

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

CRIMINAL APPLICATION (APL) NO. 270 OF 2020

- 1) Mahendra Verma s/o Durga Datt Verma,
Aged about 48 years, Occupation – Director,
M/s. Astham Healthcare Pvt. Ltd.,
Village – Theda, Tahsil – Nalagrah,
District – Solan.
 - 2) Subhkaran Verma s/o Durga Datt Verma,
Aged 46 years, Occupation – Director,
M/s. Astham Healthcare Pvt. Ltd.,
Village – Theda, Tahsil – Nalagrah,
District – Solan.
 - 3) Manoj Kumar Verma s/o Durga Datt Verma,
Aged 44 years, Occupation – Business,
(Not Director of the M/s. Astham Healthcare
Pvt. Ltd., Theda since 20-3-2016.)
- All 1 to 3 residence of Tilak Nagar,
Ward No.21, Ratangarah, District – Charu,
(Rajasthan).
- 4) Astham Healthcare Pvt. Ltd.,
Village – Theda, Tahsil – Nalagrah,
District – Solan (H.P) 174101.

.... **APPLICANTS**

VERSUS

The State of Maharashtra,
through Drug Inspector Shri S.D. Fule,
Food and Drug Administration (M.S.),
Chandrapur.

.... **NON-APPLICANT**

Mr. Sachin Deshpande, Counsel for the applicants,
Mrs. Kalyani Deshpande, Addl.PP for the non-applicant/State.

CORAM : ROHIT B. DEO, J.
DATED : 14th JUNE, 2021

ORAL JUDGMENT :

Applicants, who are arraigned as accused 2, 3, 4 & 7 in Special Criminal Case 1/2019, 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) r/w Section 34 of the Act, are assailing the order dated 04-5-2019 rendered by the Assistant Sessions Judge, Chandrapur of taking cognizance of the complaint and issuing summons.

2. The thrust of the submissions canvassed by the learned Counsel Mr. Deshpande is that in the absence of an averment in the complaint that the applicants 1, 2 & 3 were in charge of, and were responsible to the company for the conduct of the business of the company, the learned Sessions Judge committed a jurisdictional error in entertaining the complaint. Mr. Deshpande 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. Deshpande 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. Deshpande would submit that in the absence of necessary averments, the learned Sessions Judge is not clothed with the jurisdiction to issue summons requiring the applicants-Directors to face the trial. The learned Counsel states that the challenge is not pressed qua applicant 4-company. The learned Additional Public Prosecutor Mrs. Kalyani Deshpande would disagree with the submissions of the learned 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 7-Astam Healthcare Pvt. Ltd. *inter alia* manufactures for sale MCV DS, which was found in the test report “Not of standard quality”.

5. In paragraph 35, the averments read thus :

"35. The investigations made by complainant revealed as under :

i. That, the Accused No. 7, the firm M/s. ASTAM HEALTHCARE PVT. LTD., Vill. Theda, Tahsil- Nalagarh, Distt. Solan- 174101 holding drugs manufacturing licenses No. MNB/08/683 (Form-25) and MB/08/684 (Form-28) under which manufacturing of "MCV DS Dry Syrup" was permitted. The accused no. 1 to 7 did manufacture "MCV DS, Batch No.-MDA1616, Mfg. Dt. 11/2016, Exp. Dt. 04/2018, M.L.No.MB/08/684, Mfd. By: ASTAM HEALTHCARE PVT. LTD., Vill. Theda, Tahsil Nalagarh, Distt. Solan- 174101 (H.P)" around 19760 x 5.5gm/50ml quantity of the said drug and was distributed 4960 x 5.5gm/50ml quantity to M/s. Maneesh Pharmaceuticals Ltd., 1 Floor, Rajlaxmi Commercial Complex, Thane-Bhiwandi Road, Kalher, Bhiwandi, Thane. M/s. Maneesh Pharmaceuticals Ltd., 1 Floor, Rajlaxmi Commercial Complex, Thane-Bhiwandi Road, Kalher, Brandi, Thane distributed to M/s. Maneesh Pharmaceuticals Ltd., H. No. 56, W.No. 01, Survey No. 54, R.P. Agrawal Estate, Amravati Raod, Wadi, Nagpur. M/s. Maneesh Pharmaceuticals Ltd., H. No. 56, W.No. 01, Survey No. 54, R.P. Agrawal Estate, Amravati Raod, Wadi, Nagpur distributed 42 x 5.5gm/50ml quantity to M/s. Suhas Agency, Shop No.3, Pawansut Dawa Bazar, Ram Nagar Road, Chandrapur, Distt. Chandrapur. M/s. Suhas Agency, Shop No.3, Pawansut Dawa Bazar, Ram Nagar Road, Chandrapur, Distt. Chandrapur distributed 06 x 5.5gm/50ml quantity to M/s Shiv Medical & General Stores, Shop No. 1, H.No. 34/4, Jatpura Gate, Chandrapur, Distt. Chandrapur. That, from said drug, sample was drawn by the Complainant on 30.08.2017 which is declared as 'Not OF Standard Quality.

ii. That, the Accused No: 1, is Plant Head of the Firm and person handling day to day activity of the accused company.

iii. That, the Accused No. 2, is a Director of the accused company.

iv. That, the Accused No. 3, is a Director of the accused company.

v. *That, the Accused No. 4, is a Director of the accused company.*

vi. *That, the Accused No. 5, is Approved Manufacturing Chemist and person responsible for manufacturing of drugs in the Firm.*

vii. *That, the Accused No. 6, is Approved Quality Control Chemist and person responsible for testing of drugs in the Firm.*

viii. *That, the Accused No. 7, is the Firm responsible for manufacturing and distribution of drugs.*

ix. *That, the "MCV DS, Batch No.- MDA1616, Mfg. Dt. 11/2016, Exp. Dt. 04/2018, M.L.No.MB/08/684, Mfd. By: ASTAM HEALTHCARE PVT. LTD., Vill. Theda, Tahsil Nalagarh, Distt.- Solan- 174101 (H.P)" is the drug within the meaning of Section 3(b) of the Drugs & Cosmetics Act, 1940 which is declared **NOT OF STANDARD QUALITY** drug by the Govt. Analyst, Mumbai as well as Director Incharge, Central Drugs Laboratory, Kolkatta.*

x. *That the provisions of Section 18(a)(i) of Drugs & Cosmetics Act, 1940 read as follows: "No person shall himself or by any other person on his behalf shall manufacture for sale or sell or distribute any drug which is not of standard quality."*

6. The averments which are produced supra, are the only averments on the basis of which the principle of vicarious liability is invoked and applicants 1 to 3 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.”

7. 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.

8. 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.**

9. 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.”

10. Testing the averments in the complaint on the anvil of the settled legal position, the only conclusion is that the learned Sessions Judge committed a jurisdictional error in summoning accused 2, 3 and 4. The only averment in the complaint is that accused 2, 3 and 4 are the Directors of the company. It is not averred that accused 2, 3 and 4 were, as a fact, in charge of the affairs of the company or that applicants 1 to 3 were responsible to the company for the conduct of its business. It is not even averred that any applicant 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.

11. In my considered view, the order of summoning accused 2, 3 and 4 is clearly unsustainable and is liable to be quashed.

12. Before parting with the judgment, in fairness to the learned Additional Public Prosecutor Mrs. Kalyani Deshpande, it must be noted that she 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.

13. In view of the discussion supra, the application is allowed and the order impugned of issuing summons is quashed qua accused 2, 3 and 4. The trial shall continue as against applicant 4-company/accused 7.

JUDGE