IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRM-M-19322-2016
Reserved on: 06.04.2022
Pronounced on: 05.05.2022

SANJAY BHATIA

... PETITIONER

VERSUS

STATE OF HARYANA & ANR.

....RESPONDENTS

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ

****

Argued by: Mr. Amit Jhanji, Sr. Advocate with
Mr. Tushar Sharma and Mr. Himmat Singh Sidhu, Advocates
for the petitioner.

Mr. Anmol Malik, DAG, Haryana.

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VINOD S. BHARDWAJ, J.

The instant petition raises a challenge to the complaint No.08 dated 21.01.2015 (Annexure P-4) as well as summoning order dated 21.01.2015 (Annexure P-6) passed by the Chief Judicial Magistrate, Panipat in the case titled as State of Haryana (through Drugs Control Officer, Panipat) Vs. Sunil Vasishtha and others.

BRIEF FACTS OF THE CASE

2. Briefly noticed and summarized facts of the case are as under:

2.1 That the petitioner Sanjay Bhatia is a Director of M/s Laborate Pharmaceuticals India Ltd. (Unit-2) company (hereinafter to be referred to as 'the accused company') and the said Company is having its manufacturing unit in Poanta Sahib, Himachal Pradesh and possesses drug manufacturing licence. The complaint in question was instituted by the State of Haryana through its

Drugs Control Officer, Panipat under Section 3 of the Essential Commodities Act, 1955 read with paragraph 8(1), 9(1), 14(2) & 14(3) of Drugs (Price Control) Order, 1995 punishable under Section 7(1)(a)(ii) of Essential Commodities Act, 1955 (hereinafter to be referred to as 'the Act of 1955').

2.2 It is alleged in the said complaint that Sunil Vasishtha- accused No.1 [Vice President (Operation)], is the person who is the overall incharge and sole responsible person of the accused company i.e. the accused no.3 namely M/s Laborate Pharmaceuticals India Ltd. in the complaint in question. Petitioner herein is alleged to be the 'responsible director' of the accused company-respondent No.3.

2.3 It is further alleged in the said complaint that on 31.07.2013, the complainant inspected the accused company situated at Nizampur Road, Panipat holding wholesale drug licence as per the directions of the State Drugs Controller, Haryana and to enquire the contents of the letter No.DPCO-01/GJ/DI/Z-II/VJA/2013 dated 09.07.2013 received from the office of Drugs Control Administration, Government of Andhra Pradesh regarding violation detected of ceiling prices under DPCO 1995. Sanjay Paul, the competent person incharge and responsible for sale of drug of the firm was found present at the time of inspection. Samples of the drug products MALIGO 250 tablets and Nflox Eye/Ear Drops with one other drug was drawn for test/analysis purpose in accordance with the provisions of Section 23 of the Act of 1955 read with Rule 56. The samples were drawn and packed in accordance with regulations prescribed under the Rules. Despite asking, the person incharge refused to affix his seal on the sample portions, but signed each of the sealed samples. One portion each of the above said samples was handed over to the representative of the accused company. A copy of the inspection report duly signed by the representative of the accused company was handed over to him. The accused company submitted that it had returned the stocks of drugs received from its Vijaywada depot to their manufacturing plant i.e. the accused company and submitted copy of price list on Form-V submitted to the Chairman, NPPA, New Delhi under DPCO, 1995. The drug MALIGO-250 tablets, manufactured by the accused company-respondent No.3, was found to bear the maximum retail price as Rs.11.80/- per 10 tablet whereas the ceiling price notified by the Government of India vide notification no.S.O.309(E) dated 23.01.2009 is Rs.6.12 only (excluding Excise Duty). Similarly the formation Nflox Eye/Ear Drops was bearing the retail price of Rs.15.25 per ten ml. vial whereas the ceiling price notified by Govt. of India vide its Notification No.S.O.1335(E) dated 16.09.2005 is Rs.7.30 only (excluding Excise Duty).

2.4 As per the report of the Government Analyst, the drug was declared as "is of standard quality". A show cause notice was issued to the accused company alongwith the photocopies of the labels of the drugs in question. On failure of the accused company to respond to the same, the complete report was sent to the State Drugs Controller to seek permission to launch prosecution against the accused persons and the same was granted vide letter dated 09.01.2015. The drugs in questions are essential commodities within the meaning of Section 2-A(1) of the Essential Commodities Act, 1955, and both the drugs are formulations within the meaning of paragraph 2(h) and a scheduled formulation as defined under paragraph 2(v) of Drugs (Price Control) Order, 1995. As the accused company had violated the mandate of the Essential Commodities Act, 1955 as well as Drugs (Price Control) Order, 1995, hence, the complaint in question was instituted under Section 11 of the

Essential Commodities Act, 1955. The accused persons were summoned by the Chief Judicial Magistrate, Panipat vide order dated 21.01.2015.

3. Aggrieved thereof, the instant Revision Petition had been preferred.

ARGUMENTS

4. Learned counsel for the petitioner has argued that the petitioner-Sanjay Bhatia has been wrongly arraigned as "responsible director" alongwith Mr. Sunil Vasishtha, who has been arrayed as overall incharge-cum-sole person responsible for the day to day control of the business activities of the drug manufacturing firm i.e. the accused company. It is submitted that under Section 10 of the Essential Commodities Act, only the person who is overall incharge or responsible for the day to day business activities of a company can be proceeded against contravention of any provision(s) of the Essential Commodities Act, 1955 and Drugs (Price Control) Order, 1995 by the company. Learned counsel for the petitioner placed reliance upon the resolution passed by the accused company, which is appended alongwith the petition to point out that as per the said resolution dated 01.03.2013, Mr. Sunil Vasishtha has been made overall Incharge and solely responsible for the conduct of all activities relating to manufacture, quality assurance, distribution of drugs & pharmaceuticals produced by the company's Unit-II and also for compliance with requirements of the Drugs and Cosmetics Act, 1940, Drugs and Cosmetic Rules 1945, Drugs (Price Control) Order and other rules framed thereunder. Attention of the Court was also drawn to the affidavit dated 02.04.2013 (Annexure –P-2) duly sworn by Mr. Sunil Vasishtha, wherein he has specifically admitted about being overall incharge and sole person responsible for the day to day activities of the accused Company Unit-II and

has also admitted that the Directors of the accused company are not responsible for the day to day activities and control of business or for compliance with the requirements of the Drugs Act and other Rules framed thereunder as well as for compliance of Drugs (Price Control) Order, 1955. It is, thus, contended that the petitioner, being not in control of the business activities of the accused company, could not be prosecuted in the complaint in question and only the persons who were declared as 'sole responsible person' can be prosecuted. Reliance was placed on the judgment of the Hon'ble Supreme Court in the matter of ***State of Haryana Vs. Brij Lal Mittal, reported as 1998(5) SCC 343***. Reference was also made to certain other precedents, which would be adverted to during the course of analysis of the submissions raised by the Counsel for respective parties.

5. While controverting the arguments advanced on behalf of the petitioners, learned State Counsel has submitted that there is no procedural violation that would justify the invocation of the power under Section 482 of the Cr.P.C. It is also pointed out that the petitioner is fully responsible person being Director of the accused company and that he was the sole beneficiary of the higher rates printed on the labels in contravention of the rates notified by the National Pharmaceuticals Pricing Authority (NPPA), Government of India, for the scheduled drugs. The said accused person, qua whom the resolution in question is stated to be passed, is an employee of the petitioner and did not gain anything from the pricing of the essential commodities in breach of the statute and/or Drugs (Price Control) Order, 1995. It is also argued that the petitioner had attempted to mislead the Court by making a reference to the mandate of Drugs and Cosmetics Act as well as Rules framed thereunder, whereas the prosecution is initiated under the Essential Commodities Act, 1955 by charging

a higher price for a drug, which falls under the Essential Commodities Act. It was, thus, prayed that the petition in question be dismissed.

6. I have heard learned counsel for the appellant and have gone though the evidence adduced before the Court below.

ANALYSIS

7. Before proceeding further in the matter, the relevant statutory provisions referred to in the complaint as well as by the learned counsel appearing on behalf of the petitioner are reproduced hereunder below:

> ***Section 2-A(1) of Essential Commodities Act:***
> *For the purposes of this Act, "essential commodity" means a commodity specified in the Schedule.*
> ***Paragraph 2(h) of the Drugs (Price Control) Order, 1995 reads as under:***
> *"formulation" means a medicine processed out of, or containing one or more bulk drug or drugs with or without the use of any pharmaceutical aids, for internal or external use for or in the diagnose, treatment, mitigation or prevention of disease in human beings or animals.*
> ***Paragraph 2(v) of the Drugs (Price Control) Order, 1955 reads as follows:***
> ***"Scheduled formulation"*** *means a formulation containing any bulk drug specified in the First Schedule either individually or in combination with other drugs, including one or more than one drug or drugs not specified in the First Schedule except single ingredient formulation based on bulk drugs specified in the First Schedule and sold under the generic name.*
> ***Para 9(1) of Drugs (Price Control) Order 1995 reads:***
> *Notwithstanding anything contained in this order, the Government may, from time to time by notification in the official Gazette, fix the ceiling price of a Scheduled formulation in accordance with the formula laid down in Paragraph-7, keeping in view the cost or efficiency, or both of major manufacturers of*

such formulations and such price shall operate as the ceiling sale price for all packs including those sold under generic name and for every manufacturer of such formulations.

Paragraph 14(2) & 14(3) of Drugs (Price Control) Order 1995 reads: Para 14(2) – *Every manufacturer, importer or distributor of a formulation intended for sale shall display in indelible print mark on the label of "container" of the formulation and the minimum pack thereof offered for retain sale, the retail price of that formulation, notified in the Office Gazette or ordered by the Government in this behalf, (with the words "maximum retail price" (or max retail price or MRP) proceeding it and "inclusive of all taxes" succeeding it), (and "Under Government Price Control" on a red strip), in the case of scheduled formulations.*

Para 14(3) – *Every manufacturer or importer shall issue a price list and supplementary price list, if required in Form V to the dealers, State Drugs Controller and the Government indicating reference to such price fixation or revision as covered by the order or Gazette notification issued by the Government, from time to time."*

ESSENTIAL COMMODITIES ACT, 1955

Section (3) *- Any notification issued under sub-section (2) may also direct that an entry shall be made against such commodity in the said Schedule declaring that such commodity shall be deemed to be an essential commodity for such period not exceeding six months to be specified in the notification: Provided that the Central Government may, in the public interest and for reasons to be specified, by notification in the Official Gazette, extend such period beyond the said six months.*

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Section 7 Penalties.

(1) If any person contravenes any order made under section 3,—

(a) he shall be punishable,—

(i) in the case of an order made with reference to clause (h) or clause (i) of sub-section (2) of that section, with imprisonment

for a term which may extend to one year and shall also be liable to fine, and

(ii) in the case of any other order, with imprisonment for a term which shall not be less than three months but which may extend to seven years and shall also be liable to fine:

[Provided that the court may, for any adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than three months;]

(b) any property in respect of which the order has been contravened shall be forfeited to the Government;

(c) any package, covering or receptacle in which the property is found and any animal, vehicle, vessel or other conveyance used in carrying the commodity shall, if the court so orders, be forfeited to the Government.]

[(2) If any person to whom a direction is given under clause (b) of sub-section (4) of section 3 fails to comply with the direction, he shall be punishable with imprisonment for a term which shall not be less than three months but which may extend to seven years and shall also be liable to fine: [Provided that the court may, for any adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than three months.]

(2A) If any person convicted of an offence under sub-clause (ii) of clause (a) of sub-section (1) or under sub-section (2) is again convicted of an offence under the same provision, he shall be punishable with imprisonment for the second and for every subsequent offence for a term which shall not be less than six months but which may extend to seven years and shall also be liable to fine: [Provided that the court may, for any adequate and special reasons to be mentioned in the judgment impose a sentence of imprisonment for a term of less than six months.]

[(2B) For the purposes of sub-sections (1), (2) and (2A), the fact that an offence under sub-clause (ii) of clause (a) of sub-section (1) or under sub-section (2) has caused no substantial harm to the general public or to any individual, shall be an adequate and special reason for awarding a sentence of imprisonment for a

term of less than three months, or six months, as the case may be.]]

[(3) Where a person having been convicted of an offence under sub-section (1) is again convicted of an offence under that sub-section for contravention of an order in respect of an essential commodity, the court by which such person is convicted shall, in addition to any penalty which may be imposed on him under that sub-section, by order, direct that that person shall not carry on any business in that essential commodity for such period, not being less than six months, as may be specified by the court in the order.]

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Section 10. Offences by companies.—

(1) If the person contravening an order made under section 3 is a company, <u>every person who, at the time the contravention 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</u>, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly: <u>Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention</u>.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and <u>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</u> 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 any 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.

***** *(Emphasis supplied)*

> ***Section 11.*** ***Cognizance of offences****.—No Court shall take cognizance of any offence punishable under this Act except on a report in writing of the facts constituting such offence made by a person who is a public servant as defined in section 21 of the Indian Penal Code (45 of 1860) 1[or any person aggrieved or any recognized consumer association, whether such person is a member of that association or not]. 1[Explanation.—For the purposes of this section and section 12AA, "recognized consumer association" means a voluntary consumer association registered under the Companies Act, 1956 (1 of 1956) or any other law for the time being in force.] state amendment Uttar Pradesh.—In section 11, for the words "by a person who is a public servant as defined in section 21 of the Indian Penal Code," substitute the words "by order of, or under authority from the District Magistrate or such other officer as may be empowered by the State Government by general or special order in this behalf."*

8. While making a reference to the aforesaid statutory provisions, learned counsel for the petitioner has drawn attention of the Court to the judgment of ***State of Haryana Verus Brij Lal Mittal and others*** reported as ***1998(5) SCC 343.*** The relevant extract mentioned at para 8 of the said judgment is reproduced hereinbelow:

> *"8. Nonetheless, we find that the impugned judgment of the High Court has got to be upheld for an altogether different reason. Admittedly, the three respondents were being prosecuted as directors of the manufacturers with the aid of Section 34(1) of the act which reads as under:*
>
> *"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 quality, 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 its knowledge or that he exercised at due diligence to prevent the commission of such offence."

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"

9. By making reference to the abovesaid judgment, it is urged that a person cannot be held vicariously liable only on account of being a Director of a Company and by a mere unsubstantial, uncorroborated and bald statement that the accused were Directors of the Manufacturing Company i.e. the accused company and especially in the absence of any material to indicate that they were incharge of the company and also responsible for the conduct of the day to day business activities. Thus the petitioner could not be prosecuted under the Drugs and Cosmetics Act, 1940. Even otherwise provisions under Section 34 of the Drugs and Cosmetics Act, 1940 is para-material with Section 10 of the Essential Commodities Act, 1955, except with minor variations.

10. Further reference was also made to the judgment of the Hon'ble Supreme Court in the matter of ***National Small Industries Corporation Vs. Harmeet Singh Paintal*** reported as ***(2010) 3 SCC 330*** to point out as to who can be considered as the person responsible to the Government for the conduct of the business. Relevant part of the said judgment is reproduced hereinbelow:

> ***"22.*** *Therefore, this Court has distinguished the case of persons who are in-charge of and responsible for the conduct of the business of the company at the time of the offence and the persons who are merely holding the post in a company and are not in-charge of and responsible for the conduct of the business of the company. Further, in order to fasten the vicarious liability in accordance with Section 141, the averment as to the role of the concerned Directors should be specific. The description should be clear and there should be some unambiguous allegations as to how the concerned Directors were alleged to be in- charge of and was responsible for the conduct and affairs of the company*
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> ********
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> ***37.*** *A combined reading of Sections 5 and 291 of Companies Act, 1956 with the definitions in clauses 24, 26, 30, 31 and 45 of Section 2 of that Act would show that the following persons are considered to be the persons who are responsible to the company for the conduct of the business of the company:*
>
> *(a) the Managing Director/s;*
>
> *(b) the whole-time Director/s;*
>
> *(c) the Manager;*
>
> *(d) the Secretary;*
>
> *(e) any person in accordance with whose directions or instructions the Board of Directors of the company is accustomed to act;*
>
> *(f) any person charged by the Board of Directors with the responsibility of complying with that provision;*
>
> *Provided that the person so charged has given his consent in this behalf to the Board;*

(g) where any company does not have any of the officers specified in clauses (a) to (c), any director or directors who may be specified by the Board in this behalf or where no director is so specified, all the directors:

Provided that where the Board exercises any power under clause (f) or clause (g), it shall, within thirty days of the exercise of such powers, file with the Registrar a return in the prescribed form.

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39 *From the above discussion, the following principles emerge:*

(i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.

(ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.

(iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make accused therein vicariously liable for offence committed by company along with averments in the petition containing that accused were in-charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

(v) If accused is Managing Director or Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.

(vi) If accused is a Director or an Officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in complaint.

> *(vii) The person sought to be made liable should be in- charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases."*

11. Reference was also made to the judgment of the Hon'ble Supreme Court passed in the matter of ***Ravindranatha Bajpe Vs. Mangalore Special Economic Zone Ltd. and others, bearing Criminal Appeal Nos.1047-1048 of 2021***. Relevant extract of paragraph no.9 of the said judgment is reproduced hereinbelow:

> *"9. From the order passed by the learned Magistrate issuing the process against the respondents herein – accused nos. 1 to 8, there does not appear that the learned Magistrate has recorded his satisfaction about a prima facie case against respondent nos. 2 to 5 and 7 & 8. Merely because respondent Nos. 2 to 5 and 7 & 8 are the Chairman/Managing Director/Executive Director/Deputy General Manager/Planner & Executor, automatically they cannot be held vicariously liable, unless, as observed hereinabove, there are specific allegations and averments against them with respect to their individual role. Under the circumstances, the High Court has rightly dismissed the revision applications and has rightly confirmed the order passed by the learned Sessions Court quashing and setting aside the order passed by the learned Magistrate issuing process against respondent nos. 1 to 8 herein........."*

12. Reliance has also been placed upon the judgment passed by the Kerala High Court in ***Criminal MC No.1183 of 2012*** in the case filed by the petitioner herein (as petitioner No.2 therein) decided on 20.02.2014. Relevant part of the said judgment is extracted as under:

> *"9. It is settled by various decisions of the Apex Court that the liability of the person responsible and in charge of the company must be construed. A vague averment in a complaint that the*

Directors in charge were responsible to the company for the conduct of the business is not sufficient. Therefore, the responsible Drug Inspector has to conduct a detailed enquiry from the competent authority regarding that aspect. If such an enquiry is not conducted, it is not fair to prosecute all the Directors of the Company on the basis of vague allegation. Therefore, while considering the penal provision, especially as a special statute, the Drug Inspector has to show more vigilance in prosecuting the person in charge of the company. From the aforesaid facts, it is clear that the 1st respondent filed Annexure-A complaint against the company, its Directors, General Manager and a wholesale dealer of drugs alleging the commission of offence u/s.27(d) of the Drugs and Cosmetics Act. The Magistrate took cognizance of the offence upon the complaint and issued process against the persons concerned. Now, the petitioners have approached this Court with the above averments. Accepting the above legal principle, I am of the view that this is a fit case to invoke the inherent jurisdiction.

10. For invoking inherent jurisdiction U/s.482 Cr.P.C. the directions issued by the the Apex Court are very relevant. Apex Court in Madhu Limaye v. State of Maharashtra [(1977) 4 SCC 551] held that:

> *"The following principles in relation to the exercise of the inherent power of the High Court have been followed ordinarily and generally, almost invariably, barring a few exceptions:*
>
> *(1) That the power is not to be resorted to if there is a specific provision in the Code for the redress of the grievance of the aggrieved party.*
>
> *(2) That it should be exercised very sparingly to prevent abuse of process of any court or otherwise to secure the ends of justice.*
>
> *(3) That it should not be exercised as against the express bar of law engrafted n any other provision of the Code."*

11. Annexure-B is the resolution of the 1st accused Company entrusting Sri. Sunil Vashishth, the 6th accused appointed as the General Manager of the Company, who is the responsible person to represent the company in all aspect before the authorities, *bodies, court of law etc. As per Annexure-C, the 6th accused accepted the entrustment as General Manager of the Company, which shows that he is the responsible person of the company. Therefore, petitioners are not responsible for the company's day-to- day business and they are not in charge of the company. For fastening criminal liability, there is no presumption that every Director knows about the transaction of the Company and Section 34 does not make all the Directors liable for the offence. The criminal liability can be fastened only to those persons, who at the time of commission of offence were in charge of and responsible for the conduct of the business of the Company. When vicarious liability is attributed against a registered Company, the 1st respondent has to plead in his complaint that how the accused fastened with such liability for offence committed by the company.*

Therefore, invoking the inherent jurisdiction, I quash Annexure-A complaint and further proceedings in C.C.No.1290/2011 against the petitioners. The 1st respondent is at liberty to proceed with the responsible persons, i.e, 6th and 7th accused in the complaint, as per law."

13. Reference has also been made to the judgment of Bombay High Court (Nagpur Bench) in ***Criminal Writ Petition No.737 of 2016 decided on 17.12.2020*** where the proceedings under Section 21 of the Drugs and Cosmetics Act 1940 were the subject matter of challenge. The proceedings against the petitioner herein were quashed by the Nagpur Bench.

14. Learned counsel appearing on behalf of the respondent-State has, however, contended that the said judgments are not applicable to the facts and circumstances of the present case as the proceedings in the matter of ***Brij Lal Mittal's case (supra)*** were instituted under the Drugs and Cosmetics Act, 1940 and the rules framed thereunder. Similarly, in the matter of ***Ravindranatha Bajpe (supra)***, the issue was with regard to the persons responsible for the criminal prosecution for the offences under the Indian Penal Code and as such,

the said case law can also not be applicable to the facts and circumstances of the instant case. While referring to the judgment of the High Court of Kerala and that of Bombay High Court (supra), it was pointed out that even in those proceedings, the prosecution was launched under the Drugs and Cosmetics Act, 1940. It is contended that the proceedings in the instant case have not been instituted under the Drugs and Cosmetics Act, 1940 or the rules framed thereunder. The instant criminal proceedings against the petitioner have been initiated for violation of the provisions of Essential Commodities Act and as such, the case laws relied upon by the petitioner hereinabove are not applicable to the peculiar facts and circumstances of the instant case. He has, however, not raised any challenge to the fact that in the event, the prosecution having been instituted under the Drugs and Cosmetics Act, 1940 and the rules framed thereunder, the said judgments would be applicable.

CONCLUSION

15. The admitted factual position as well as the position in law clearly shows that a declaration is required to be filed by the licensed drug manufacturing Company mentioning that as to which person(s) is/are shall be solely responsible for the day to day business of the company and as to who shall be liable to be prosecuted in the event of any violation of or lapse in abiding by the statutory provisions. The respondent-State has not disputed that a declaration in terms of the Drugs and Cosmetics Act, 1940 and the rules framed thereunder as well as Drugs (Price Control) Order, 1995 in the prescribed statutory form 25 has already been filed by the accused company nominating Mr. Sunil Vasishtha as the person responsible, hence only the said person could have been prosecuted for such breach of statutory provisions, if any. It is also not disputed that there is no specific averment against the petitioner in the complaint that as to how he was responsible for the conduct of

the day to day affairs of the company. A mere unsubstantiated bald assertion has been made in the complaint that the petitioner was the person responsible for the affairs of the company, that too without specifying or disclosing as to how and in what capacity was the petitioner responsible for the affairs and conduct of the business of the accused company.

16. Now adverting to the aspect of the prosecution having been initiated under the provisions of Essential Commodities Act, which is the sole surviving argument raised by the respondent-State, it would be apt to make a reference to the judgment of the Hon'ble Supreme Court in the matter of ***Sham Sunder and others Vs. State of Haryana,*** reported as (***1989) 4 SCC 640.*** The relevant extract of the said judgment is reproduced herein below:

> *6. Counsel for the appellants urged that there is no evidence adduced by the prosecution that the appellants were in charge of the business of the firm when the offence was committed and in the absence of any such evidence the conviction could not be sustained. Counsel rested his submission on the text of section 10 of the Essential Commodities Act. This section provides:*
>
> > *"10. Offences by companies--(1) If the person contravening an order made under section 3 is a company, every person who, at the time of contravention 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 contravention and shall be liable to be proceeded against and punished accordingly:*
> >
> > *Provided that nothing contained in this sub-section render any such person liable to any punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.*
> >
> > *(2) Notwithstanding anything contained .in sub-section where an offence under this Act has been committed by a company*

and it is proved that the offence has been commit- ted 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 any 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. From explanation to section 10 it will be seen that the company includes a firm and other association of persons. Section 10 provides that the person shall be deemed to be guilty of contravention of an order made under section 3 if he was incharge of and was responsible to the firm for the conduct of the business of the firm. What is of importance to note is, that the person who was entrusted with the business of the firm and was responsible to the firm for the conduct of the business, could alone be prosecuted for the offence complained of.

8. Counsel for the State, however, relied upon the legal liability of partners and he argued that it would be for the accused partners to prove that the offence was committed without their knowledge or in spite of exercising due diligence on their part. He relied upon the proviso to sub- section (1) of sec. 10. It is true that under the Indian Partnership Act, 1932, a 'firm' or 'partnership' is not a legal entity but is merely an association of persons agreed to carry on business. It is only a collective name for individuals, carrying on business in partnership. The essential characteristic of a firm is that each partner is a representative of other partners. Each of the partners is an agent as well as a principal. He is an agent in so far as he can bind the other partners by his acts within the scope of the partnership agreement. He is a principal to the extent that he is bound by acts of other partners. In fact every *partner is liable for an act of the firm. Section 2(a) of the Partnership Act defines an "act of a firm" to mean any act or omission by all the partners, or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm.*

9. But we are concerned with a criminal liability under penal provision and not a civil liability. The penal provision must be strictly construed in the first place. Secondly, there is no vicarious liability in criminal law unless the statute takes that also within its fold. Section 10 does not provide for such liability. It does not make all the partners liable for the offence whether they do business or not.

10. It is, therefore, necessary to add an emphatic note of caution in this regard. More often it is common that some of the partners of a firm may not even be knowing of what is going on day to day in the firm. There may be partners, better known as sleeping partners who are not required to take part in the business of the firm. There may be ladies and minors who were admitted for the benefits of partnership. They may not know anything about the business of the firm. It would be a travesty of justice to prosecute all partners and ask them to prove under the proviso to sub- section (1) that the offence was committed without their knowledge. It is significant to note that the obligation for the accused to prove under the proviso that the offence took place without his knowledge or that he exercised all due diligence to prevent such offence arises only when the prosecution establishes that the requisite condition mentioned in sub-section (1) is established. The requisite condition is that the partner was responsible for carrying on the business and was during the relevant time in charge of the business. In the absence of any such proof, no partner could be convicted. We, therefore, reject the contention urged by counsel for the State.

11. We have perused the evidence of the prosecution. Santlal Inspector, Food and Civil Supplies (PW 1) has deposed that the accused were partners of the firm. He has stated that the

> *statement Ex. P. 8 regarding purchase of paddy and supply of levy rice was signed by Lajpat Rai as partner on behalf of the firm. The rest of his statement relates to the short supply of levy rice, and it does not indicate that other partners were also conducting the business during the relevant time. The statement of PW-3 who investigated the case does not indicate anything further. He has seized the relevant documents like stock register and recovery memo and arrested all the four accused. These documents do not indicate even remotely that all the partners were doing the business of the firm. There is no other evidence on record on this aspect. With these tit-bits, it is impossible to hold that when the offence was committed all the partners were con- ducting the business of the firm. However, Lajpat Rai accused No. 3 cannot escape the liability. The material on record indicates that he was conducting the business of the firm and in fact, he has signed the statement Ex. P. 8 on behalf of the firm. His conviction cannot therefore be disturbed. But the conviction of other partners is absolutely uncalled for.*

17. A perusal of the aforesaid judgment and the extract thereof as reproduced hereinabove would show that even for prosecution under Essential Commodities Act, 1955, a person, who is entrusted with the business of the firm and responsibility for conducting of business, alone is liable to be prosecuted and that not all the partners/directors can be prosecuted or held criminally liable. The initial burden lies on the prosecution to establish that the petitioner-accused was responsible for the current business activities and was the incharge of the said business during the relevant period of time.

18. The same is the question of fact which is required to be established by the prosecution. In the complaint in question, there is no pleading by the respondent as to how the petitioner-accused was the responsible Director of the accused Company. The persons, who were responsible for the affairs of the company as well as the conduct of its

business, are set out in the judgment of National Small Industries Corporation (supra), however, the complaint does not in any manner indicate or point out that the petitioner-accused would fall under any of the said categories of the persons, who are deemed to be responsible for the conduct of the business of the company as per law. Criminal prosecution of any person has serious consequences against an individual. There can be no deemed responsibility or vicarious liability for criminal prosecution merely on account of being on the Board of a Company, unless every such person is held liable by the Statute. 'Mens-rea' and 'actus-reus' are two essential ingredients for criminal prosecution. However, in the strict statutes, even knowledge of an act may attract penal consequences. However, where the manufacturer is a juristic entity, there can be no presumption of criminal culpability against all persons despite their role and responsibility. It is for the said reasons that Section 10 of the Essential Commodities Act, 1955 specifically deals with the deemed liability. The Section seeks the complainant to prosecute only the persons who were incharge and responsible for the conduct of business of the company or where the crime has been committed with the consent or connivance of an officer of the company as discussed in Section 10(2) of the Essential Commodities Act, 1955. The same cannot be presumed against a person and must be *prima-facie* reflected from the proceedings. The ratio laid down by the Hon'ble Supreme Court in relation to the "persons responsible and incharge for the conduct of business of the company", thus also gets attracted to cases where prosecution has been initiated under the Essential Commodities Act, 1955 and it is the said philosophy that was imbibed and echoed by the Hon'ble Supreme Court in the judgment of Sham Sunder and others (supra).

19. The submission of the respondent-State that the petitioner-accused is the beneficiary of the high prices of the drugs in question, is clearly an

argument which is not reflected in the complaint in question or in the impugned order of summoning. Even otherwise, being a beneficiary is not contemplated under Section 10 of the Essential Commodities Act, 1955. An active consent, connivance or deliberate and conscious neglect has to be pleaded and brought on record. The possibility of 'being a beneficiary' and holding such a person to be liable for prosecution would amount to re-writing Statute and inserting provisions that do not exist. While exercising its power of review of interpretation, the Constitutional Courts do not re-write Statute or insert Clauses. The scope is restricted to an interpretation of the clause to sub-serve the legislative intent and object. Once the Statute does not entail sweeping consequences of penal prosecution against all office bearers in a company, the said principles are to be kept in mind while considering validity of launching a criminal prosecution against a person who does not fall within categories of officials identified to be held liable by deemed operation of law.

20. If the intent of law would have been to seek prosecution of all, there was no occasion or reason for the legislature to qualify the persons who were to be held deemed liable. The legislature thus consciously wanted to restrict the criminal liability from amongst the select few in the said category who fall within the scope of Section 10 of the Essential Commodities Act, 1955.

21. A reference is thus required to be made to the stand of the petitioner in the petition and the response thereto by the respondent-State, which follows as under:

Averments in the petition	Response by the State.
3(a) That M/s Laborate	**In preliminary submissions:**

Pharmaceuticals India Ltd (hereinafter referred to as the 'Company'……… ……… The present petitioner is one of the Directors of the Company and had joined on 16.04.1990. Although the petitioner is a Director of the company but he is not actively involved in the day to day business of the company and has no role in business activities of the company. (c) ….It has also been specifically mentioned in the said affidavit the Directors of the company are not responsible for the day to day activities and control of business activities. ...... (g) That an analysis of the complaint filed by respondent no.2 further reveals that in paragraph 2 of the complaint, respondent no.2 has specifically pleaded that Mr. Sunil Vasishtha is the overall in-charge cum sole person responsible for day to day and control of business activities of the drugs manufacturing of the company (M/s Laborate	2. That on 31.07.2013, the complainant i.e. Drug Control Officer inspected M/s Laborate Pharmaceuticals India Ltd., Nizampur Road, Panipat………….. ………The said drug was found to bear Maximum Retail Price as Rs.15.25/- per 10 Ml vial where as the ceiling price notified by Govt. of India vide Notification No.S.O. 1335 (E) dated 16.09.2005 is Rs.7.30 only (Excluding Excise Duty). Thus, the petitioner being Director of the Firm has committed an offence by selling the drug/medicine in higher rates. 4. That the petitioner is fully responsible person being director of the Firm to sell the drug/tablets at higher rates even from the rates notified by the National Pharmaceutical Pricing Authority, Govt. of India of the Scheduled Drugs and earning financial benefit/gain to the Firm in illegally. The other accused in the case is employee of the Firm, therefore, the petitioner much

Pharmaceuticals India Ltd. (Unit-2)) but at the same time a ague averment has also been made in the complaint that the present petitioner is the responsible Director. ………. As is clear from the above that there are no allegations against the petitioner as such except a vague mention that the petitioner is the responsible Director and apart from the above paragraph, nowhere in the complaint anything else has been attributed to the petitioner. The complaint is totally silent as to how and on what basis the petitioner has been said to be the responsible Director. No material or documents have been filed alongwith the complaint to even prima facie suggest that the petitioner is the responsible Director or that the petitioner has any role in the day to day working of the company or that the petitioner is in-charge of the business activities of the company. (i) That a perusal of the order	more responsible being director of the Firm for all activities of the Firm. **In reply on merits:** 3. That in reply to the contents of para No.3 of the petition, it is submitted that the brief factual backgrounds has already been explained in the preliminary submissions, therefore, no need to reiterate the same in reply to the contents of sub-paras of this para. The contents of preliminary submissions may kindly be read as part and parcel in reply to the contents of sub paras of this para. 4. That the contents of para no.4 of the petition are wrong and hence denied. It submitted that there is no ground whereby the complaint may be quashed. In reply to the contents of sub para of the grounds of this para, it is humbly submitted that the contents of preceding paras of the petition have been reiterated in the sub paras of the grounds of this para, therefore, no

dated 21.01.2015 would show that the same has been passed in a totally casual manner, without any serious application of mind and without going into the question as to whether any specific allegations have been made against the petitioner or whether the role of the petitioner in the company has been elaborated so as to come to the conclusion that the petitioner is a person responsible and overall in-charge of the day to day activities of the company or the business activities of the company. 4(i) …….and since the violation has been alleged to have been done by company (M/s Laborate Pharmaceuticals India Ltd.), therefore, in terms of Section 10 of the 1955 Act the company can be prosecuted alongwith the person responsible and overall in-charge of the day to day functioning and business activity of the company. Section 10 of the 1955 Act which has already been reproduced above, makes it absolutely	need to reiterate the reply of the preceding paras of the petition in reply to the contents of sub paras of the grounds of this para.

clear that only the person overall in-charge of business activity of the company can be prosecuted. In the present case, there are no allegations against the petitioner in the complaint except for a vague averment in para 2 that the petitioner is the responsible Director. It is a settled principle of law that it is not sufficient to simply state that accused no.2 is the responsible Director of the company. The complainant *(wrongly mentioned as 'compliant')* has to specifically aver in the complaint/pleadings as to the manner in which the Director is in-charge of the conduct and affairs of the company. ……..	

22. Besides, the accused Company happens to be a Company incorporated under the Companies Act and as such, the law applicable with respect to the juristic entity has to be extended and applied.

23. In view of the above, the petition in hand is allowed and the complaint dated 21.01.2015 (Annexure P-4) as well as the impugned summoning order dated 21.01.2015 (Annexure P-6) passed by the Chief Judicial Magistrate, Panipat and the consequential proceedings arising therefrom are, hereby, set aside qua the present petitioner as the petitioner has

not been established or proved to be the person solely responsible for the day to day affairs and the conduct of business of the accused Company, and that there is a mere bald assertion in this regard in the complaint, which is not substantiated by any documentary evidence or any other cogent and convincing evidence/particulars.

The present petition stands allowed, accordingly.

(VINOD S. BHARDWAJ)
JUDGE

May 05, 2022
rajender

Whether speaking/reasoned ***Yes****/No*
Whether reportable ***Yes****/No*