



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

Criminal Revision Application No. 121 of 2022

Rajnikant Gulabdas Patel
Aged about 64 years,
Occupation : Joint Managing
Director of M/s. Lincoln
Pharmaceuticals Ltd., having Regd.
Office Lincoln House, Behind
Saryam Complex, Science City
Road, Sola, Ahmdabad (Gujrat).
R/o. 5, Manek Avenue, Opp. D. K.
Patel Hall, Near Navrang School,
Naranpura, Ahmedabad.

... Applicant

- Versus -

State of Maharashtra,
Through Drugs Inspector
Smt. Swati S. Bharde,
Food and Drugs Administration
Wardha, Tah. and District – Wardha.

... Non-Applicant/
Respondent

Mr. G. D. Reddy, Senior Advocate assisted by Mr. R. M. Patwardhan,
Advocate for the applicant
Mr. A. R. Chutake, APP for the State/non-applicant

CORAM : ANIL L. PANSARE, J.

Date of reserving judgment : 29-09-2023

Date of pronouncing judgment : 29-11-2023

JUDGMENT

Rule. Rule made returnable forthwith.

2. The applicant, a Joint Director of pharmaceutical company, has questioned the legality, correctness and propriety of the order dated 19-1-2022 passed by the Sessions Court, Wardha in Sessions Case No. 59/2018 whereby the application filed by the applicant seeking discharge for the offences punishable under Section 18(a)(i) read with Sections 16, 14 and 27(d) of the Drugs and Cosmetics Act, 1940 (for short 'the Act of 1940') has been dismissed. The challenge is mainly on the ground of absence of requisite averments in the complaint to the effect that the applicant was, at the relevant time, in-charge of the company and also responsible to the company for the conduct of its business.

3. The facts necessary to decide the application are as under.

The respondent – complainant has filed complaint before the Chief Judicial Magistrate against ten accused, of which accused nos. 6 to 8 and 10 came to be discharged vide order dated 30-8-2014 passed by the Sessions Court in Criminal Revision No. 47/2013. According to the complainant, he collected sample of *Cepy-O Dry syrup* from M/s. Quality Drugs on 13-10-2011 which was *Cefpodoxime Oral Suspension IP* for pediatric use. The said drug was alleged to have been manufactured by the accused no. 1 – company, namely, M/s. Lincoln Pharmaceuticals Limited, Ahmedabad. The sample was forwarded for

analysis to the Government Analyser, who reported it to be of substandard quality. During the enquiry, it was revealed that M/s. Quality Drugs had purchased the said syrup from M.S. Sales Corporation, Nagpur who intimated that it was purchased from the accused no. 1 - company, the holder of valid manufacturing licence. The said medicine/syrup, however, was manufactured under the licence of M/s. Sakar Healthcare Pvt. Ltd., Changodar under the approved technical person deployed by the said company. It further transpired that though the manufacturing licence was held by the accused no. 1-company but it was the a loan licence with the accused no. 5 – company and accused no. 5 used to manufacture the said drugs and same was marketed by accused no. 1 - company.

4. The contentions before the trial Court were that accused nos. 1 to 3 have not actually manufactured the drugs and, therefore, they are not responsible. The only role attributed is that accused no. 1 – company facilitated its licence. Accused nos. 2 and 3 are directors. There is no averment or evidence against them that they were looking after the day to day affairs of accused no. 1 – company.

5. The aforesaid contentions were countered by the prosecution, contending that accused no. 1 is the licence holder, who provided raw material to the accused no. 5 – company. The quality of

final goods depend upon raw material as well. Accused nos. 2 and 3 have played the active role in commission of the crime. The trial Court noted that there is ample material against the accused nos. 1 to 3. They have played active role in commission of the crime and accordingly rejected the application.

6. Learned Senior Counsel appearing for the applicant has invited my attention to the averments made in the complaint. The applicant herein was accused no. 3 before the trial Court. The cause title indicates that he was Joint Managing Director of accused no. 1 – company. Accused no. 2 is described as Executive Director of the company. In the body of the complaint, however, the complainant has described accused nos. 2 and 3 as Directors of accused no. 1 - company. The drug under question was found to be of substandard quality, as reported by the Government Analyser. The accused nos. 1 and 3 have vide letter dated 6-2-2012 have requested to reanalyze the drug from Central Drugs Laboratory, Kolkata in terms of Section 24 of the Act of 1940. The sample was accordingly sent to Central Laboratory whose report has confirmed the drug to be of not standard quality.

7. The complainant has averred that during investigation, it was revealed that accused nos. 2 and 3 are/were directors and accused no. 2 is/was looking after day to day activities of the accused no. 1 –

firm/company. Accordingly, the complaint has been filed against the concerned persons including the present applicant/original accused no. 3.

8. Learned Senior Counsel for the applicant contends that there is absolutely nothing in the complaint as regards involvement of the applicant in the day to day affairs of the company or conduct of its business. He contends that in such circumstances, merely by quoting the applicant to be Joint Managing Director of the company, will not be sufficient to prosecute him. In support, he has relied upon the following authorities.

(i) ***State of Haryana Vs. Brij Lal Mittal and ors. [1998 Cri.L.J. 3287]***

wherein it is held that prosecution of director against whom there is no allegation to indicate, even prima facie that he was incharge of the company and also responsible to the company for the conduct of its business, is not maintainable.

(ii) ***Umesh Sharma and anr. Vs. S. G. Bhakta and ors. [2002 Cri.L.J.***

4843]. This Court has held that mere description of accused as Director and Managing Director is not sufficient to sustain issuance of process against them.

(iii) ***Ramprakash Gulati and ors. Vs. State of Maharashtra [2018 ALL MR (Cri) 1177]***. This Court has held that specific averments are necessary regarding the role played by the Director of the Company when criminal liability is to be fastened against them.

(iv) ***Rashmi Kamal Shah Vs. The State of Maharashtra and anr. [2017(2) Drugs Cases (DC) 27]***. This Court held that sub-section 2 of Section 34 of the Act clearly mandates that in order to launch prosecution against the director, manager, secretary or any other officer of the company, it is obligatory on the part of the complainant to show that the offence is committed with the consent or connivance. Merely because he or she was director, that by itself is not sufficient to bring such person within the clutches of the Act, if the said director is not responsible for the day to day affairs of the Company.

(v) ***Anandkumar Satyanarayan Loya and anr. Vs. State of Maharashtra and anr. [2017(5) Mh.L.J. (Cri) 289]***. This Court held in paragraph no. 23 as under :

Though Section 34 of the Act of 1940 creates presumptions of liability, it does not say that the person being merely a partner and incharge of administration of the firm is criminally liable. The Court noted that, it is nowhere averred in the complaint that the petitioners there were responsible for the objectionable drug and same was

manufactured with their consent or in their connivance or production of the said drug is attributed to any neglect on their part.

(vi) ***Rajivkumar Satyapal Gupta and ors. Vs. The State of Maharashtra [2013 ALL MR (Cri) 2926]***. This Court has noted that there were no specific averments in complaint that accused persons were in charge of and responsible for conduct of business of company and thus order rejecting application for discharge of accused, was not proper.

(vii) In the case of ***Pepsico India Holdings Pvt. Ltd. Vs. Food Inspector and anr. [2011(1) SCC 176]***, the Supreme Court observed as under.

“.... It is now well established that in a complaint against a company and its directors, complainant has to indicate in the complaint itself as to whether the directors concerned were either in charge of or responsible to the company for its day to day management, or whether they were responsible to the company for the conduct of its business. A mere bald statement that a person was a director of company against which certain allegations had been made is not sufficient to make such director liable in absence of any specific allegations regarding his role in the management of the company.”

(viii) *Keki Bomi Dadiseth Vs. State of Maharashtra [2002(3) Mh. L.J. 246]*. This Court, after referring judgments of Supreme Court in several cases under Drugs and Cosmetics Act, held that -

“There were no specific or remote allegations made by the complainant which would demonstrate any aspect of consent or connivance in regard to commission of offence by the Directors nor same were even remotely attributable to any neglect on their part. The entire complaint was totally silent in this regard and there was not even a whisper against the Directors in this respect so as to indicate any nexus. Allegations even if accepted in toto, would not prima facie make out any offence under the Act. Prosecutions if allowed to continue would result in abuse of process of Court. Order issuing process against Directors for vicarious liability can not be sustained.”

9. Thus, there is a consistent view that in the complaint where the company is accused of commission of crime under the Act of 1940, the complainant has to show, by averments in the complaint that the directors concerned were either in-charge of or responsible to the company for its day to day management or were responsible for the conduct of its business, which averments, according to the learned Senior Counsel for the applicant are absent in the present case and accordingly, seeks his discharge for the offences alleged against him.

10. As against, learned Additional Public Prosecutor (A.P.P.) contends that the averments made in the complaint against the applicant are sufficient to prosecute him. The applicant was Joint Managing Director in the accused no. 1 – company. His designation is self speaking of his involvement in the day to day affairs of the company as also in its conduct. He has relied upon the judgment in the case of ***S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and anr. [2005(5) ALL MR (S.C.) 1118]***. The case before the Honb'le Supreme Court was pertaining to offence punishable under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 (for short 'N.I. Act'). The question as to the liability of Director fell for its consideration. The Supreme Court considered the scope of Section 141 of the N.I. Act. The Larger Bench of the Supreme Court was required to answer three questions formulated and referred to by the two Judges Bench. The following were the questions.

“(a) Whether for purposes of Section 141 of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfill the requirements of the said section and it is not necessary to specifically state in the complaint that the persons accused was in charge of, or responsible for, the conduct of the business of the company.

(b) Whether a director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the

business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.

(c) Even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the Managing Directors or Joint Managing Director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against.”

On the point of the effect of holding a particular position in the company, the Supreme Court noted in paragraph 11 as under.

“11. The position of a Managing Director or a Joint Managing Director in a company may be different. These persons, as the designation of their office suggests, are in charge of a company and are responsible for the conduct of the business of the company. In order to escape liability such persons may have to bring their case within the proviso to Section 141(1), that is, they will have to prove that when the offence was committed they had no knowledge of the offence or that they exercised all due diligence to prevent the commission of the offence.”

The Supreme Court then considered the relevant provisions of the N.I. Act as also various judgments on this point and answered the referred questions as under.

(a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) The answer to question posed in sub-para (b) has to be in negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for conduct of its business. The requirement of Section 141 is that 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.

(c) The answer to question (c) has to be in affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141.

11. The Supreme Court has, thus, noted that by virtue of the office, they hold as Managing Director or Joint Managing Director, these persons are in-charge and responsible for the conduct of business of the company and therefore, they get covered under Section 141 of the N.I. Act. The learned A.P.P. submits that this judgment has been delivered later in time and therefore, this Court in **Umesh Sharma's** case supra had no occasion to be guided by law laid down in this case. Accordingly, he submits that the **Umesh Sharma's** case will have no binding effect.

12. Learned Additional Public Prosecution has then referred to the judgment in the case of ***Dinesh B. Patel and ors. Vs. State of Gujarat and anr. [2010 ALL MR (Cri) 4012 (S.C.)]***. The case before the Supreme Court pertained to offences punishable under the provisions of the Act of 1940. The Supreme Court has noted that in addition to the statement that the respondents therein were directors of the manufacturers, a statement was made in the complaint that by manufacturing of the concerned medicine for sale, the company and its directors had committed the breach of the Act. The Supreme Court, considering this allegation of breach of the provisions of the Act, held that there was an allegation that the Directors were privy to the manufacturing of medicine by the company. The Court then concluded in the following manner.

“9. Under the peculiar circumstances of this case and realizing the seriousness of the allegations, we would not take a technical view based on pleadings in the complaint. Mr. Raichura contended that as per the settled law by this Court in complaints under Section 138 of the Negotiable Instruments Act against company and directors also specific averment about the active role of directors in running the company has to be made, failing which the directors cannot be proceeded against. Same logic should apply even in the present case. We cannot agree. Firstly, the language of Section 34(2) of the Act substantially differs from the language of Section 141 of the Negotiable Instruments Act. Secondly, here we are dealing with the offence which has the direct impact on the public health. We,

therefore, would choose not to interfere with the order of the High Court. It will be open for the directors to show to the Trial Court that they had nothing to do with the manufacture process and, therefore, they should not be held liable under Section 34(2) of the Act.”

13. Learned A.P.P submits that the drug under question, which is found to be not of standard quality, is a syrup for pediatric use. It is a consumable drug and, therefore, the applicant cannot shirk his liability on a technical ground in terms of observations made by the Supreme Court in the above case. Accordingly, he prayed for rejection of application.

14. Having given thoughtful consideration to the submissions made by both the sides and having gone through the judgments cited, the law appears to be well settled on the point involved. In the prosecution against the company in terms of Section 34 of the Act of 1940, the complainant is duty bound to disclose in the complaint by specific averment that the directors are/were in-charge of or responsible for conduct of business so far as it relates to manufacturing the drug.

15. In the context of above, the averments made in the present complaint will have to be considered. Firstly, in the cause title, the complainant has described the applicant as Joint Managing Director, which status is not really disputed by the applicant. Further, in

paragraph 20 of the complaint, the complainant has stated that on 14-2-2012, the then Inspector of Drugs received letter dated 6-2-2012 from the accused no. 1 – company and the applicant/accused no. 3 who have informed to reanalyze the product from Central Drugs Laboratory, Kolkata. In paragraph 24, however, the complainant has averred that during investigation, it was revealed that accused nos. 2 and 3 (present applicant) are/were directors and accused no. 2 is/was looking after day to day activities of the firm and accused no. 1 is/was holding drug manufacturing licence. In that sense, the complainant in paragraph 24 has not stated that the applicant/accused no. 3 is/was also looking after day to day activities of the firm/company. At the same time, paragraph 24 of the complaint does not speak anything as to who was responsible for the conduct of its business.

16. In the circumstances, to understand whether the applicant was responsible for the conduct of the business of accused no. 1 – company, one will have to consider the allegations levelled in the complaint as a whole. The complainant has described the applicant to be Joint Managing Director. This designation itself indicates, in terms of the law laid down by the Supreme Court in the case of ***S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and anr.*** that the applicant is in-charge of and responsible for the conduct of the company, which fact

finds support by the averments made in paragraph 20 of the complaint wherein the complainant has averred that the applicant/accused no. 3 has issued letter dated 6-2-2012 informing the then Inspector to reanalyze the product from Central Drugs Laboratory, Kolkata. By issuing letter, in a way, the applicant/accused no. 3 has shown his involvement in the business activities of the company. He has challenged Government Analyzer's report. The sample was accordingly sent to the Central Laboratory, which has confirmed the finding of the Government Analyzer that the drug under question was not of the standard quality. In the circumstances, sub-section (2) of Section 34 of the Act of 1940 will be also attracted. The enquiry as to whether the applicant's negligence, consent or connivance in manufacturing substandard drug will have to be made. These facts coupled with the other averments made in the complaint, to my mind are sufficient to continue prosecution against the applicant.

17. That apart, the drug under question is a pediatric syrup and is a consumable drug by the children. The manufacturing unit, as a whole, must take responsibility of quality of such drugs. The Supreme Court in *Dinesh Patel's* case (supra) has held that language of Section 34(2) of the Act of 1940 substantially differs from the language of Section 141 of the Act of 1881. It has refused to interfere with the

order of the High Court on the count that offence has direct impact on public health. In the present case, the impact is on innocent children. In that sense, the offence is more serious.

18. The complainant has, therefore, made out a case for giving him an opportunity to lead evidence against the applicant. I am, therefore, not inclined to interfere with the order impugned in the revisional jurisdiction. The application is rejected.

(Anil L. Pansare, J.)

wasnik