IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

1) **Crl. Revision No.4436 of 2017**
Date of Decision: 02.07.2018

Madan Lal …Petitioner

Versus

State of Haryana …Respondent

2) **Crl. Revision No.4453 of 2017**

Sushil Bansal …Petitioner

Versus

State of Haryana …Respondent

3) **Crl. Revision No.4455 of 2017**

S. C. Gupta …Petitioner

Versus

State of Haryana …Respondent

4) **Crl. Revision No.4456 of 2017**

Sushil Bansal …Petitioner

Versus

State of Haryana …Respondent

5) **Crl. Revision No.4459 of 2017**

S. C. Gupta …Petitioner

Versus

State of Haryana …Respondent

6) **Crl. Revision No.4460 of 2017**

Gian Chand Gupta …Petitioner

Versus

State of Haryana …Respondent

7) Crl. Revision No.4461 of 2017

Gian Chand Gupta …Petitioner

Versus

State of Haryana …Respondent

8) Crl. Revision No.148 of 2018

Jitender Kumar …Petitioner

Versus

State of Haryana …Respondent

9) Crl. Revision No.149 of 2018

Jitender Kumar …Petitioner

Versus

State of Haryana …Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. Kanwaljit Singh, Senior Advocate
with Mr. Abhishek Bajaj, Advocate
in CRR-4436-2017;
Mr. N.S.Shekhawat, Advocate in CRR nos. 4455, 4459, 4460, 4461 of 2017;
Mr. Suman Jain, Advocate in CRR no.4453 & 4456 of 2017;
Mr. Sunil Panwar, Advocate &
Mr. Dhananjay Singh, Advocate
in CRR nos.148 and 149 of 2018
for the petitioners.

Mr. B.S. Virk, DAG, Haryana.

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Amol Rattan Singh, J.

By these 9 revision petitions, the 5 petitioners all challenge the judgments and orders of the learned Courts below, by which they have been convicted for the commission of an offence punishable under Section 27 (a) of the Drugs and Cosmetics Act, 1940 (hereinafter referred to as the Act), and sentenced to undergo rigorous imprisonment for 5 years each, and have also each been imposed a fine of Rs.10,000/-, in default of payment of which each/any of them is to undergo further simple imprisonment for 6 months.

The first of the judgments/orders under challenge are all dated 11.08.2014 and 14.08.2014 passed by the learned Chief Judicial Magistrate, Faridabad, (by the first of which he convicted the present petitioners, the latter being the order of sentence pronounced by him); the second 'set' of judgments under challenge are dated 09.11.2017, passed by the learned Additional Sessions Judge, Faridabad, dismissing the appeals filed by the present petitioners.

2. It needs to be first of all elaborated that other than petitioner Madan Lal, all the other four petitioners have filed two revision petitions each before this Court, which is on account of the fact that two criminal complaints were instituted by the complainant (Drug Inspector, Faridabad) against all four of them, the first arising out of the inspection carried out upon the premises of petitioner Madan Lal (Proprietor of M/s Harsh Surgical and Medicine Centre), and the drug in question (Injection Mannitol) having been purchased and “seized” from him on 13.11.2003. He disclosed the name of the person from whose firm he had purchased it, that being M/s J.P. Medical Agency, its Proprietor being Jitender Kumar who then disclosed that he had

purchased it from M/s S.K. Enterprises, Rohtak, (of which the petitioner Sushil Bansal is stated to be the Proprietor), who eventually disclosed that he had purchased it from the manufacturer, i.e. M/s Ess Jee Pharmaceuticals, the Proprietor and authorised signatory of that firm being petitioners G.C. Gupta and S.C. Gupta respectively. Hence, as regards the drug obtained by the complainants on 13.11.2003, Criminal Complaint no.1419 of 2005 was instituted, and upon conviction of all the accused as were tried before the trial Court, they filed separate appeals, which were heard by the learned Additional Sessions Judge, all the appeals having been decided on 09.11.2017. The details of the appeals filed against the judgment in that complaint, are as follows:-

i) Madan Lal (petitioner in CRR no.4436 of 2017): Criminal Appeal no.55 of 201;
ii) Sushil Bansal (petitioner in CRR no.4453 of 2017) and Jitender Kumar (petitioner in CRR no.149 of 2018): Criminal Appeal no.56 of 2014;
iii) S.C. Gupta (petitioner in CRR no.4459 of 2017): Criminal Appeal no.53of 2014;
iv) G.C. Gupta (petitioner in CRR no.4460 of 2017): Criminal Appeal no.54 of 2014.

Thus the first set of revision petitions before this Court all pertain to the judgments of the trial Court and appellate Court as arise out of Criminal Complaint no.1419 of 2005.

3. The second set of revision petitions arise from Criminal Complaint no.1418 of 2005, in which Madan Lal was not an accused because upon he having disclosed on 13.11.2003 that he had purchased the drug in question from M/s J.P. Medical Agency, on the next day, i.e. on 14.11.2003,

the team of Drug Inspectors also inspected the premises of the said firm (M/s J.P.Medical Agency) and obtained the same drug, which was also prima-facie found to be not conforming to standards; and consequently, was also sent for analysis to the Government Analyst, as was the drug obtained from the petitioner Madan Lals' firm on 13.11.2003.

The samples of the drug seized from M/s Harsh Surgical and Medicine Centre and M/s J.P. Medical Agency were sent for analysis to the Government Analyst on 14.11.2003.

(Eventually, the reports of the Government Analyst having been received on different dates, i.e. 01.03.2004 in Criminal Complaint no.1419 of 2005 and 02.03.2004 in Criminal Complaint no.1418 of 2005, the complaints were both instituted on 20.12.2005).

Criminal Complaint no.1418 of 2005 was thus instituted pertaining to the sample obtained on 14.11.2003 from M/s J. P. Medical Agency.

That too was decided by the trial Court on 11.08.2014, (as was Criminal Complaint no.1419 of 2005), with the orders of sentence passed on 14.08.2014 in both cases.

The appeals filed by the present petitioners against the judgment in Criminal Complaint no.1418 of 2005 were as follows:-

i) Sushil Bansal (petitioner in CRR no.4456 of 2017) and Jitender Kumar (petitioner in CRR no.148 of 2018): Criminal Appeal no.59 of 2014;

ii) S.C. Gupta (petitioner in CRR no.4455 of 2017): Criminal Appeal no. 57 of 2014;

ii) G.C. Gupta (petitioner in CRR no.4461 of 2017): Criminal Appeal no.58 of 2014.

Those appeals were also decided on the same date as the first set of appeals, by the appellate Court, on 09.11.2017.

Thus these 9 revision petitions have come to be filed, separately by each petitioner, challenging their conviction and sentences of imprisonment by the trial court and appellate Court.

4. Of the 5 petitioners (accused in Criminal Complaint no.1419), Madan Lal (petitioner in CRR no.4436 of 2017), as already said, was the person from whose premises the adulterated drug in question (Mannitol Injection) was first recovered on 13.11.2003, and who is stated to have been present at the spot when the complainant and his party inspected his premises.

Two more persons, i.e. Sarabjeet Singh and Rajeev Chouhan, were also arraigned as accused in the complaint filed before the learned trial Court, but were declared to be proclaimed offenders, with the trial, therefore, having proceeded only against the present petitioners.

Sushil Bansal (petitioner in CRR nos.4453 and 4456 of 2017) and Jitender Kumar (petitioner in CRR nos.148 and 149 of 2018) are wholesalers who had stocked the drug in question at different points of time. S. C. Gupta (petitioner in CRR nos.4455 and 4459 of 2017) is the authorised signatory of the firm that manufactured the drug in question, i.e. of M/s Ess Jee Pharmaceuticals, Delhi Gurgaon Road, Samalkha, Delhi, who alongwith Sarabjeet Singh is stated to have been present on the licensed premises of the said firm at Bahadurgarh (not Delhi), when the raiding party consisting of two Senior Drug Inspectors and two Drug Inspectors visited the said premises.

G. C. Gupta (petitioner in CRR nos.4460 and 4461 of 2017) is stated to be the proprietor of the said firm.

Sarabjeet Singh is stated to have been the approved Manufacturing Chemist with the manufacturing firm at Delhi, while Rajeev Chouhan was the approved Analytical Chemist of the firm.

5. The facts as given in the complaint, are being taken almost *ad verbatim* from the judgments of the learned Courts below, as follows hereinafter.

6. As per the case of the complainant, i.e. the District Drug Inspector, Faridabad, on 13.11.2003, Shri Rajender Harna, the Drug Inspector, Faridabad, alongwith Shri R. K. Chugh, Senior Drug Inspector, Faridabad, and Shri Rakesh Dahiya, Drug Inspector, Faridabad-I, visited the premises of M/s Harsh Surgical and Medicine Centre, Old Faridabad. Shri Madan Lal was found present, with the firm holding Whole Sale Drug License No.8836-OW/H and 8703-W/H. He (Madan Lal) was the Proprietor and 'experienced person' of the firm. Shri Rakesh Dahiya, after disclosing his identity and purpose of visit, conducted inspection of the firm in the presence of other members of the inspection team. He collected one sample of the drug, i.e. Mannitol Injection IP 20% w/v, vide a sample assigned No.RDN-2003/001 (with Form-17, in terms of Rules 56 and 145A of the Drugs and Cosmetics Rules, 1945). Madan Lal made his statement on Form-17 which was signed by him and members of the inspection team. An inspection report was also made on the spot and signed by Madan Lal and the inspection team. Madan Lal issued a credit memo of Rs.176/-, bearing No.976 dated 13.11.2003, in respect of sale of the sample drug. A copy of the inspection report and Form-17 were handed over to him on the spot.

It is further the complainants' case that on 14.11.2003 Shri

Rakesh Dahiya, the Drug Inspector Faridabad, sent one sealed sample portion of Sample No.RDN-2003/001 to the Government Analyst Haryana, alongwith a copy of Form No.18, through registered post and parcel. It was further contended that on 01.03.2004 a copy of the test report of Sample No.RDN-2003/01 (on Form-13), in triplicate, was received in the office of the said Drug Inspector, the test report bearing No.1638 dated 27.02.2004, in which this sample was declared as not being of standard quality; thus being adulterated and spurious, for the reason mentioned in the test report, i.e. that "The sample contains fibrous mass comprising of fungus", further stating that the sterility bacteria and fungus did not comply with the norms and the sample did not pass the test for sterility with regard to Bacteria & fungus.

On the same day, Rakesh Dahiya is stated to have issued a show cause notice, vide letter no.DIF2004/191 dated 01.03.2004, to petitioner Madan Lal, under Section 18 of the Act, asking him to disclose the name/names of the person/s from whom he had acquired the drug in question.

As per the complainant, on 08.03.2004, in reply to the show cause notice issued to him, Madan Lal disclosed that he had purchased the drug from the firm M/s J. P. Medical Agency, Chawla Colony, Ballabgarh, vide Invoice No.2605 dated 31.10.2003.

7. On 15.03.2004, the complainant issued show cause notice No.DIF-2004/231 dated 15.03.2004, again under Section 18 of the Act, to the aforesaid firm (M/s J. P. Medical Agency Chawla Colony Ballabgarh), for stocking for sale a drug not of standard quality, and thus spurious and adulterated, with intimation thereof sent to the State Drugs Controller, Haryana.

On 17.03.2004, in reply to the notice, petitioner Jitender Kumar disclosed that his firm had purchased the drug in question from M/s S. K. Enterprises, Shop No.16, New Medicine Market Gohana Road, Rohtak, vide Invoice No.378 dated 12.08.2003.

8. On 18.03.2004, the complainant (Drug Inspector Faridabad) is stated to have visited the premises of M/s S. K. Enterprises, Shop No.16, New Medicine Market, Gohana Road, Rohtak, alongwith Shri Manmohan Taneja, District Drug Inspector, Rohtak. Shri Sushil Bansal, Proprietor and 'experienced person incharge', was found present and was handed over Show Cause Notice No.DIF-2004/240, dated 17.03.2004, under Section 18 of the Act, for stocking/stocking for sale, a drug not of standard quality, and thus spurious and adulterated. Sushil Bansal (petitioner in CRR no.4453 of 2017), received the said show cause notice under acknowledgement. A spot memo was also prepared by the complainant which was signed by Sushil Bansal and the inspection team. Sushil Bansal in his reply to the above said show cause notice, disclosed that he had purchased the drug from the manufacturer of the drug, M/s Ess Jee Pharmaceuticals, Delhi Gurgaon Road, Samalkha, Delhi, vide their Bill no.028, dated 07.05.2002.

9. It is further the case of the complainant, that on 07.05.2004 he issued a show cause notice vide No.DDI/04/SPL-1 under Section 18-B of Act to the said firm (M/s Ess Jee Pharmaceuticals, Delhi Gurgaon Road, Samalkha Delhi), for manufacturing/manufacturing for sale, a drug not of standard quality.

Shri P. P. Sharma, Assistant Drug Controller, Government of NCT Delhi, is also stated to have informed, vide his letter No. F.1226/88/mfg/

DC/1465, dated 21.01.2004, that the factory premises of M/s. Ess Jee Pharmaceuticals, Delhi, was no more in existence in Delhi and their manufacturing licences had already been cancelled.

10. Thereafter, on 07.05.2004, Shri N. K. Ahuja (Drug Inspector, Fairdabad), alongwith Shri R. K. Chug, Senior Drug Inspector, Faridabad, Shri M. P. Gupta, Senior Drug Inspector, Rohtak and Shri Rakesh Dahiya, Drug Inspector, Faridabad-I, are stated to have visited the licensed premises of M/s Ess Jee Pharmaceuticals, Plot No.371, M.I.E. Phase-I, Bahadurgarh, for the purpose of "investigation of the drug in question". At the time of the visit, S. C. Gupta (petitioner in CRR no.4455 of 2017 and 4459 of 2017) and Sarabjeet Singh (now proclaimed offender), were said to be present. Sarabjeet Singh is stated to have informed the team that he was working as an approved Manufacturing Chemist with the manufacturing firm at its Delhi plant, when the drug in question was manufactured in January 2002. He is also stated to have informed that (petitioner) Gyan Chand Gupta was the proprietor of the manufacturing firm M/s Ess Jee Pharmaceuticals, Delhi Gurgaon Road, Samalkha, Delhi, and that Rajeev Chouhan (also now proclaimed offender) was the approved Analytical Chemist of the firm.

A spot memo was prepared by the Drug Inspector Faridabad, signed by members of the investigation team and Sarabjeet Singh. After the disclosure of Sarabjeet Singh, Shri Rakesh Dahiya is stated to have served upon him a show cause notice, alongwith one sealed sample portion of Sample no.RDF-2003/001, a copy of test report no.1638 dated 27.02.2004, with a copy of cash memo no.028 dated 07.05.2002, issued by the manufacturing firm, all against a receipt issued by Sarabjeet Singh, who then

submitted his reply to the Drug Inspector, Faridabad.

11. It is further stated that on 07.05.2004 Shri N. K. Ahuja, the Drug Inspector, Faridabad, alongwith Shri R. K. Chug, Senior Drug Inspector, Faridabad, Shri M. P. Gupta and Shri Rakesh Dahiya, Drug Inspector, Faridabad, visited the office of the Drug Controller Delhi, at 15 Shyamnath Marg, Delhi, for obtaining the constitution of the manufacturing firm M/s Ess Jee Pharmaceuticals, Delhi Gurgaon Road, Samalkha Delhi, and handed over letter no.DIF2K4/398 dated 07.05.2004 to Shri R.D. Garg, DSDC/Licensing Authority Delhi. Shri K.C. Agarwal, Drug Inspector Government of NCT Delhi, supplied photocopies of licences of the said manufacturing firm on Form-26H, with a list of approved items, on which permission to manufacture the drug in question was seen at serial no.04, upon a declaration form having been submitted by the authorised signatory of the accused manufacturing firm (S.C. Gupta-petitioner in CRR no.4455 of 2017 and 4459 of 2017), with an affidavit of the said authorised signatory, also executed by him.

Thereafter, the State Drug Controller Haryana, Panchkula, vide his letter No.30/200-1Drug-II-04/8481, dated 13.07.2004, granted permission to launch prosecution against the accused.

12. Yet further, as per the complainant, on 07.09.2004 Shri Karan Singh Godara, Drug Inspector Faridabad, made a payment of Rs.176/- to Shri Madan Lal for the sample drug in question, against a receipt issued by him.

The State Drug Controller, Haryana, vide his letter No.30/798-2-Drug II-05/3028, dated 12.05.2005, is also said to have supplied the constitution of the firm, M/s J. P. Medical Agency, Chawla Colony Ballabgarh, having wholesale drug licence nos.10785-OWH and 10635-WH;

as also the constitution of the firm M/s S. K. Enterprises, Gohana Road, Rohtak, which also had a licensed premises with wholesale drug licence no.9118-OWH and 8988-WH, on Form 20B and Form 21B, with Shri Sushil Bansal as the proprietor and competent person incharge of the firm.

13. It was contended by the complainant that the accused persons and the firm never challenged the test report of the Government Analyst, Haryana, within the stipulated time of 28 days as given in the notice and as per Section 25(3) of the Act. The accused also failed to adduce evidence to controvert the test report of the Government Analyst 'before the complainant'.

14. Giving the aforesaid facts, Criminal Complaint no.1419 of 2005 was instituted on 20.12.2005 in the Court of the learned Chief Judicial Magistrate, Faridabad, by the District Drugs Inspector, Faridabad-I, alleging therein that accused nos.6 to 11 before the trial Court were the persons who were responsible for selling the drug, that could even cause the death of patients on account of bacteria and fungus growth, and that accused nos.1 to 5 were those who were responsible for manufacturing the spurious drug.

It is seen from the memo of parties before the trial Court that accused no.1 to 4 are G. C. Gupta, S. C. Gupta, Sarabjeet Singh and Rajeev Chouhan respectively, whereas accused-respondent no.5 was the firm with which they were all connected in one capacity or the other, i.e. M/s Ess Jee Pharmaceuticals, Delhi Gurgaon Road, Samalkha, Delhi.

Accused no.6 was Sushil Bansal, with his firm, M/s S.K. Enterprises, Gohana Road, Rohtak, being accused no.7. Accused no.8 was Jitender Kumar, with his firm, M/s J. P. Medical Agency, Chawla Colony, Ballabgarh, being accused no.9; whereas Madan Lal was accused no.10, with

his firm, M/s Harsh Surgical and Medicine Centre, Old Faridabad, being accused no.11.

15. Upon summons being issued to them, all the accused, except Sarabjeet Singh and Rajeev Chouhan, appeared before the trial Court, with those who had appeared all being admitted to bail, Sarabjeet Singh and Rajeev Chouhan not having appeared despite a proclamation issued under Section 82 Cr.P.C., upon which they were eventually declared to be proclaimed offenders, as already noticed.

16. In the precharge evidence led by the complainant, N. K. Ahooja, Rakesh Dahiya and Karan Singh Godara, Drug Inspectors, testified as PWs1, 2 and 3 respectively.

Based on the precharge evidence, the accused were charged with the commission of an offence punishable under Section 27 (a) of the Act, to which they pleaded not guilty and claimed trial.

In the 'after charge evidence', the complainant examined five witnesses as follows:-

Manmohan Taneja	PW1
N. K. Ahooja	PW2
Rakesh Dahiya	PW3
Karan Singh Godara	PW4
Rajender Kumar Harna	PW5

By way of documentary evidence, the complainant exhibited 44 documents as enumerated in paragraph 11 of the judgment of the learned trial Court, which included renewed licences, Form-17, report of the Government Analyst, notices issued to the accused and their replies thereto, a spot memo, an investigation report in Form-16; Form-18, Form 26-H and Form-19, the

permission to launch prosecution, a receipt as regards the drug purchased from one of the accused, a letter regarding constitution of one of the firms, etc.

17. In their statements under Section 313 Cr. P.C., all the accused denied the incriminating 'material' put to them and pleaded innocence, thereafter leading their defence by way of examining three of the five accused, i.e. Madan Lal as DW1, Jitender Kumar as DW2 and S.C. Gupta as DW4, with one Ashok Kumar Jha having deposed as DW3.

18. The Drug Inspector who argued the matter on behalf of the District Drug Inspector, reiterated the contents of the complaint before the trial Court, with the counsel for the respondents first taking a stand before that Court that the drug in question had only been declared as “Not of Standard Quality” by the Government Analyst and that it had neither been declared to be a misbranded drug, nor to be an adulterated or spurious drug, even as per report no.1654 dated 27.02.2004.

Further argument on that aspect, on behalf of the defence, was that there was no evidence to prove whether any other drug or substance had been substituted in place of Mannitol and consequently, the drug did not come within the purview of Section 17-B of the Act, (the said provision being the one defining a spurious drug), and therefore, Section 27 (b) and (c) of the Act could not be attracted and even as regards Section 27 (a), the drug was not actually used for diagnoses, treatment, mitigation or prevention of any disease or disorder and that even the case of the complainant did not show that anybody had been injured or harmed by any such usage.

19. Amongst other arguments raised before that Court, it is also seen

to be argued that only bacteria and fungus were found, that the report of the Analyst was not admissible and that in fact the report only stated that the drug did not pass the sterility test, due to fungus and bacteria present in it.

A contention is also seen to have been raised before the trial Court that even the fungus and bacteria stated to have been contained in the drug, was not analysed to say that it was not fit for human consumption.

Other than that, an argument was also raised before the trial Court that the 5th accused, i.e. M/s Ess Jee Pharmaceuticals, Delhi Gurgaon Road, Samalkha, Delhi, is a proprietorship firm, with the proprietor being accused G. C. Gupta, and a proprietorship firm not being a legal person, prosecution of such firm is against the law.

20. It was also submitted before the trial Court on behalf of the accused, that other than the Criminal Complaint in question, i.e. Complaint no.1419 of 2005, Criminal Complaint no.1418 was also instituted on the same date, i.e. 20.12.2005, in respect of the same drug in question, by the same complainant against the same accused (with the exception of accused Madan Lal and his firm) in Criminal Complaint no.1419 of 2005, and that the spot memo dated 07.05.2004, in both the cases, was actually the same and consequently, prosecution of accused persons in two complaints making out the same offence, was barred by Sections 219 and 220 of the Criminal Procedure Code.

21. On considering the aforesaid arguments and other arguments raised before it, as also appraising the evidence, the learned trial Court found that prosecution in Criminal Complaint no.1419 of 2005 was based on the report of the Government Analyst, Ex.PW2/5, which was qua the drug seized

from accused Madan Lal, with the relevant part of the report reading as follows:-

> "6. Condition of seals on the package intact and identical with the specimen seal impression sent by D.I. Separately.
>
> 7. Result of test or analysis with protocols of test or analysis applied **IP**
>
> **Description: A colourless solution in colourless glass transfusion bottle. The sample contains white fibrous mass comprising of fungus.**

		Claim
Ext. volume/bottle	**100 ml**	**100 ml**
PH identification	**complies**	
Mannitol % w/v	**positive** **19.58**	**20.0**
Sterility bacteria	**does not comply**	
Fungus	**does not comply**	

> In the opinion of the undersigned the sample referred to above **is not of standard quality as defined in the Drugs and Cosmetics Act, 1940** for the reasons given below:-
>
> **The sample does not pass the test for sterility w.r.t. Bacteria and fungus.**"

22. In the light of the above report, the learned trial Court found that on the touchstone of Section 17-A of the Act, the drug in question was adulterated, with bacteria and fungus found in it, it therefore not having passed the sterility test.

It was also held that the drug being an injection which is to be infused intravenously into the human body, if there was fungal growth in the same, it would have been fatal to the person to whom it would have been administered, and therefore, the provisions of Section 27-A of the Act were

liable to be invoked.

A finding was also recorded by that court that the drug being sealed, with its seals not found to be tampered with or broken, the growth of the fungus was from within the bottles, and that such a drug would either be adulterated or spurious or misbranded.

A contention raised on behalf of the accused that the growth in the bottles was not fungal growth but was on account of crystallisation, was rejected by that Court, on the ground that the argument was wholly misconceived in the face of the report of the Government Analyst, with the accused never having challenged the said report, within the time stipulated in Section 25 (3) of the Act, and that they also failed to adduce any evidence controverting the said report; whereas on the other hand, the prosecution (complainant) had led overwhelming evidence, both oral and documentary, in support of the complaint, also showing the step by step links to co-relate the change of hands of the drug in question, from the person from whom it was actually recovered, right upto the stage beginning with the person who had manufactured it.

An allegation that the documents relied upon by the complainant were fabricated, was rejected by the trial Court, holding that no evidence was led to rebut the authenticity of those documents.

23. As regards those accused who were not manufacturers of the drug, a defence raised by relying on Section 19 (3) of the Act was also rejected, holding that the drug was kept in colourless glass transfusion bottles, and therefore, the white fibrous mass comprising the fungus would be clearly visible, and consequently, even the stockists /wholesalers who had not

manufactured it, could not escape culpability.

While recording the finding that accused no.9 (M/s J. P. Medical Agency) had purchased the drug from accused no.7 (M/s S. K. Enterprises), the Court however also recorded a finding that it had not been proved that the fungus had taken birth/had been grown because of improper storage.

24. Though a 'blamegame' is seen to have been indulged in, by the manufacturers of the drug on the one hand and the traders/retailers on the other, with the manufacturers alleging that the fungus had grown due to improper storage, and the non-manufacturers alleging that there was no improper storage and the fungus was due to the fault of the manufacturers only, the trial Court held that as the drug could have proved to be fatal if administered, it could not exonerate even the non-manufacturers as, firstly, they had not proved their defence in terms of sub-section (3) of Section 19 and further, they also did not opt to get the sample re-tested or re-analysed; and therefore the report of the analyst was binding upon them.

It was also held that there was nothing on record to establish that the test results were on account of improper storage or handling and consequently the culpability of the manufacturer, the retailer and the wholesaler was the same, once it was found that the sample recovered contained fibrous mass that was clear to the naked eyes.

25. Next, rejecting an argument raised that there was non-compliance of Section 23 (4) of the Act, by which procedure to be adopted by the Inspectors is laid down, the trial Court held that the 3rd sample taken is to be given to the person whose name had been disclosed by Madan Lal, i.e. present petitioner in CRR No.4436 of 2017, and with him having disclosed the name

of M/s J. P. Medical Agency, with a bill also submitted by him, notice was found to be duly sent under Section 18-A of the Act to Jitender Kumar, Proprietor and 'experienced person incharge' of the said M/s J. P. Medical Agency.

The said accused, i.e. Jitender Kumar (petitioner in CRRs no.148 and 149 of 2018), having disclosed that he had purchased the drug from M/s S. K. Enterprises, proper procedure was also found to have been followed qua that accused, who eventually disclosed that the drug was purchased from M/s Ess Jee Pharmaceuticals, Delhi Gurgaon Road, Samalkha Delhi, to whose premises also the complainants duly went, but with the premises found to be locked.

26. Thereafter, the Inspectors of the complainant went on 07.05.2004 to another firm, namely M/s Ess Jee Pharmaceuticals, Plot No.371, M.I.E. Phase-I, Bahadurgarh, where they found Sarabjeet Singh, who disclosed that he was the manufacturing chemist at Samalkha.

As per the trial Court, the procedure stipulated in Section 23 (4) of the Act therefore stood duly complied with, inasmuch as, it is obligatory on the part of the Inspector to give one part of the sample to the person whose name and address has been disclosed by the person from whom the vendor acquired the drug, with the second part of the sample forwarded to the Government Analyst, the 3rd to the Court and the 4th to the person whose name and address was disclosed by the vendor. (Reference paragraph 90 of that Courts' judgment).

The first proviso to sub-section (3) of Section 23 was referred to by the Court, by which it is stipulated that where the sample is taken from the

premises where the drug was manufactured, it would be necessary to divide it into three parts only, with one part to be given to the manufacturer and the remaining two to be given as provided in clauses (i) and (ii) of sub-section (4), i.e. with one portion to be forwarded to the Government Analyst and the second to the Court.

Hence, it was held that when a drug or medicine has passed on to a wholesaler/distributor and from there on to a retailer, the Inspector is only obliged to give parts of the sample to the retailer as also the distributor, which, as per the Court, was a procedure duly complied with.

27. The trial Court then again referred to the fact that no notice was given under Section 25(3) by the accused that (any of them) wished to adduce evidence to rebut the report of the Government Analyst, with the provision of Section 32-A of the Act also referred to, whereby the Court has the jurisdiction to implead the manufacturer (or other person who appears to be concerned with the offence) and to proceed against such person in a similar manner as if the prosecution had been instituted under Section 32 of the Act.

The learned trial Court then went on to observe that a manufacturer too must have the liberty to challenge the correctness of the Government Analysts' report and avail of the remedy provided under Section 25 (4), by making an application to the Court, to send the other part of the sample (remaining in the Court) to be tested at the Central Testing Laboratory.

Having considered that, it was held that there was no ambiguity in the procedure adopted by the Drug Inspector once the report and sample had been duly supplied to the 7th accused, i.e. M/s S. K. Enterprises and therefore, the plea that accused no.1 and 2 were not supplied with a sample,

was wholly misconceived.

28. In fact, it was further recorded by that Court that accused no.1 and 2, i.e. G. C. Gupta and S. C. Gupta (petitioners in CRRs no.4460 & 4461 of 2017 and CRRs no.4455 & 4459 of 2017 respectively), time and again tried to “prevail” (*sic*, evade) the procedure, with their conduct showing that they did not cooperate with the team of Inspectors.

29. Referring to Exs.PW1/4 to PW1/8, the trial Court held that S. C. Gupta was the holder of a Special Power of Attorney for the 'work of the firms' M/s Ess Jee Pharmaceuticals, and that G. C. Gupta was the Proprietor of the said firm at Samalkha.

A finding was also recorded by the trial Court that the drug in question was from Production Batch no.1029, with the date of manufacturing being January 2002, at which time the firm at Delhi was working (but was subsequently closed), with that fact clearly apparent from a perusal of cash memo no.028 dated 07.05.2002.

Thus it was held by that Court that the first two accused (G.C. Gupta and S.C. Gupta) had tried to evade service and therefore once the service of the test report alongwith a sample portion was duly effected upon Sarabjeet Singh, Manufacturing Chemist, it was presumed to be service upon the said two accused.

Section 23 (4) was also referred to, holding that it mandates service upon the person whose name is disclosed under Section 18-A, which meant that service has to be effected on the person who is the immediate supplier.

30. Thereafter, that Court went on to hold that there was a chain

established, with the sample served "up to the Rohtak supplier started from Madan Lal" and even if it was to be taken by way of argument that the sample was not supplied to the first two accused, prosecution would not fail merely on that count, because Section 23 (4) would not apply, as compliance 'stood duly made' as regards M/s S. K. Enterprises.

31. Further rejecting an argument that there had been non-compliance of Sections 23 and 25, thereby vitiating the trial qua the first two accused (G.C. Gupta and S.C. Gupta), as also accused no.5 Sushil Bansal of M/s S. K. Enterprises, Rohtak, the trial Court held that the names of G.C. Gupta and S.C. Gupta "transpired to the Drug Inspector/complainant" on 07.05.2004, whereas in the month of June 2004 the shelf-life of the product had expired, with the sanction for prosecution granted thereafter.

Even having observed as above, a finding of fact was recorded (reference paragraph 103 of the trial Courts' judgment), that PW2, N. K. Ahooja, during his cross-examination had in clear terms stated that when he had handed over the sample to Sarabjeet Singh, S. C. Gupta was present. Consequently, it was further held that once it was established that S. C. Gupta held a Power of Attorney in his favour from the proprietor, it was sufficient to impute knowledge even to the proprietor, G. C. Gupta.

32. Rejecting another argument that the firm that had manufactured the drug stood closed in the year 2002, the trial Court held that since the drug was produced in January 2002, the said argument was misconceived / inconsequential.

33. Next referring to the testimony of DW1 Ashok Kumar Jha (seen to be an Analytical Chemist with a private laboratory in Delhi), the trial Court

found that he was not clear regarding the test report and had admitted that fungus cannot develop due to crystal deposits and that it could develop if the product is mixed with foreign matter.

[It may be noticed at this stage itself that the said witness for the respondents/accused also admitted in cross-examination that if the sample is manufactured in unsanitary conditions, fungus and bacteria could develop.]

That Court then again reiterated that no evidence was led (on behalf of the manufacturers) to show that the bacteria and fungus had occurred due to non-proper storage, and therefore it was held that it was due to a "lacuna" in the manufacturing process.

34. An argument raised on behalf of accused Madan Lal and Jitender Kumar that they had not opened the cases containing the drug, was held to be inconsequential, on the ground that the sealed drug had been sold to the Drug Inspector by M/s Harsh Surgical and Medicine Centre (run by accused Madan Lal).

35. On the aforesaid reasoning, it was held that the drug, Mannitol Injection, IP 20% w/v, falls within the purview of an adulterated drug on account of the presence of foreign particles, i.e. fungus, and therefore falls within the ambit of Section 17-A, thereby invoking the consequences stipulated in Section 27(a) of the Act, against accused no.1 and 2 and 5 to 11 (accused no.3 and 4 having been declared to be proclaimed offenders).

36. On the issue of two separate complaints (i.e. 1418 and 1419 of 2005) having been instituted, the trial Court held that since the samples in both the cases were recovered from different places, independent cause of action (qua each) was maintainable.

However, eventually only accused no.1, 2, 6, 8 and 10, i.e. the present five petitioners before this Court, were held guilty for the commission of the offence punishable under Section 27 (a) of the Act, for which they had been charged, no charge having been framed against respondents-accused no.5, 7, 9 and 11, the said accused being the firms of which accused no.1, 2, 6, 8 and 10 were proprietors, respectively.

37. The sentence imposed on each of the five convicts-petitioners, was 5 years rigorous imprisonment plus a fine of Rs.10,000/- each, in default of payment of which, they are to undergo simple imprisonment for 6 months.

38. Separate appeals having been filed against their conviction by the convicts, the learned appellate court (Additional Sessions Judge, Faridabad), also, after referring to the facts of the complaint, as also the evidence adduced by both sides, and the detailed reasoning given by the trial Court, eventually upheld the conviction of the present petitioners, as also the sentence imposed upon them by the trial Court, thereby dismissing the appeals filed.

39. It is significant to notice here that while doing so the learned appellate Court noticed an argument raised before it that Section 27(a) of the Act was not applicable because neither was the drug spurious, nor adulterated, with the argument rejected by the Court.

Referring to clauses (a) and (e) of Section 17-A of the Act, that Court held that admittedly the samples seized, of the Mannitol injections, did not pass the sterility test, showing bacteria and fungal growth in it, and therefore, with the injection being a drug to be used intravenously, it could have proved fatal if administered to a patient, and consequently the provisions of Section 27(a) would apply to the case at hand.

40. Hence, the appeal filed against the judgment of the trial Court in Criminal Complaint no.1419 of 2005 was dismissed by the appellate Court.

41. As regards Criminal Complaint no.1418 of 2005, also instituted on 20.12.2005 as already noticed, the case of the complainant (Drug Inspector, Faridabad), was identical as in Criminal Complaint no.1419 of 2005, but for the fact that the sample of the Mannitol Injection that was found to be adulterated in this case, was purchased by the inspecting party from M/s J. P. Medical Agency, Chawla Colony, Ballabgarh, on 14.11.2003, with the inspecting party consisting of Drug Inspectors Rajinder Harna, R. K. Chug and Rakesh Dahiya. The proprietor of the firm, i.e. petitioner Jitender Kumar, was found to be present there as the person incharge of the premises, from whom samples of three types of drugs were collected, of which we are only concerned in the present case with Mannitol Injection, the other two drugs not being subject matter of the said criminal complaint.

In this case also the samples were stated to have been divided and sealed as per procedure, with necessary forms filled in, one portion of the sealed sample having been handed over to Jitender Kumar who issued a credit memo for Rs.361/-, bearing no.2772 dated 14.11.2003 (Ex.PW1/4), with another parcel sent to the Government analyst, from whom the report was received on 02.03.2004 (Ex.PW1/7), also stating identically as was the report in Criminal Complaint no.1419 of 2005.

The rest of the case of the complainant is also identical, except for the fact that the notice issued in this case to M/s S. K. Enterprises (the firm of which petitioner Sushil Bansal is the proprietor) was handed over to him on 18.03.2004, but with the visit to the premises of the manufacturing firm (M/s

Ess Jee Pharmaceuticals) being the same as in Criminal Complaint no.1419 of 2005.

42. A perusal of the judgment of the learned trial Court shows that the reasoning given for convicting the accused, i.e. the present petitioners, i.e. Sushil Bansal, Jitender Kumar, S. C. Gupta and G. C. Gupta, is essentially the same as the reasoning given in the other case.

The same is the case in the appeal filed against the judgment of the trial Court, which was again dismissed by the learned Additional Sessions Judge, Faridabad, on 09.11.2017 (giving essentially the same reasoning), as is not denied even before this Court by learned counsel on either side.

43. Before this court, all learned counsel appearing in these cases have raised common arguments in both sets of petitions, on the ground that the criminal complaints filed were actually almost identical.

The arguments are as follows.

CRR-4436-2017 (arising out of Criminal Complaint no.1419 of 2005)

44. Appearing for the petitioner, Madan Lal, in this case, Mr. Kanwaljit Singh, learned Senior Advocate submitted that admittedly the manufacturer of the drugs was M/s Ess Jee Pharmaceuticals which had manufactured the drug in January 2002, the expiry date being June 2004. The petitioner is a licenced dealer and Proprietor of M/s Harsh Surgical and Medicine Centre, Old Faridabad, who had purchased it from M/s J.P.Medical Agency, Ballabgarh, on 31.10.2003, who in turn had purchased it from S. K. Enterprises, Rohtak on 12.08.2003, that firm having in turn purchased it from M/s Ess Jee Pharmaceuticals on 07.05.2002.

Learned senior counsel submitted that the drug in question was

admittedly sealed in a box and therefore there was no question of the petitioner knowing that the vials stored in the box contained fungus or bacterial growth and it is nowhere the case of the complainant that the fungus occurred due to improper storage in the hands of the petitioner. Though that argument had been raised before the trial Court by the manufacturer, it was rejected on the ground that no evidence was led to the effect that fungus occurred due to improper storage, the entire evidence pointing to the fact that the fungus occurred due to improper manufacturing process.

Therefore he submitted that the case of the petitioner is squarely covered in his favour by Section 19 (3) which reads as follows:-

> *"(3) A person, not being the manufacturer of a drug or cosmetic or his agent for the distribution thereof, shall not be liable for a contravention of section 18 if he proves-*
>
> *(a) that he acquired the drug or cosmetic from a duly licensed manufacturer, distributor or dealer thereof;*
>
> *(b) that he did not know and could not, with reasonable diligence, have ascertained that the drug or cosmetic in any way contravened the provisions of that section; and*
>
> *(c) that the drug or cosmetic, while in his possession was properly stored and remained in the same state as when he acquired it."*

45. Learned senior counsel further referred to the testimony of PW-3, i.e. Rakesh Dahiya, where he admitted in cross-examination that he did not know when the fungus had developed in the bottle; further also pointing to the testimony of PW-4 Karan Singh Godara, who also stated the same thing and

further stated that it could be due to a manufacturing defect.

Mr. Kawaljit Singh then pointed to the testimony of PW-5 Rajinder Kumar, Drug Inspector, to the effect that the medicine was obtained by opening a carton, from which 8 bottles were taken out. He is also stated to have admitted that he did not know when the fungus had developed.

Hence senior counsel submitted that it was very obvious that fungus / bacteria in the injection vial / bottle was not visible to the naked eye and consequently the petitioner could not be held guilty in any manner whatsoever, for the fungus to have developed, or for storing the medicine in improper storage conditions.

He next referred to the testimony of the petitioner himself as DW-1, to submit that he too had submitted that the sample was obtained by opening the carton and that in fact he had never sold the medicine to anyone and had thereafter returned the remaining medicine.

46. Mr. Kawaljit Singh next referred to the testimony of DW-3, i.e. Ashok Kumar, Analytical Chemist, to the effect that fungus and bacteria or any other impurity can develop in a Mannitol injection if the testing conditions are not appropriate, or it is exposed to atmosphere, or it is manufactured in insanitary conditions.

47. Learned senior counsel then next pointed to Ex.PW2/7, which is seen to be a letter dated 08.03.2004 addressed by the petitioner to the Drug Inspector, Faridabad, stating that he did not want to challenge the test report as he had procured the drug on 31.10.2003 from J.P. Medical Agency, and that he had stored it properly, with it remaining in the same condition that it had been acquired in.

48. Lastly, Mr.Kawaljit Singh submitted that the complaint having been filed on 20.12.2005, i.e. well after the shelf-life of the drug had expired, the complaint itself was non-maintainable. In this context, he referred to the judgments of the Supreme Court in **Glaxo Smith Kline Pharmaceuticals Ltd. and another vs. State of Madhya Pradesh,** AIR 2011 SC 2998, as also **Northern Mineral Ltd. v. Union of India & Anr.,** AIR 2010 (SC) 2829, **M/s. Northeren Minerals Ltd. & Ors. vs. Rajasthan Govt. & Anr.,** 2016(2) RCR (Criminal) 996.

CRR nos.4453 and 4456 of 2017 (arising out of Criminal Complaint nos.1419 and 1418 of 2005 respectively) and **CRR nos.148 & 149 of 2018** (arising out of Criminal Complaint nos.1418 and 1419 of 2005 respectively)

49. Mr. Suman Jain and Mr. Sunil Pawar, learned counsel appearing for the two petitioners in these four petitions, i.e. Sushil Bansal in CRR nos.4453 and 4456 of 2017 and Jitender Kumar in CRR nos.148 and 149 of 2018, have essentially reiterated what learned senior counsel for the petitioner in CRR no.4436 of 2017 submitted, to the effect that the petitioners admittedly not being manufacturers of the drug in question, it not having been shown in any manner that fungus and bacteria developed on account of improper storage, they too are protected by the provisions of Section 19(3) of the Act.

Mr. Pawar further submitted that with the drug in question only having been shown to be “not of standard quality”, it can neither be decleared to be a misbranded or adulterated drug, nor a spurious drug.

He pointed to the test reports of the Government Analyst; (Ex.PW2/4 in Criminal Complaint no.1419 of 2005 and Ex.PW1/7 in Criminal Complaint no.1418 of 2005).

He also submitted that there was violation of Rule 5 of the Drugs and Cosmetics Rules, as there is no recording on the said reports of the Government Analyst, as to the conditions of the seals on the packet being intact or otherwise, with column no.6 of Form no.13 (test report) having been left blank in both the cases.

Hence both learned counsel in these petitions also submitted that the petitioners have been erroneously convicted and as a matter of fact the learned courts below having ignored the fact that the boxes in which the injections bottles/ vials were contained were sealed boxes from which the bottles could not be seen by the petitioners, right from the time of purchase till the time of inspection by the drug inspectors, the judgment in fact is perverse qua the petitioners, who are not manufactures.

CRR nos.4455 & 4459 of 2017 (arising out of Criminal Complaint nos.1418 and 1419 of 2005 respectively) and **CRR nos.4460 & 4461 of 2017** (arising out of Criminal Complaint nos.1419 and 1418 of 2005 respectively)

50. The two petitions in these cases, being the authorised signatory and competent person respectively (S.C. Gupta and G.C. Gupta) of the firm that manufactured the drug in question, Mr. N.S. Shekhawat first made a submission qua S.C. Gupta, to submit that, firstly, the sample of the drug taken by the Drug Inspectors not having been supplied to the petitioners, there was a violation of Section 23 (4) (ii) of the Act and consequently a valuable right having been taken away from them, of getting the sample analyzed, the complaint in any case should have been dismissed on that ground alone by the learned Courts below.

He next submitted that with neither the notice dated 07.05.2004, nor the report of the Government Analyst having been served upon these

petitioners, again their right to refute the report was taken away.

Mr. Shekhawat also reiterated what Mr. Singh and Mr. Pawar had argued, to the effect that the complaint having been filed after the expiry of the shelf-life, the petitioners in any case should have been acquitted by the learned Courts below.

In support of the aforesaid arguments learned counsel relied upon a judgment of the Supreme Court in **Laborate Pharmaceuticals India Ltd. and Ors. vs. State of Tamil Nadu,** AIR 2017 SC 2423.

51. Mr. Shekhawat next also reiterated the argument that the Government Analyst only having declared the drug to be "not of standard quality", it could neither be stated to be a misbranded drug, nor an adulterated drug, nor a spurious drug in terms of Section 17, 17-A and 17-B of the Act respectively.

52. Mr. Shekhawat next submitted that the sample (in Complaint Case no.1418 of 2005) having been taken on 14.11.2003, and sent on the same date to the Government Analyst, from where the report was received by the Drug Inspector on 02.03.2004, and a show cause notice having been issued to the firm of the petitioners on 05.05.2004, and the complaint thereafter having been instituted only on 20.12.2005, and the situation not being different even as regards Criminal Complaint no.1419 of 2005, wherein the sample was seized on 13.11.2003, sent to the Government Analyst on 14.11.2003, with the report received on 01.03.2004, but the complaint having again been instituted on 20.12.2005, and the shelf-life of the drug having expired admittedly in June 2004, the petitioners could not even seek the indulgence of the trial Court to have the sample that was available with the Court to be sent for analysis to the Central Drugs Laboratory in terms of

Section 25(4) of the Act, and therefore their valuable right having been taken away, the petitioners deserve the benefit of acquittal.

53. Mr. Shekhawat next submitted that even after the authorised person of M/s S. K. Enterprises, i.e. Sushil Bansal (petitioner in CRR nos.4453 and 4456 of 2017), having disclosed that S. C. Gupta is the authorised signatory of the manufacturing firm, with his address also given, and the said firm admittedly "having closed" at the time when his premises at Delhi was inspected by the complainant party, even the notice stated to be served upon Sarabjeet Singh on 07.05.2004 at the premises of Ess Jee Pharmaceuticals, Bahadurgarh, (not Samalkha, Delhi), cannot be stated to be a notice validly served in terms of Section 23 of the Act, and consequently the entire proceedings against the petitioners are vitiated.

Elaborating further on this argument, Mr.Shekhawat next submitted that as a matter of fact with Sarabjeet Singh admittedly never having been even served of summons issued to him by the trial Court, therefore it is not even known as to who the said person is, whose signatures were ostensibly obtained by the complainant on 07.05.2004.

Learned counsel submitted that though Ex.PW1/36 is a document showing the presence of S.C.Gupta at the said premises at Bahadurgarh, it admittedly does not carry his signatures and therefore his presence is wrongly shown by the Drug Inspector, because if he was actually present it would not have been stated by the aforesaid Sarabjeet Singh (if he exists) in his statement Ex.PW1/37, that he would "try his best to locate the residential address of the proprietor of the firm" (G.C.Gupta) and in fact he would have stated that the authorised person, i.e. S.C.Gupta, was also present at the spot.

Mr. Shekhawat pointed to the fact that PW-1 N.K. Ahooja had

admitted that he was not aware that M/s Ess Jee Pharmaceuticals, Samalkha, had closed in 2002; with him also admitting that the notice dated 05.05.2004 had not been served at the address at Samalkha.

54. Mr. Shekhawats' next argument was that there was violation of Rules 46 and 57 of the Rules of 1945, inasmuch as the protocols applied, of the test for analysis, are required to be given in Form 13 (test report). However, the reports (Ex.PW2/4 in Criminal Complaint no.1419 of 2005 and Ex.PW1/7 in Criminal Complaint no.1418 of 2005) are silent on the protocol applied to determine that fungus or bacteria was actually present in the injections.

55. Mr. Shekhawat then submitted that from the drug batch in question (bearing no.1029A), no other complaint has been received and therefore, if at all there was some fungus and bacteria detected, it was due to improper storage by those who had purchased the drug in question at different stages, i.e. the petitioners in the other accompanying petitions before this court. He submitted that as per the Indian Pharmacopeia, Mannitol injection is to be stored at a temperature between 20 degrees to 30 degrees and consequently, the chances of any contamination having occurred at a subsequent stage, after sale by the manufacturer, is obvious, for which the petitioners cannot be held guilty.

56. Consequently, learned counsel submitted that the petitioners having lost their valuable rights of getting reanalyzed the samples taken, and it nowhere having been shown that the drug in question was stored at the temperature required, they deserve to be acquitted and have in fact been erroneously convicted by the learned Courts below.

57. In response to the aforesaid arguments on behalf of the

petitioners, (whether manufacturers or subsequent purchasers from whom the drugs were seized by the Drug Inspectors), Mr. B.S.Virk, learned Deputy Advocate General, Haryana, first pointed to the fact that Sushil Bansal of M/s S. K. Enterprises, Rohtak, had disclosed on 18.03.2004 that he had purchased the drug in question from M/s Ess Jee Pharmaceuticals, and thereafter the "complainant team' had visited the working premises of the manufacturing firm at Bahadurgarh on 07.05.2004, with even a sample of the drug handed over, along with the notices, to the Manufacturing Chemist present there, i.e. Sarabjeet Singh, as is obvious from the receipt issued by the said person (Ex.PW1/1 before the trial Court).

Hence he submitted that even if the shelf-life of the drug was to expire in the month of June 2004 (with no specific date of expiry), there was ample time for the manufacturer, i.e. petitioners G. C. Gupta and S.C.Gupta, to seek a second sampling of the drug in terms of Section 25(3) of the Act, which admittedly they did not do. Hence, learned State counsel submitted that the petitioners cannot take advantage of their own mistake to contend that their valuable right was taken away.

Mr. Virk submitted that the same holds good for all the other petitioners also, whose firms had stocked / sold the drug in question, they admittedly never having applied for the second testing.

58. Learned State counsel next submitted that as a matter of fact, as held by the Supreme Court in **Amery Pharmaceuticals vs. State of Rajasthan,** 2001(2) RCR (Criminal) 265, where the sample of a drug is obtained from a particular person (not being a manufacturer), and he in terms of Section 18-A of the Act discloses the name of the person from whom he acquired the drug, the Inspector is only required to give one portion of the

sample to the person from whom it has been taken, forward the second portion to the Government Analyst, the third portion to the Court, and the fourth portion to the person whose name and address has been disclosed under Section 18-A.

Hence Mr. Virk submitted that as a matter of fact petitioners S.C. Gupta and G.C.Gupta, nor any representative representing their manufacturing firm, was even entitled to a portion of the sample obtained from petitioner Madan Lal (in Criminal Complaint no.1419 of 2005) and from petitioner Jitender Kumar (in Criminal Complaint no.1418 of 2005).

59. Learned State counsel further went on to point to the same judgment to submit that it was held that even in terms of Section 32-A of the Act, where the manufacturer had actually been arraigned as an accused by the Court itself and not the complainant, it is not mandatory that the manufacturer must have a right of second sampling. Hence, he submitted that in any case the said petitioners, i.e. S.C. Gupta and G.C. Gupta, cannot take advantage of second sampling not having been availed of by them, they in any case not having availed of that opportunity even in terms of Section 25 (3).

60. On the argument of Mr.Shekhawat that in fact neither G.C. Gupta nor S.C. Gupta were even served with a copy of the report of the Government Analyst in terms of Section 25(2), Mr. Virk submitted that admittedly the factory / premises where the drug in question had been manufactured in January 2002, i.e. at Delhi, stood closed, as was subsequently learnt by the complainant from the Assistant Drug Controller/ Licencing Authority, Delhi, on 17.09.2004; and upon having obtained information that the manufacturing company, i.e. M/s Ess Jee Pharmaceuticals, now functions from Bahadurgarh, the premises at that place was visited by the inspecting team on 07.05.2004,

where the Manufacturing Chemist, i.e. Sarabjeet Singh, was found, who was served with a notice under Section 18-B (Ex.PW1/34), with the said person initially in fact admitting that he was the Manufacturing Chemist even at Delhi in the closed premises (as per Ex.PW1/36), though he subsequently retracted that statement vide his reply Ex.PW1/37.

Mr. Virk then pointed to Ex.PW1/39 from the record, which is seen to be an intimation, by way of Form 26-H, from the Deputy Drugs Controller and Licencing Authority, NCT, Delhi, to the effect that the names of "competent technical staff", "responsible for manufacturing", were Sarabjeet Singh, Vinod Bhushan Gautam and Sanjiv Tiwari.

Hence, learned State counsel submitted that even if it is presumed (though not admitted at all) that S.C. Gupta was not present at the spot on 07.05.2004 when the team of inspectors visited the premises at Bahadurgarh, Sarabjeet Singh was present there, whose signatures were taken and who even replied to the notice issued under Section 18-B, as also admitted to having received the report and a part of the sample of the drug in question (vide the receipt Ex.PW1/35, dated 07.05.2004).

As regards non presence of S.C. Gupta, Mr.Virk submitted that testimonies of all three inspectors, i.e. N. K. Ahooja (PW-1 in pre-charge evidence and PW-2 in after charge evidence), Rajinder Kumar Harna PW-2 and PW-4, as also Rakesh Dahiya PW-3, show that as a matter of fact S.C. Gupta was present, though his signatures are not found on any of the documents exhibited pertaining to the visit of the team on 0.7.05.2004.

61. As regards the other petitioners who are not manufacturers of the drug, Mr. Virk submitted that though he could not deny (in the face of admission of even the prosecution witnesses) that the bottles were in sealed

boxes at the time when the samples were taken from the firm of the petitioner Jitender Kumar and petitioner Madan Lal, however they admittedly had stored the said bottles. The firm of Sushil Bansal also having stored and sold the drug, none of them can escape liability, even in terms of Section 19 of the Act, the samples in both cases eventually having been obtained from the firms of Madan Lal and Jitender Kumar.

62. Consequently, learned State counsel submitted, that the learned Courts below have not erred in any manner in convicting the petitioners for the commission of an offence punishable under Section 27(a) of the Act and sentencing them to 5 year rigorous imprisonment, as also imposing fines upon them.

63. Having considered the judgments of the Courts below, as also the arguments of all learned counsel, first dealing with the revision petitions filed by the non-manufacturers, i.e. CRR nos. 4436 of 2017, 4453 of 2017, 4456 of 2017, 148 of 2018 and 149 of 2018, in my opinion, two questions arise in the context of whether the said petitioners can be acquitted on the touchstone of Section 19 of the Act or not.

(Section 19 (3) of the Act is already reproduced hereinabove in paragraph 44).

Undoubtedly, the aforesaid provision does postulate that a person who is not a manufacturer of a drug or the agent of the manufacturer (with the purpose of its distribution), shall not be liable for contravention of Section 18 (the said provision being the prohibitory provision as regards manufacture and sale of drugs that are misbranded, adulterated or spurious, or not of standard quality); however clause (b) of sub section 3 of Section 19 provides that a non-manufacturer would not be so liable, only if he “did not know and could

not, with reasonable diligence have ascertained" that the drug contravenes the provisions of Section 18.

The question therefore is whether once the drug in question is admitted to have been contained in bottles that were in turn found to be in sealed boxes at the time of the inspection by the complainant team (in both the criminal complaints), can the 'non-manufacturing petitioners', be wholly absolved of guilt.

[It is to be noticed here that though these are revision petitions, yet, Mr.Virk, upon query from this Court, as regards the cross-examination of the prosecution witnesses, to the effect that the boxes were all sealed, took specific instructions from the Drug Inspector present in Court to assist him, who did not deny that they were sealed. Consequently this Court had observed at that stage, that in such a case, the said petitioners cannot be held liable in terms of Section 19 (3)].

Yet, judgment having been reserved and the matter having been looked at more carefully, what this Court cannot ignore, is the fact that the drug itself (Mannitol injection) was contained in sealed bottles that were neither opaque nor translucent (as could not be denied); and therefore I do not see why the petitioners who stored / sold the drug, could not "with due diligence" have opened the cardboard container without breaking the seals of the bottles inside those containers, to determine as to whether, what they had purchased, was indeed (apparently at least) free from any kind of impurities etc.

In this context it needs to be stated that even as per Ex.PW2/4 in the record pertaining to Criminal Complaint no.1419 of 2005, it is seen that the application made on 13.11.2003 itself by the District Drug Inspector,

Faridabad, to the Government Analyst, in Form 18, shows that white fibrous suspended material was visible, which is also seen written on the intimation to petitioner Madan Lal (Form 17-Ex.PW2/A), also dated 13.11.2003.

That suspended material was thereafter found by the Government Analyst to be fungus, as per the report in Form 13 (also part of Ex.PW2/4 in Criminal Complaint no.1419 of 2005 and Ex.PW1/7 in Criminal Complaint no.1418 of 2005).

64. Had, of course, such due diligence been observed by any / all of the 'non-manufacturer petitioners', they would most definitely have been entitled to the benefit of Section 19(3); but not, in my opinion, in the aforesaid situation, where they even did not bother to open the boxes in which the sealed bottles were packed, containing the drug, i.e. Injection Mannitol.

It is further to be observed here that if the drug had been such as was to be sold in the box itself, and therefore the seal could not have been opened by the vendor, naturally these petitioners would again have been entitled to the benefit of Section 19(3); however, the boxes in which the bottles containing the drug being a secondary packing, with each bottle also capable of being sold in a sealed condition individually, naturally, to sell any bottle individually the boxes would have to be desealed. Therefore, it would be expected of the seller of the drug to deseal the box at the time of its purchase, to determine whether the sealed bottles contained therein, were, apparently at least, containing a non-contaminated drug or not.

65. The next question as regards these petitioners (as also the petitioners whose firm manufactured the drug), is as to whether the drug was spoiled on account of carelessness in the manufacturing process, or due to improper storage at any stage subsequently.

In this context, as has been pointed out by the learned counsel for the 'non-manufacturing petitioners', PW Rajinder Kumar Harna, (Drug Inspector on the date in question) admitted in his testimony that the samples were stored at the correct temperature and there was no violation of storage norms; though he also stated that suspended matter visible to the naked eye was seen in the bottle.

(The said testimony is as regards the samples taken from petitioner Jitender Kumars' firm, i.e. M/s J.P.Medical Agency, Ballabgarh, with that firm having also sold the same drug to petitioner Madan Lal, from whom the first sample was taken on 13.11.2003).

66. On the crucial question of whether the drug was contaminated on account of improper handling/ insanitary conditions during the manufacturing process, or due to improper storage at any stage thereafter, the testimony of the witness produced by petitioners Gian Chand Gupta and S.C. Gupta, i.e. DW-3 Ashok Kumar Jha, Analytical Chemist, also needs to be referred to, wherein he has stated that as per the Indian Pharmacopeia, the drug in question (Mannitol) should not be used if it contains visible sold particles even on warming, he further stating that the drug may develop fungus and bacteria or any other impurity, if the testing conditions are not appropriate, or it is exposed to atmosphere.

In cross-examination he admitted that fungus and bacteria cannot develop due to crystal deposition but can develop if the manufacturing is done in insanitary conditions.

Mr. Shekhawat, learned counsel for the aforesaid two petitioners also referred to the relevant part of the Indian Pharmacopeia (Mark DW3/B in Criminal Complaint no.1419 of 2005 and Mark DW1/B in Criminal

Complaint no.1418 of 2005), to submit that it is shown at page 1635 thereof, that storage of the injection must be maintained between 20 degrees and 30 degrees. It is further stated therein as follows:-

> *"Exposure to lower temperatures may cause the deposition of crystals which should be dissolved by warming before use."*

Thereafter, with regard to labelling, it goes on to state that the injection should not be used if it contains visible and solid particles that "do not dissolve" on warming.

67. In this context it is to be noticed that Form 19, that was duly exhibited by the complainant, at serial no.4 describes the particulars for special storage accommodation, and in both criminal complaints (no.1418 and 1419), it is shown to be stored in "Refrigerators & Racks". Thus in both premises where the drug and its sample were actually obtained by the complainants, i.e. from the firms of petitioner Madan Lal and Jitender Kumar, the drug was shown to be refrigerated. However nothing has been pointed to this Court as to whether the refrigeration / storage in racks was within the specified temperatures of 20 degrees to 30 degrees or not, (presumably Celsius, with the extract of the pharmacopeia not specifying as to whether it is Celsius or Fahrenheit).

It also needs to be stated here that though the extracted photocopy of the Indian Pharmacopeia was not led by way of evidence as an exhibit but only as a 'Mark', however in my opinion, it being an official document, published by the Indian Pharmacopeia Commission, and in any case accepted encyclopedia, it would meet with the criteria of Sections 74, 78 and 79 of the Indian Evidence Act, there also being absolutely no question put

to PW-1, Ashok Kumar Jha, in his cross-examination, that the said document could not be relied upon, and in fact even learned State counsel on instructions (even though these are revision petitions), could not deny that the Indian pharmacopeia is acceptable as a trusted document.

68. Yet, the said book stating that crystal deposition can take place due to lower temperature, but DW-1 having stated that crystal formation cannot lead to fungus or bacteria being developed, not much mileage can be taken by petitioners G.C. Gupta and S.C. Gupta on that count, especially with their own witness also having admitted that fungus and bacteria develop if the testing condition are inappropriate or the drug is exposed to atmosphere, or if there are insanitary conditions, or it is mixed with some foreign matter.

In that respect of course, the seals on the bottles containing the drug not having been shown to be tampered, even as per the case of the complainant, obviously, the petitioners herein whose firms were not manufacturers, cannot be held guilty of the fungus having developed in the bottle, though as already held herein earlier, they not having exercised due diligence to even check the contents of the sealed bottles upon opening the boxes in which bottles were contained, they cannot get the benefit of Section 19 (3) of the Act, due diligence not having been resorted to by them.

69. Coming then to the argument raised by Mr. Shekhawat, learned counsel appearing for the petitioner whose firm had manufactured the drug in question; firstly, as regards the delay in the institution of the complaint thereby abrogating the right of the said petitioners to have the sample tested even by moving an application to the Court, the said right allegedly taken away on account of the shelf-life had expired in June 2004, I see no reason to agree with that argument because firstly, as already observed hereinabove, the

expiry date of the drug being in June 2004, with Sarabjeet Singh having been served of a notice as also having been served with a copy of the test report and even a sample of the drug on 07.05.2004, with the petitioners not having even at that stage sought resampling, the contention is rejected; and also so for the reason, as held by the Supreme Court in *Amery Pharmaceuticals'* case (supra), that a sample was actually not even required to be given to the manufacturer if he / it is a person other than the person from whom the accused from whom the sample was actually taken by the Drug Inspector, purchased the drug. Consequently, as per the said judgment also, non supplying of the sample would not be fatal to the case of the complainant. (In other words, if the manufacturer is not a person from whom the person "caught with the adulterated drug" has purchased the drug, he is not required to be served with a sample of the drug; and only the person from whom such "last person" brought it, is required statutorily to be so served).

70. The argument that Sarabjeet Singh was not the Manufacturing Chemist of the firm at the time when the drug was manufactured in Delhi, is also a contention to be rejected, in view of the fact that as also already observed, even the licencing authority at Delhi had informed the complainant that he was in fact the Manufacturing Chemist of the firm at Delhi, which was shut down on account of its licence being cancelled by the Delhi Government.

In fact, though an argument was also raised on behalf of the said petitioners that the firm having been shut down at Delhi, the firm at Bahadurgarh was a wholly different entity, that is also not an argument to be accepted, with Sarabjeet Singh (who had also replied to the notice issued to him by the complainant), himself also admitting at the initial stage that he was the manufacturing chemist at Delhi, and the licencing authority in any case

having so informed the complainant.

Of course what does seem strange to this Court is that despite petitioner Sushil Bansal, (Proprietor of M/s S.K. Enterprises, Rohtak), having informed the complainant in March 2004 itself that he had purchased the drug from M/s Ess Jee Pharmaceuticals and that the address of S.C. Bansal, "who was the owner of the Company/Authorised Signatory" was house no.B-3, 236, Paschim Vihar, New Delhi, yet the inspectors did not bother to go to that address; which either shows connivance or sheer callousness. [The factum of address having been supplied has been pointed to by learned counsel for the petitioners from Ex.PW1/20 in Criminal Complaint no.1418 of 2005, he contending that therefore service upon petitioners G.C. Gupta and S.C. Gupta was never effected.]

Even so, though this court may possibly assume that S.C. Gupta was not present at the premises at Bahadugarh on 07.05.2004 when the inspecting party went there and met Sarabjeet Singh, in view of the fact that S.C. Guptas' signature was not present on the document served upon Sarabjeet Singh, or in his reply thereto, yet it cannot be presumed that Sarabjeet Singh did not inform S.C. Gupta and G.C. Gupta of the factum of the notice served, as also of the report of the Government Analyst and that a sample had also been given to him by the Drug Inspector. In any case, Sarabjeet Singh having been proved to be the Manufacturing Chemist both at Bahadurgarh as also the premises that subsequently shut down in Delhi, he would be a person duly representing the firm and consequently, the procedure laid down in Section 25 is seen to be complied with.

71. Consequently, in my opinion, even the judgment cited by Mr. Shekhawat in *Laborate Pharmaceuticals Indias'* case (supra), would not apply

in the present case, as a reading of the said judgment would imply that the sample was seized from a retailer, who seems to have disclosed the name of the manufacturer to the Drug Inspector, there not being any mention of any wholesaler in between, from whom the retailer had purchased the drug and therefore, the factual situation is completely different. In fact, it would be the judgment cited by learned State counsel in *Amery Pharmaceuticals'* case (supra) which would apply to the present case, for the reasons already given hereinabove, i.e. that petitioners S. C. Gupta and G.C. Gupta were not even statutorily required to be 'served' with samples of the drug, they (nor their firm) not being the persons from whom the drug was purchased by either petitioner Madan Lal (qua Criminal Complaint no.1419 of 2005), or petitioner Jitender Kumar (qua Criminal Complaint no.1418 of 2005).

72. Coming next to the argument of Mr. Shekhawat that protocols applied by the Government Analyst have not been shown in the reports submitted by him, in terms of Rule 46 of the Rules. In this context, the judgment of the Supreme Court in **T. A. Krishnaswamy v. State of Madras** (1966) 3 SCR 31, needs to be referred to, wherein it was held by a three Judge Bench as follows:-

> "5. Now, the report of the Analyst did not state the protocols of any test. It is said that Rule 46 and Form 13 indicated that the protocols of the tests applied had to be stated in the report. The contention is that in the absence of the protocols the report was not in the prescribed form and was hence not admissible in evidence. It appears that protocols of test means the details of the process of test.
>
> 6. The question then is : Do Rule 46 and Form 13 require that in the present case the protocols of tests had to be stated? We do not think they do. Obviously, the rule and the form contemplate analysis and test is two different things, for otherwise both words

would not have been mentioned nor the word 'or' been put between them. It is true that the rule and the form require that the protocols of a test should be stated. They do not require any protocols to be stated in the report of an analysis. Now in the present case what the report did was only to give the result of the analysis. It did not give the result of any test. Nor does it say that any test had been carried out. Indeed no dispute exists as to the components constituting the drug, the only dispute being as to the quantities in which they were so contained. The report only stated the quantities of them found on analysis. That being so, in our view, the report is in the prescribed form and is fully admissible in evidence.

7. The Inspector in his letter to the Analyst no doubt stated that the sample was sent to him for "test or analysis" but what the Analyst did was only to make an analysis. It is irrelevant to consider whether he should also have carried out a test even if he should have and did not, that would not prevent the report of the result of the analysis from being admitted in evidence. That report would none the less be conclusive evidence under Section 25 (3) of the Act.

8. Our attention was drawn to the case of *Raj Kishan v. The State, AIR 1960 Allahabad 460*. There it was observed that when a report did not state the protocols of the test applied, it could not be said to be a report in the prescribed form. It is not clear from the judgment whether the report in that case purported to be the report of a test or of an analysis. If that case intended to hold that no report of an analysis is in the prescribed form where the protocols are not stated, we are unable to agree with it."

Hence, that argument raised by learned counsel for the petitioners is rejected.

73. Coming last to the argument of Mr. Shekhawat that the test reports (Exs.PW1/7 and PW2/4) do not state that the seals were intact at the time when the samples were received by the Government analyst.

Though that otherwise may have been a reason to grant the petitioners the benefit of doubt, however, in the context of these cases, the factum of suspended matter being present in the bottle containing the drug, having already been specifically seen and mentioned even in the applications made by the complainant to the analyst, Ex.PW2/4, as already seen, and eventually that suspended matter itself having been found to be fungus and bacteria that did not comply with prescribed standards, the non-mentioning of the condition of the seals, in the test reports, would not be fatal to the case of the complainant.

Hence, that argument is also rejected.

74. Having held as above, the question then would be as to which offence punishable under the Act all the petitioners are guilty of.

In this context, as regards the petitioners who are found to have caused an adulterated drug to be manufactured and stored/sold, Section 17-A of the Act, reads as follows:-

> *17A. Adulterated drugs.—For the purposes of this Chapter, a drug shall be deemed to be adulterated,—*
> *(a) if it consists in whole or in part, of any filthy, putrid or decomposed substance; or*
> *(b) if it has been prepared, packed or stored under insanitary conditions whereby it may have been contaminated with filth or whereby it may have been rendered injurious to health; or*
> *(c) if its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health; or*
> *(d) if it bears or contains, for purposes of colouring only, a colour other than one which is prescribed; or*
> *(e) if it contains any harmful or toxic substance which may render it injurious to health; or*

(f) if any substance has been mixed therewith so as to reduce its quality or strength.

Section 18 (a) (i) and (vi) of the Act reads as follows:-

"*18. Prohibition of manufacture and sale of certain drugs and cosmetics.- From such date as may be fixed by the State Government by notification in the Official Gazette in this behalf, no person shall himself or by any other person on his behalf-*

(a) [manufacture for sale or for distribution, or sell, or stock or exhibit or offer for sale,] or distribute-

[(i) any drug which is not of a standard quality, or is misbranded, adulterated or spurious;

xxxxx xxxxx xxxxx

(vi) any drug or cosmetic in contravention of any of the provisions of this Chapter or any rule made thereunder;]"

Thus, the petitioners having manufactured (in the case of S. C. Gupta and G. C. Gupta), stored and sold (in the case of Sushil Bansal and Jitender Kumar) and stocked (in the case of Madan Lal), an adulterated drug they contravened the provisions of Section 17-A and Section 18 (a) (i) and (vi) of the Act.

Even as regards the petitioners from whom the sample of the drug was actually obtained on 13.11.2003 and 14.11.2003, i.e. Madan Lal and Jitender Kumar, this Court already having held that they did not exercise due diligence in even inspecting the sealed bottles, at the time of purchase, when all they had to do was to deseal the carton in which the sealed bottles were contained, to see the bottles, they too cannot be absolved of having committed an offence in terms of Section 17-A and 18 (a) (i) of the Act.

75. Even the petitioner who purchased the drugs from the

manufacturer and sold it to the firm of petitioner Jitender Kumar, i.e. Sushil Bansal, petitioner in CRR nos.4453 and 4456 of 2017, (Proprietor of M/s S. K. Enterprises); he also very obviously did not exercise due diligence in inspecting the bottles that he purchased, to see as to whether they are contaminated or not, and even though the recovery of the contaminated drug was not actually made from him but from those to whom he had sold it, with no sample having been taken from his firm, and therefore whether or not the drug was contaminated during the period that he possessed it, is not positively determinable, yet, I would not grant him the benefit of doubt, in view of the fact that Section 19 (1) stipulates that it shall be no defence to prove merely that the accused was ignorant of the nature, substance or quality of the drug in respect of which the offence was committed, or even of the circumstances of its manufacture or import. Thus, he also not having shown due diligence (in terms of Section 19 (3)) to determine even the apparent quality of the drug, he cannot be absolved of the commission of the offence.

Consequently, in my opinion, the petitioners are all guilty of contravening the provisions of Section 17-A (a) and (b), as also Section 18 of the Act.

76. The next question then is whether they have been correctly held to be guilty of an offence punishable under Section 27(a), or they are actually only guilty of the commission of an offence falling under clause (b) thereof.

The relevant parts of Section 27 (as applicable in the year 2003), are being reproduced herein as under:-

> ***"[27. Penalty for manufacture, sale, etc., of drugs in contravention of this Chapter.-*** *Whoever, himself or by any other person on his behalf, manufactures for sale or for distribution, or sells, or stocks or exhibits or offers*

for sale or distributes,--

(a) any drug deemed to be adulterated under section 17A or spurious under section [17B and which] when used by any person for or in the diagnosis, treatment, mitigation, or prevention of any disease or disorder is likely to cause his death or is likely to cause such harm on his body as would amount to grievous hurt within the meaning of section 320 of the Indian Penal Code (45 of 1860), solely on account of such drug being adulterated or spurious or not of standard quality, as the case may be, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to a term of life and with fine which shall not be less than ten thousand rupees.

(b) any drug--

(i) deemed to be adulterated under section 17A, but not being a drug referred to in clause (a), or

(ii) without a valid licence as required under clause (c) of section 18, shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than five thousand rupees.

Provided that the Court may, for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a term of less than one year and of fine of less than five thousand rupees."

xxxxx xxxxx xxxxx

77. This Bench has already held in ***Rajbir Khushwaha vs. State of Haryana*** (CRR no.2012 of 2011 decided on May 01, 2018), that Clause (a) of Section 27 would only apply when a drug that is deemed to be adulterated or spurious (but in this case only adulterated) is proved, when it is used by any person for diagnoses, treatment, etc., to be likely to cause his death or such

harm to his body as to amount to grievous hurt within the meaning of Section 320 of the Indian Penal Code.

It needs to be observed here that though of course it may possibly be presumed that with non-medicinal fungus injected into the human body, (with any injectable drug), grievous hurt in terms of Section 320 IPC may be expected as regards the person who has been so injected, yet, whether that presumption would be acceptable for the purpose of imposing a harsh punishment of not less than 5 years rigorous imprisonment, or not, in the opinion of this Court, would be debatable.

In my opinion, unless a doctor/pharmacist is specifically examined on the said question, as to whether the injected fungus/bacteria could cause death or grievous hurt, it would not be appropriate to convict a person for the commission of an offence punishable under clause (a) of Section 27 of the Act and punish him accordingly.

Hence, nothing having been shown to this Court by counsel on either side that any competent witness was actually examined/cross-examined on the effect of such fungus/bacteria having been injected, as was found in the drug in question, the petitioners would have to be given the benefit of doubt, at least as regards the commission of an offence punishable under clause (a) of Section 27.

Yet, this Court having held that they have been correctly found by the learned Courts below to have contravened the provisions of Section 17-A, and Section 18 (a) (i) of the Act, i.e. having manufactured/stored/sold an adulterated drug, what needs to be seen is as to under what provision they are to be penalised and punished.

78. In the opinion of this Court, clause (b) of Section 27, would be

applicable to the case of the petitioners, the drug manufactured/stored/sold by them being adulterated but not being a drug referred to in clause (a) and therefore, the punishment to be imposed would be in terms of sub-clause (i) of clause (b) of Section 27.

79. In view of the above, these petitions are allowed to the extent that the conviction of the petitioners for the commission of an offence punishable under clause (a) of Section 27 is set aside and instead they are held guilty for the commission of an offence punishable under clause (b) of Section 27 of the Act.

It is to be noticed here that though Section 27(b) provides for a minimum punishment a 3 years presently w.e.f. 10.08.2009, the offence in question having taken place in the year 2003, it would be the unamended Act that applies, by which a minimum sentence of one year and a minimum fine of Rs.5000/- is stipulated, with the imprisonment extendable upto a period of 3 years.

The proviso thereto postulates that for any adequate and special reasons to be recorded in the judgment, a Court may impose a sentence of imprisonment for a term of less than one year and may also impose a fine of less than Rs.5000/-.

In the present case therefore, what needs to be seen by this Court is as to whether the petitioners are to be imposed the minimum punishment of one year as stipulated in the aforesaid provision, or whether there are any adequate and special reasons for imposing a lesser sentence on them.

80. First, what needs to be seen is that the occurrence in question, i.e. the obtainment of the drug, is in the year 2003, i.e. a few months less than 15 years, after which the petitioners have been facing prosecution since

December 2005, when the two complaints were instituted in the trial Court. Thus, a period of about 13 and half years has gone by thereafter too.

In the context of the present cases it also needs to be stated that it is the admitted case of the complainant that the adulteration, in the form of fungus, was visible to the naked eye upon seeing the bottle in which the drug was contained. Thus, the likelihood of it being administered to anyone who opened the carton in which the bottles were contained, would not be very high, though obviously the chances of actual usage cannot be ruled out.

Still, this Court having opined that the offence committed by the petitioners being one not punishable under clause (a) of Section 27, their conviction and sentence has to be modified accordingly as is prescribed for the commission of an offence punishable under Section 27 (b) instead of Section 27(a) of the Act.

81. Consequently, in my opinion, as regards the petitioners who were not manufacturers of the drug, i.e. Madan Lal (petitioner in Criminal Revision nos.4436 of 2017), Sushil Bansal (petitioner in Criminal Revision nos.4453 and 4456 of 2017) and Jitender Kumar (petitioner in Criminal Revision nos.148 and 149 of 2018), they having been found by this Court to be guilty of not being vigilant at the time of purchase of the drug, but nonetheless guilty even in terms of Section 19 (1) of the Act, their punishment could be reduced to the extent already undergone by them. The aforesaid petitioners are also imposed a fine of Rs.35,000/- each, to be paid within a period of 3 months from the date receipt of a certified copy of this judgment, their sentences already having been suspended. In default of payment of the said fine they would undergo further imprisonment for a period of 5 months.

82. As regards the petitioners in Criminal Revision nos.4455 and

4459 of 2017 and CRR nos.4460 and 4461 of 2017 (S.C. Gupta and G. C. Gupta respectively), they being the proprietor and authorised signatory respectively of the firm that manufactured the drug, and it having been found that it was an improper method of manufacturing that led to the fungus and bacteria developing in the drug, they cannot be put on the same footing as the other petitioners, and consequently, still keeping in view the fact that they have been facing prosecution for the past 13 and a half years, they are imposed a sentence of rigorous imprisonment of 6 months, with the period of custody already undergone by them, either at the under trial or post conviction stages, to be set off from the total sentence now imposed upon them.

They are also imposed a fine of Rs.50,000/- each, in default of payment of which they would undergo further imprisonment for a period of 6 months.

Consequently, both these petitioners, i.e. S. C. Gupta and G. C. Gupta, be taken into custody to complete the remaining terms of sentence now imposed by this Court, for the commission of an offence punishable under Section 27 (b) of the Act.

83. These nine petitions are allowed to the aforesaid extent.

02.07.2018 **(AMOL RATTAN SINGH)**
dinesh/d.k. **JUDGE**

1.Whether speaking/reasoned? Yes/No
2. Whether reportable? Yes/No