

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL WRIT PETITION NO. 556 OF 2011

- 1) Shri A.K. Kothari,
Aged about – Major, Occ. - Director,
M/s. Albert David Ltd.
- 2) Shri P.L. Agrawal,
Aged about – Major, Occ. - Director,
M/s. Albert David Ltd.
- 3) Shri Hemal Kampani,
Aged about – Major, Occ. - Director,
M/s. Albert David Ltd.
- 4) Shri Rajiv Singhi,
Aged about – Major, Occ. - Director,
M/s. Albert David Ltd.
- 5) Shri A.V. Iyengar,
Aged about – Major, Occ. - Director,
M/s. Albert David Ltd.
- 6) Shri K.P. Mundhara,
Aged about – Major, Occ. - Executive Director,
M/s. Albert David Ltd.
- 7) Shri Praveen Kumar Jain,
Aged about – Major, Occ. - V.P. (Works),
M/s. Albert David Ltd.
- 8) Shri D.D. Binani,
Aged about – Major, Occ. - Director,
M/s. Albert David Ltd.
- 9) M/s. Albert David Ltd.,

All 1 to 9 R/o 5/11D, Gupta Lane,
Kolkatta – 700 050.

.... **PETITIONERS**

VERSUS

Chandrakant Kanhuji Dange,
Drugs Inspector, Bhandara Office of the
Assistant Commissioner, Food & Drug
Administration (M.S.) at the instance
of State of Maharashtra.

.... **RESPONDENT**

Mr. S.C. Mehadia, Counsel for the petitioners,
Mrs. S.S. Jachak, Addl.PP. for the respondent.

CORAM : ROHIT B. DEO, J.
DATED : 8th DECEMBER, 2020

ORAL JUDGMENT :

Petitioners 1 to 6 and 8 are the Directors and petitioner 7 is the Vice-President (Works) of petitioner 9-company which is engaged in manufacture of various drugs under licence issued under the provisions of the Drugs and Cosmetics Act, 1940 ("Act" for short).

2. The challenge is to the order dated 22-11-2007 of issuance of summons in Criminal Case 293/2007 which is instituted by the Inspector appointed under Section 21 of the Act alleging commission of offence punishable under various provisions of the Act.

3. The substratum of the challenge is that the learned Magistrate was not clothed with the jurisdiction to entertain the complaint against

the Directors and the Vice-President of petitioner 9-company in the absence of an averment in the complaint that the said arraigned accused were in charge of, and were responsible to the company for the conduct of the business of the company at the relevant time.

4. The submission that the learned Magistrate erred in issuing summons to petitioners 1 to 8 is well merited.

5. Section 34 of the Act reads thus :

“34. Offences by companies – (1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation _ For the purposes of this Section -

(a) “company” means a body corporate, and includes a firm or other association of individuals; and

(b) “director” in relation to a firm means a partner in the firm.”

Section 34 of the Act is *pari materia* with Section 141 of the Negotiable Instruments Act and similar provisions in other enactments which, by a deeming fiction, enthrone an element of vicarious liability which is an exception to the general rule that a person is not vicariously responsible for the offence committed by the other.

6. It is well settled, and reference to the catena of decisions enunciating the position of law is not really necessary, that a Director or a Partner cannot be fastened with vicarious liability unless he was in charge of, and was responsible to the firm for the conduct of the business of the firm. A Director or a Partner cannot be deemed to be liable, and that the Director and Partners is vicariously liable for the offence committed by the company or firm must be pleaded and proved like any other fact. In the absence of the necessary averments in the complaint, which averments may not necessarily confirm to or mechanically reproduce the language of Section 34 of the Act, it would be impermissible for the Court to take cognizance of the complaint. The very *sine qua non* for issuance of process is that the complaint, holistically read and understood, must aver that the Directors or Partners who are arraigned as accused were responsible to the

company or firm for the conduct of the business.

7. The legal position is well settled and it would not be necessary to make a reference to the catena of decisions which hold that the very *sine qua non* for the maintainability of the complaint is a specific averment that the Directors who were in charge of the affairs of the company and were responsible to the company for conduct of its business. Reference may be made to the decisions of the Hon'ble Apex Court in *SMS Pharmaceuticals vs. Neeta Bhalla and another*, (2005) 8 SCC 89, *Gunmala Sales Pvt. Ltd. vs. Anu Mehta and others*, (2015) 1 SCC 103 and *National Small Industries Corporation Ltd. vs. Harmeet Singh Paintal and Another* (2010) 3 SCC 330.

8. Perusal of the complaint (Annexure-G) would reveal that there is no averment that petitioners 1 to 8 were in charge of the affairs of the company or were responsible to the company for the conduct of its business. The only averment in paragraph 19 is that petitioners 1 to 9 had manufactured, distributed and sold the drug which was found to be substandard as per the analytical report.

9. In view of the total absence of the necessary averments in the complaint, the order of issuance of summons qua petitioners 1 to 8 is

vitiated by jurisdictional error.

10. The order of summons issued qua petitioners 1 to 8 is quashed and the complaint is dismissed against petitioners 1 to 8. The learned Magistrate shall proceed with the complaint against petitioner 9-company.

11. The petition is partly allowed in the aforestated terms.

JUDGE

adgokar