

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

**CRIMINAL WRIT PETITION NO. 737 OF 2016**

- 1) Sanjay s/o Prithviraj Bhatia,  
Aged 50 years, Occupation – Business,
- 2) Aditya s/o Sanjeev Bhatia,  
Aged 35 years, Occupation – Business,
- 3) Ajay s/o Prithviraj Bhatia,  
Aged about 55 years,  
Occupation – Business,
- 4) Smt. Anita w/o Sanjeev Bhatia,  
Aged 58 years, Occupation – Household,  
  
All R/o Model Town, Panipat,  
District Panipat (Haryana)

.... **PETITIONERS**

**VERSUS**

State of Maharashtra,  
through Nitin Padmakar Bhandarkar,  
Drugs Inspector, Office of the  
Assistant Commissioner, Foods &  
Drugs Administration, Room No.21  
& 21, 2<sup>nd</sup> Floor, Administrative  
Building Chandrapur, District Chandrapur.

.... **RESPONDENT**

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Mr. S.V. Manohar, Senior Counsel assisted by Mr. S.A. Mohta, Counsel  
for the petitioners,  
Mr. Vinod Thakre, Addl.PP for the respondent.

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**CORAM : ROHIT B. DEO, J.**  
**DATED : 17<sup>th</sup> DECEMBER, 2020**

**ORAL JUDGMENT :**

Petitioners, who are arraigned as accused 1 to 4 in Regular Criminal Case 2100/2014, which complaint is instituted by the Drug Inspector appointed under Section 21 of the Drugs and Cosmetics Act, 1940 ("Act" for short) alleging commission of offence punishable under Sections 27(d) and 28-A of the Act, are assailing the order dated 07-7-2014 rendered by the Additional Chief Judicial Magistrate, Nagpur of taking cognizance of the complaint and issuing summons.

2. The thrust of the submissions canvassed by the learned Senior Counsel Mr. Sunil Manohar is that in the absence of an averment in the complaint that the petitioners were in charge of, and were responsible to the company for the conduct of the business of the company, the learned Magistrate committed a jurisdictional error in entertaining the complaint. Mr. Sunil Manohar would submit that Section 34 of the Act fastens vicarious liability on the Directors for the offence committed by the company provided the Directors were in charge of, and were responsible to the company for the conduct of its business. The deeming fiction is a departure from the ordinary rule entrenched in criminal jurisprudence that a person shall be responsible only for the offence committed personally and not for the acts of others and Mr. Sunil Manohar submits that there is no presumption in law that every

Director was in charge of, and was responsible to the company for the conduct of its business, and a Director cannot be roped in on the principle of vicarious liability in the absence of necessary averments. Mr. Sunil Manohar would submit that in the absence of necessary averments, the learned Magistrate is not clothed with the jurisdiction to issue summons requiring the petitioners-Directors to face the trial. The learned Additional Public Prosecutor Mr. Vinod Thakre would disagree with the submissions of the learned Senior Counsel.

3. In view of the primary challenge to the order impugned, it would not be necessary to reproduce in detail the averments in the complaint which pertain to the alleged contravention of the provisions of the Act and the Rules framed thereunder. Suffice it, if certain basic facts are noticed.

4. The substratum of the complaint is that accused 8-M/s. Laborate Pharmaceuticals *inter alia* manufactures for sale Astozyme Syrup, which was found in the test report “Not of standard quality” in view of the content of PEPSIN in the sample being less than the quantity prescribed. The complaint avers that accused 1 to 4-petitioners herein are the Directors, accused 5 is the General Manager and accused 6 & 7 are the Approved Manufacturing & Analytical Chemist respectively of

accused 8-company.

5. Paragraph 2 of the complaint reads thus :

*“2. That the Accused No.1 to 4 are the Directors of the Accused No.8 i.e. M/s. Laborate Pharmaceuticals India Ltd., 31, Nariwala, Rajban Road, PaontaSahib (H.P) and hence responsible for the manufacturing for sale of not of standard quality Drug Astozyme Syrup, B.No.DASL-032,D/Mfg.-05/2013, D/Exp.07/2014.*

6. It would be relevant to also note the averments in paragraphs 3 and 4 which read thus :

*“3. That Accused No.5 is the General Manager of the Accused No.8 and hence responsible for Manufacturing for sale of not of standard quality Drug Astozyme Syrup, B.No.DASL-032,D/Mfg.-05/2013, D/Exp.07/2014.*

*4. That Accused 6 & Accused No.7 is the Approved Manufacturing & Analytical Chemist respectively of the Accused No.8 i.e. M/s. Laborate Pharmaceuticals India Ltd., 31, Nariwala, Rajban Road PaontaSahib (H.P). As drug in question manufactured under Accused no.6 supervision and tested & released under Accused No.7, hence they are responsible for manufacturing & testing for sale of not of standard Quality Drug Astozyme Syrup, B.No.DASL-032, D/Mfg.-05/2013, D/Exp.07/2014.”*

7. In paragraph 11, the averment is that accused 8-company did not produce the constitution of the firm with the list of Directors and Directors who are responsible for day to day activity of the company.

8. The averments which are produced supra, are the only averments on the basis of which the principle of vicarious liability is invoked and the petitioners are arraigned as accused to face the trial on the premise that the provisions of Section 34 of the Act come into play.

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.”*

9. Section 34 of the Act is *pari materia* with Section 141 of the Negotiable Instruments Act, 1881. Provisions which are similar and indeed identical to Section 34 of the Act and Section 141 of the Negotiable Instruments Act, 1881 are also found in several other statutes. Illustrative reference may be made to Section 22C of the Minimum Wages Act, 1948, Section 68 of the Foreign Exchange Regulation Act, 1973, Section 58C of the Reserve Bank of India Act, 1934 and Section 35A of the Income Tax Act.

10. Considering the *pari materia* provisions of the Negotiable Instruments Act, 1881, the Apex Court has held, in a catena of decisions that the *sine qua non* for the maintainability of the complaint is a specific averment that the Directors, who are arraigned as accused, were in charge of the affairs of the company and were responsible to the company for the conduct of its business. A Director cannot be deemed to be liable, and the vicarious liability must be pleaded and proved like any other fact. A bald statement that the accused was a Director at the relevant time does not satisfy the requirement of Section 141 of the Negotiable Instruments Act, 1881 and *pari materia* provisions like Section 34 of the Act. Reference may be made to the decisions of the 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*.

11. The provisions of Section 34 of the Act are considered by the Apex Court in *State of Haryana v. Brij Lal Mittal and others, AIR 1998 SC 2327* and the relevant articulation reads thus :

*“It is thus seen that the vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises if at the material time he was in-charge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of the company it does not necessarily mean that he fulfills both the above requirements so as to make him liable. Conversely, without being a director a person can be in-charge of and responsible to the company for the conduct of its business. From the complaint in question we, however, find that except a bald statement that the respondents were directors of the manufacturers, there is no other allegation to indicate, even prima facie, that they were in-charge of the company and also responsible to the company for the conduct of its business.”*

12. Testing the averments in the complaint on the anvil of the settled legal position, the only conclusion is that the learned Magistrate committed a jurisdictional error in summoning the petitioners. The only averment in the complaint is that the petitioners are the Directors of the company and are, therefore, responsible for manufacturing for sale the drug found to be of sub-standard quality. It is not averred that

the petitioners were, as a fact, in charge of the affairs of the company or that the petitioners were responsible to the company for the conduct of its business. It is not even averred that any petitioner was the Managing Director, as would possibly do away with the requirement of a specific averment that he was in charge of the affairs of the company, inasmuch as in view of the provisions of Section 2(53)&(54) of the Companies Act, a Managing Director would be deemed to be in charge of the affairs of the company.

13. In my considered view, the order of summoning the petitioners is clearly unsustainable and is liable to be quashed.

14. Before parting with the judgment, in fairness to the learned Additional Public Prosecutor Mr. Vinod Thakre, it must be noted that he relied on the decision of a learned Single Judge in ***Lalankumar Singh s/o Udit Narayan Singh & Others vs. State of Maharashtra, 2016 ALL MR 479***. The said decision revolves on facts and I do not have the benefit of perusing the averments in the complaint which fell for consideration in that case. In any event, I am respectfully bound by the law enunciated by the Apex Court. The other aspect is the averment in paragraph 11 that the company did not produce the list of Directors responsible for the conduct of business. Assuming *arguendo* that the

averment is factually correct, I am afraid that jurisdiction cannot be conferred on the Magistrate and the requirement of incorporating necessary averments is not obviated due to the alleged inability of the complainant to gather the requisite information. That apart, the General Manager of the company has sworn an affidavit dated 04-7-2012 which asserts that he is the overall in charge-cum-sole person responsible for the day to day affairs of the company and the Directors shall not be responsible for the day to day activity and control of business. Perusal of the letter dated 16-12-2013 addressed by the company to the Drug Inspector who instituted the complaint, reveals that the board resolution alongwith affidavit sworn by the General Manager was duly forwarded to the said authority. In the affidavit in response, while the respondent avers that the petitioners did not produce the list of Directors responsible for the day to day activities of the company, the affidavit referred to supra is not dealt with.

15. In view of the discussion supra, the petition is allowed and the order impugned of issuing summons is quashed qua the petitioners. The trial shall continue as against accused 5 to 8.

**JUDGE**

*adgokar*