SCC 125 by distinguishing the facts of the case of State of Haryana vs. Brij Lal Mittal (supra), in para 9 and 10 of the judgment, the Supreme Court has made the following observations :-

> *"9. 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

10. Under the peculiar circumstances of this case and realizing the seriousness of the allegations, we would not take a technical view based on pleadings in the complaint. Mr. Raichura contended that as per the settled law by this Court in complaints under Section 138 of the Negotiable Instruments Act against company and directors also specific averment about the active role of directors in running the company has to be made, failing which the directors cannot be proceeded against. Same logic should apply even in the present case. We cannot agree. Firstly, the language of Section 34 (2) of the Act substantially differs from the language of Section 141 of the Negotiable Instruments Act. Secondly, here we are dealing with the offence which has the direct impact on the public health. We, therefore, would choose not to interfere with the order of the High Court. It will be open for the directors to show to the Trial Court that they had nothing to do with the manufacture process and, therefore, they should not be held liable under Section 34 (2) of the Act."

26. Thus, the averments made in the complaint as referred to above, cannot be described as bald statement. It further appears that such averments have been made in the complaint on the basis of the documents produced by the petitioners original accused Nos. 1

and 2 before the complainant during his visit to the premises of the company. Further, the petitioners have not raised this ground in their application Exh.16 and the petitioners sought dismissal of the complaint solely on the ground of territorial jurisdiction and even in the criminal revision application filed before the Sessions Court, no such ground was raised. Even the petitioners have not made any oral submissions before the Sessions Judge at Beed with reference to the provisions of Section 34 of the Act of 1940. It thus appears that the petitioners have not disputed their position that they were responsible to the company for the conduct of its business. Even assuming that the petitioners can raise such legal point at any time, there are specific averments in the complaint about their involvement and therefore, no case is made out for quashing of the proceedings or dismissal of the complaint on this ground.

27. Learned counsel for the petitioners submits that the sample of the drug was required to be stored in cool place. It is a matter of record that the said drug was transported from one place to another place, from one agency to another agency and there is no evidence even prima facie to indicate that the said drug was stored in cool place. Further the photo copy of Form 13 was handed over to the petitioner company on 12.8.1996. Thus, ultimately the drug in question was under the custody of the Drug Inspector for six months.

It has neither been mentioned in the complaint nor explained anywhere in the record that even the Drug Inspector had stored the said drug sample in proper condition. Even before the sample was sent to the CDL Calcutta, there is no record to show that the drug in question was stored in proper condition.

28. Learned A.P.P. has brought to my notice the Pharmacopoeia of India of the relevant year in respect of the drug which contains pediatric mixin plus suspension. As per the Government analyst report, each 10 ML of the sample contains MetronidazoleBenzoate equivalent to Metronidazole, Diiodohydroxyquinoline and Furazolidone. In the relevant Pharmacopoeia of India, the storage condition is prescribed as “store in well-closed light resistant containers”. It has not contemplated in the storage condition that the sample drug should be kept at cool temperature. It is nobody's case that the said sample drug was not kept in well closed or light resistant containers. It is also not mentioned on the label appended on the sample of the drug in question that said drug is required to be kept in cool temperature.

29. In the case of ***Narendrakumar Dani and Ors. vs. State of Maharashtra and another (supra),*** the storage conditions are laid down in respect of the drugs and in the backdrop of the same, this

Court has held that two essential standards of the conditions laid down in the Pharmacopoeia of India, are not followed. In the instant case, no such conditions are laid down in the Pharmacopoeia of India in respect of the sample of drug, which is subject matter of the complaint. I do not find any substance in the submissions made on behalf of the petitioners in this regard.

30. Learned counsel further submits that when the sample is sent to the Government analyst, standard operative procedure should be followed and observation report be prepared accordingly. The said record is not produced before the Court. The same procedure should also be followed by the CDL Calcutta in terms of form No.2, after the result analysis test with full particulars. However, on perusal of the report submitted alongwith the complaint, prima facie, it appears that the said procedure and protocol is followed.

31. In the case of ***State of Maharashtra vs R.A.Chandawarkar and others (supra)*** this Court when found ample evidence that the public analyst has not conducted the test properly and fairly to arrive at correct figures, observed that the said analysis report could not be accepted and cannot be acted upon. In the instant case, no such contingency has arisen and the report of the Government analyst as well as report of CDL Calcutta, prima facie, demonstrate that test has

been properly and fairly done to arrive at certain conclusion.

32. The petitioner No.2 has filed his additional affidavit contending therein, interalia, that petitioner No.3 company informed to the Superintendent of Central Excise, Hyderabad on 11.12.1995 that due to rain on 23/24.11.1995 at night time, the rain water had flooded in to the factory premises and had damaged boundary well etc. and partners were practically forced to destroy the stocks and other related damaged records. Further the Director of Drugs Control Administration (Government of Andhra Pradesh), vide its letter dated 27.3.1996 addressed to the petitioners, calling upon them to submit the explanation and also directed the petitioner company to call back entire stock of the said drug forthwith from all persons/firm/institute to whom the drug is supplied. Further by letter dated 16.4.1996, the petitioners had informed to the Director of Drug Control Administration that the said drug pediatric mixin plus suspension is withdrawn with immediate effect since it is banned combination. By letter dated 3.8.1996, the petitioners also informed to the Director, Drug Control Administration, Government of Andhra Pradesh that balance stock of mixin/suspension came to be destroyed in its factory premises in the presence of Drugs Inspector and required to drop further action if any. Learned counsel submits that in view of this matter, when the petitioners have sold their product, as above,

in the year 1994, the prosecution, launched subsequent thereto, is liable to be quashed and set aside on this ground.

33. Learned A.P.P. submits that the petitioners themselves admitted that it is a banned combination and said drug is of a pediatric use and therefore, this matter is serious in nature.

34. In view of the above correspondence, at the most it can be inferred that the said drug was withdrawn as far as possible from the State of Andhra Pradesh. However, no steps have been taken by the petitioners to withdraw the said drug from the market, which was sold prior to aforesaid action taken by the Drug Administration, State of Andhra Pradesh. The report of the Government analyst as well as the certificate of test or analysis by the Central Drug Laboratory, Calcutta, clearly demonstrate that the sample of the drug is not of standard quality, as defined in the Drugs Act and the Rules thereunder. It is not disputed that the said drug was being used for the pediatric use, having its serious impact on the ultimate consumers. I do not find any substance in the submissions made by the learned counsel for the petitioners in this regard.

35. In view of the above discussion, I do not find any reason to interfere in the impugned order passed by the Courts below. There is

no substance in the writ petition. Writ petition is liable to be dismissed and it is accordingly dismissed. Rule discharged.

(V. K. JADHAV, J.)

rlj/