2024:BHC-NAG:7069

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

CRIMINAL WRIT PETITION NO. 105 OF 2024

1. **Swapnil S/o Liladhar Mane,**
   Aged about 35 years, Occ- Director of
   M/s. Reklim Pharmaceuticals Private
   Limited, Plot No. 10, House No. 2724,
   Ward No. 4, Maa Chandika Nagar,
   Bahadura Road, Kharbi, Nagpur -440 034
   and Registered Office & r/o. H. No. 11,
   Nozir Colony, North Korea, Koradi Road,
   Nagpur- 440 023 and Permanent
   resident of At. Post Mangrul Dastgir,
   Tal. Dhamangaon Railway, Dist. Amravati.

2. **Snehal alias Sahil S/o Liladhar Mane,**
   Aged about : 37 years, Occ.- Pharmacist
   R/o At & Post Mangrul Dastgir,
   Tah Dhamangaon Railway, Dist. Amravati.

3. **M/s. Reklim Pharmaceuticals Private**
   Limited, Plot No. 10, House No. 2724,
   Ward No. 4, Maa Chandika Nagar, Ba-
   hadura Road, Kharbi, Nagpur -440 034 and
   Registered Office & r/o, H. No. 11, Nozir
   Colony, Koradi Road, Nagpur 440 023 .... PETITIONERS

// V E R S U S //

State of Maharashtra,
at the instance of Smt. Monica Vinod
Dhawad, working as a Drugs Inspector,
at the office of the Joint Commissioner
(Nagpur Division), Food & Drug Adminis-
tration (M.S.) situated at
Administrative Building. No.2,
B-Wing, 5th Floor, Civil Lines, Nagpur. ... RESPONDENT

Mr V. R. Borkar, Advocate for the petitioners
Mr. Suraj Hulke, APP for respondent/State

CORAM : G. A. SANAP, J.
DATE : 25/06/2024

ORAL JUDGMENT :

1 Heard.

2 **RULE.** Rule made returnable forthwith. Taken up for disposal with the consent of learned Advocates for the parties.

3 In this writ petition, the petitioners, who have been arrayed as accused Nos. 6, 7 and 8 in a Sessions Trial No. 138 of 2022, have prayed for quashing the criminal case, pending on the file of Adhoc District Judge-4 and Assistant Sessions Judge, Nagpur (for short 'the Sessions Judge'), against them, on various grounds set out in the petition.

4. At the instance of the State of Maharashtra, one

Smt. Monika Vinod Dhawad, the Drugs Inspector attached to the office of the Joint Commissioner (Nagpur Division), the Food & Drug Administration (MS), filed a complaint for the offence punishable under Sections 27(d) of the Drugs and Cosmetics Act, 1940 and Rules 1945 against eight accused. It is the case of the complainant that accused No.1, the Technical Director of the firm, M/s. Shri Sai Balaji Pharmatech Private Limited i.e. accused No. 4 is having the manufacturing license granted by the Controlling cum Licensing Authority for the manufacture of the drug Reklimo-LB Tablets. Accused No.2 is a manufacturing Chemist of accused No. 4. Accused No.3 is an Analytical Chemist attached to accused No.4.

5. It is stated that accused Nos. 6 and 7 are the Directors of M/s. Reklim Pharmaceuticals Private Limited i.e. accused No.8. It is alleged that on 27.09.2019, the complainant visited the premises of M/s. Agrawal Agencies,

where the partner of the firm Shri Raja Surjeet Kumar Pahuja was present. M/s. Agrawal Agencies is a wholesale distributor of the concerned drug. The complainant drew the sample of the drug, Reklimo-LB Tablets, Batch No. SLB-0614, Mfg. Date: 07/2019, Exp. Date: 12/2020, manufactured by accused No. 5 under intimation in Form No. 17 as per the provisions of the Drugs and Cosmetics Act 1940 and Rules, 1945. The complainant, on 27.09.2019, forwarded one sealed counterpart of the sample of the said drug to the Government Analyst, Mumbai. The complainant received a copy of the report in Form No. 13 vide Report No. NSQ/MUM/122648/2020 dated 18.11.2020, wherein the Analyst opined that the said drug sample was not of standard quality for the reason mentioned in the report. It is stated that after receipt of the report, necessary compliance was made of the relevant provisions. The complainant received the order from the superior for filing the prosecution against the accused. The complaint was filed in the Sessions Court at Nagpur. As far as accused Nos. 6, 7 and 8 are concerned, the complaint states that accused Nos. 6 and 7 are the Directors of M/s. Reklim Pharmaceuticals Private Limited i.e. accused No. 8, who is mainly responsible for the marketing, sale, distribution and supply of the concerned drug. It is stated that in the said capacity, the company was liable for prosecution. Accused Nos. 6 and 7, being the Directors, are responsible for the prosecution.

6. In order to satisfy myself about the correct factual position I have called the record and proceedings of Sessions Trial No. 138 of 2022. Perusal of the same shows that the complaint was filed by the complainant on 11.02.2022. The Principal District and Sessions Judge, Nagpur, assigned the said complaint to District Judge-9 and Additional Sessions Judge, Nagpur, for hearing and disposal according to law.

Learned Additional Sessions Judge, as is evident from the record, passed the following order:

"*The accused are absent when called. Issue B/w. of Rs.15,000/- against them*"

This order has been reflected in roznama dated 06.08.2022.

7. Learned Advocate for the petitioners raised two principal grounds. It is submitted that the offence alleged to have been committed by accused No. 8/petitioner No. 3 is a company. Learned Advocate pointed out that accused Nos. 6 and 7 are alleged to be the Directors of accused No. 8. Learned Advocate submitted that in view of provisions of Section 34 of the Drugs and Cosmetics Act, 1940, the necessary pleadings are lacking in the complaint. Learned Advocate submitted that when it is alleged that the offence is committed by the company, every person who at the time of 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 prosecuted. Learned Advocate submitted that the complaint is silent about the role attributed to accused Nos. 6 and 7. Learned Advocate submitted that there is not even a whisper in the complaint that the accused Nos. 6 and 7 were incharge of and were responsible to the company for the conduct of the business of the company. Learned Advocate submitted that this defect goes to the very root of the case and therefore, the complaint is required to be quashed. In order to seek support to this submission the learned Advocate has relied upon the decision of the Hon'ble Apex Court in the case of ***Lalankumar Singh and others .v/s. State of Maharashtra***[1]. The Hon'ble Apex Court has decided the identical issue in this case.

8. Learned Advocate submitted that on filing of the

1 2022 SCC OnLine SC 1383

complaint, the learned Judge was required to apply his mind before issuing the process. Learned Advocate submitted that there is no reasoned order, much less an order of issuance of process, against the accused persons. Learned Advocate submitted that the learned Judge without issuing the process recorded the absence of the accused and issued a bailable warrant. Learned Advocate submitted that this order is perverse and therefore, cannot be sustained as against the petitioners.

9. Learned Advocate for the petitioners next submitted that the sample was collected on 27.09.2019. On 27.09.2019 it was forwarded by the complainant to the Analyst for analysis. Report of the Analyst is dated 18.11.2020. It is pointed out that the report indicates that the sample was analyzed on 18.11.2020. It is submitted that the analysis of the sample was after one year from the date of the

seizure. Learned Advocate relying upon Rule 45 of the Drugs Rules, 1945, submitted that there is a gross violation of this mandatory, rule which provides that a test or analysis of the sample in accordance with the rules must be completed within a period of sixty days of the receipt of the sample. Learned Advocate submitted that the sample was not analyzed within the stipulated period of sixty days and therefore, the entire complaint has been vitiated. In order to seek support to this submission, the learned Advocate has placed heavy reliance on the decision of the Coordinate Bench (Aurangabad Bench) of this Court in the case of ***M/s. Quixotic Healthcare and Ors. .v/s. State of Maharashtra and another***[2] wherein Rule 45 has been considered. It is held that if the analysis of the sample is not done within a period of sixty days as contemplated, then the report of the sample cannot be considered at all. It is held that the provision has been made with a specific purpose so as to maintain the quality standard of the report. It is held that if it

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is not examined or analyzed within sixty days the result is bound to be not of a standard quality. It is held that the benefit of such lapse should therefore go to the accused.

10. Learned APP submitted that before passing the impugned order learned Magistrate has taken the facts stated in the complaint into consideration and then passed the impugned order. Learned APP in short submitted that the grievance of the petitioners cannot be entertained at this stage.

4 I have minutely perused the record and proceedings. I am fully satisfied that the grievance of the petitioners is fully justifiable. The complaint filed against accused Nos. 6, 7 and 8 is required to be quashed for the following reasons.

5 The Hon'ble Apex Court in the case of ***Lalankumar (supra)*** while considering the provisions of

Section 34(1) of the Drugs and Cosmetics Act, 1940 has held as follows:

> ***13.*** *In the case of State of Haryana V. Brij Lal Mittal and others, this Court observed thus:*
> *"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:*
>
> *"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."*
>
> *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."

14. *It could thus be seen that this Court had held that simply because a person is a director of the company, it does not necessarily mean that he fulfils the twin requirements of Section 34(1) of the said Act so as to make him liable. It has been held that a person cannot be made liable unless, at the material time, he was in-charge of and was also responsible to the company for the conduct of its business.*

15. *In the case of S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla and another, this Court was considering the question as to whether it was sufficient to make the person liable for being a director of a company under Section 141 of the Negotiable Instruments Act, 1881. This Court considered the definition of the word "director" as defined in Section 2(13) of the Companies Act, 1956. This Court observed thus:*

"8. ……. There is nothing which suggests that simply by being a director in a company, one is supposed to discharge particular functions on behalf of a company. It happens that a person may be a director in a company but he may not know anything about the day-to-day functioning of the company. As a director he may be attending meetings of the Board of Directors of the company where usually they decide policy matters and guide the course of business of a company. It may be that a Board of Directors may appoint sub-committees

consisting of one or two directors out of the Board of the company who may be made responsible for the day-to-day functions of the company. These are matters which form part of resolutions of the Board of Directors of a company. Nothing is oral. What emerges from this is that the role of a director in a company is a question of fact depending on the peculiar facts in each case. There is no universal rule that a director of a company is in charge of its everyday affairs. We have discussed about the position of a director in a company in order to illustrate the point that there is no magic as such in a particular word, be it director, manager or secretary. It all depends upon the respective roles assigned to the officers in a company. .....”

16. *It was held that merely because a person is a director of a company, it is not necessary that he is aware about the day-to-day functioning of the company. This Court held that there is no universal rule that a director of a company is in charge of its everyday affairs. It was, therefore, necessary, to aver as to how the director of the company was in charge of day-to-day affairs of the company or responsible to the affairs of the company. This Court, however, clarified that the position of a managing director or a joint managing director in a company may be different. This Court further held that 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. To escape liability, 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.*

17. *In the case of Pooja Ravinder Devidasani vs. State of Maharashtra and another this Court* *observed thus:*

"17. …… Every person connected with the Company will not fall into the ambit of the provision. Time and again, it has been asserted by this Court that only those persons who were in charge of and responsible for the conduct of the business of the Company at the time of commission of an offence will be liable for criminal action. A Director, who was not in charge of and was not responsible for the conduct of the business of the Company at the relevant time, will not be liable for an offence under Section 141 of the NI Act. In National Small Industries Corpn. Ltd. [National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal, (2010) 3 SCC 330 : (2010 AIR SCW 1508): (2010) 1 SCC (Civ) 677 : (2010) 2 SCC (Cri) 1113] this Court observed: (SCC p. 336, paras 13-14)

"13. Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company <u>without anything more as to the role of the Director.</u> But the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to the accused Company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability.

14. A company may have a number of Directors and to make any or all the Directors as accused in a complaint merely on the basis of a statement that they are in charge of and responsible for the conduct of the business of the company without *anything more is not a sufficient or adequate fulfilment of the requirements under Section 141."* *(emphasis in original)*

18. In Girdhari Lal Gupta v. D. H. Mehta [Girdhari Lal Gupta v. D. H. Mehta, (1971) 3 SCC 189 : 1971 SCC (Cri) 279 : AIR 1971 SC 2162], this Court observed that a person "in charge of a business" means that the person should be in overall control of the day-to-day business of the Company.

19. A Director of a company is liable to be convicted for an offence committed by the company if he/she was in charge of and was responsible to the company for the conduct of its business or if it is proved that the offence was committed with the consent or connivance of, or was attributable to any negligence on the part of the Director concerned (see State of Karnataka v. Pratap Chand [State of Karnataka v. Pratap Chand, (1981) 2 SCC 335 : 1981 SCC (Cri) 453] : (AIR 1981 SC 872).

20. In other words, the law laid down by this Court is that for making a Director of a company liable for the offences committed by the company under Section 141 of the NI Act, <u>there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the company.</u>

21. In Sabitha Ramamurthy v. R.B.S. Channabasavaradhya [(Sabitha Ramamurthy v. R.B.S. Channabasavaradhya, (2006) 10 SCC 581 : (2007) 1 SCC (Cri) 621]: (AIR 2006 SC 3086), it was held by this Court that: (SCC pp. 584-85, para 7)
"7. ... it is not necessary for the complainant to

specifically reproduce the wordings of the section but what is required is a clear statement of fact so as to enable the court to arrive at a prima facie opinion that the accused is vicariously liable. <u>Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefor. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused therein vicariously liable for the offence committed by the company.</u>" (emphasis supplied)

By verbatim reproducing the words of the section without a clear statement of fact supported by proper evidence, so as to make the accused vicariously liable, is a ground for quashing proceedings initiated against such person under Section 141 of the NI Act."

18. *It could thus clearly be seen that this Court has held that merely reproducing the words of the section without a clear statement of fact as to how and in what manner a director of the company was responsible for the conduct of the business of the company, would not ipso facto make the director vicariously liable.*

19. *A similar view has previously been taken by this Court in the case of K. K. Ahuja vs. V. K. Vora and another.*

20. *In the case of State of NCT of Delhi through Prosecuting Officer, Insecticides, Government of NCT, Delhi vs. Rajiv Khurana, this Court reiterated the position thus:*

"17. The ratio of all these cases is that the complainant is required to state in the complaint how a Director who is sought to be made an accused, was in charge of the business of the company or responsible for the conduct of the company's business. Every Director need not be and is not in charge of the business of the company. If that is the position with regard to a Director, it is needless to emphasise that in the case of non-Director officers, it is all the more necessary to state what were his duties and responsibilities in the conduct of business of the company and how and in what manner he is responsible or liable."

21. *Recently, in the case of Ashoke Mal Bafna v. Upper India Steel Manufacturing and Engineering Company Limited, this Court observed thus:*
"9. To fasten vicarious liability under Section 141 of the Act on a person, the law is well settled by this Court in a catena of cases that the complainant should specifically show as to how and in what manner the accused was responsible. Simply because a person is a Director of a defaulter Company, does not make him liable under the Act. Time and again, it has been asserted by this Court that only the person who was at the helm of affairs of the Company and in charge of and responsible for the conduct of the business at the time of commission of an offence will be liable for criminal action. (See Pooja Ravinder Devidasani v. State of Maharashtra [Pooja Ravinder Devidasani v. State of Maharashtra, (2014)16SCC1 : (2015)3SCC (Civ) 384 : (2015)3 SCC(Cri) 378 : AIR 2015 SC 675]

10. In other words, the law laid down by this Court is that for making a Director of a Company liable for the offences committed by the

> *Company under Section 141 of the Act, there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the Company."*

11. As per this settled legal position, it is necessary that there must be a specific averment in the complaint when the company is the principal accused and the Directors are made an accused on the principle of vicarious liability, that they are in charge of and responsible for the conduct of the business of the company. A statement to that effect must be a clear statement of a fact suggesting how and in what manner the Director of the Company was responsible for the conduct of the business of the company. In this case, the complaint is totally silent about this aspect. There is no whisper or averment in the complaint as to how the accused Nos. 6 and 7, being the directors of accused No. 8, are liable to face the prosecution. A simple statement that they are Directors of the accused No. 8 company would not be sufficient to initiate and

continue the prosecution against them. In my view, on this count this complaint has to be quashed as far as accused Nos. 6, 7 and 8 are concerned.

12. The Hon'ble Apex Court in the case of ***Lalankumar (supra)*** has held that the order of issuance of process is not an empty formality. The Magistrate is required to apply his mind as to whether sufficient ground exist for proceeding in the case or not. It is held that the formation of such an opinion is required to be stated in the order itself. It is held that the order is liable to be set aside if no reasons are given therein while coming to the conclusion that there is a *prima facie* case against the accused. It is held that no doubt, the order need not contain a detailed reason.

13. In the backdrop of the above settled legal position it would be appropriate to consider the impugned order. In the present case, the learned Judge did not pass the order of

issuance of process. Learned Judge without passing the order of issuance of process by recording his satisfaction and reasons issued the bailable warrant. In my view, the order of issuance of a bailable warrant without passing a reasoned order of issuance of process was illegal. The order therefore suffers from virus of perversity. Learned Judge has passed the order of issuance of a bailable warrant without passing a reasoned order of issuance of process against the accused. The order passed by the learned Judge directly issuing the bailable warrant is a mechanical order. It does not reflect application of mind at all. Criminal prosecution is a serious matter. Learned Judge apart from recording his reasons, though brief, while issuing the process, was required to ascertain in the peculiar facts of this case qua the accused Nos. 6, 7 and 8 that the basic requirements of Section 34(1) of the Drugs and Cosmetics Act, 1940 were fully complied with. In my view, on this count alone, the order of issuance of bailable warrants against the accused Nos.6, 7 and 8 cannot be sustained.

14. The third and most important ground pressed into service by the petitioners is the non-compliance of Rule 45 of the Drugs Rules, 1940. As stated above, the sample was drawn on 27.09.2019. The sample was forwarded to the Analyst on 27.09.2019. The report of the Analyst is dated 18.11.2020. The date of analysis is 18.11.2020. The report was generated on the same date. It is therefore apparent on the face of the record that the sample was analyzed after one year. In my view, the analysis of the sample within a period of sixty days is necessary to ensure the standard of quality for the purpose of the analysis and an accurate report. On this count also, the prosecution against the accused Nos. 6, 7 and 8 cannot be sustained. The complaint lacks the reasons for the delayed analysis of the sample. The delayed analysis of the sample in such a case violates the vital right of the accused to get the sample rechecked. In my view, therefore, on all these counts,

the complaint and the order of issuance of bailable warrant against the accused Nos. 6, 7 and 8 cannot be sustained. Learned Judge has mechanically passed the order of issuance of bailable warrant. Learned Judge was required to pass reasoned order for the issuance of process against the accused. Even while issuing a bailable warrant no reasons have been recorded. In my view, therefore, the prosecution against the petitioner/ accused Nos. 6, 7 and 8 cannot be sustained. As such, the writ petition is **allowed.**

15. The criminal prosecution bearing Sessions Trial No. 138 of 2022, pending on the file of the Adhoc District Judge-4 and ASJ, Nagpur, is quashed against the petitioner/ accused Nos. 6, 7 and 8.

Rule is made absolute in the above terms.

(G. A. SANAP, J.)

Namrata