

**Ritesh Vs. the State of Karnataka**

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**Court :** Karnataka Gulbarga

**Decided On :** Nov-19-2011

**Judge :** Aravind Kumar

**Appeal No. :** Criminal Petition No. 15263 of 2011, C/w etc

**Appellant :** Ritesh

**Respondent :** The State of Karnataka

**Advocate for Pet/Ap. :** For the Petitioner: Prakash Yeli, Veeresh B. Patil, Advocates. For the Respondent: Smt. Anuradha M. Desai, Addl. SPP.

**Judgement :**

Aravind Kumar, J

1. These petitions are disposed off by a common order since the respondent/complainant has filed complaint under section 200 Cr.P.C, 1973 against the respondents before the Jurisdictional Court to take cognizance of offence alleged against the respondents and on such complaint being filed, Trial Court having taken cognizance and issuing summons to the petitioners, they are before this court urging common and identical grounds in all these petitions.

2. Respondent herein i.e., Drug Inspector lodged a complaint under section 200 Cr.P.C. against nine accused persons out of whom five i.e., A-2 to A-6 are the present petitioners, alleging that accused persons have committed offence

punishable under Sections 18 (a) (i) and 27 (d) of Drugs and Cosmetics Act, 1940 and to take cognizance of same.

3. Gist of complaint is:

A-1, M/s. Bright Drug Industry Limited is manufacturing drugs after obtaining necessary license in this regard and Assistant Drugs Controller and Drug Inspector visited the first accused industry and took legal samples of the drugs manufactured by A-1 company and on testing, it was found that drugs which were manufactured by A-1 were of sub-standard quality and after obtaining the test report and same was forwarded to A-1 factory calling upon it to furnish the details of persons in-charge of the industry for day to day affairs and responsible for the manufacturing of drugs and no reply was received. Thereafter complaint was lodged against the company, its Directors, manufacturing chemists offence punishable under sections 18 (a) (i) and 27 (d) of the Drugs and Cosmetics Act 1940 (hereinafter referred to as 'Act' for the sake of brevity).

4. On such complaint being filed before the Jurisdictional Magistrate, cognizance was taken summons was ordered to be issued to the accused person. Petitioners who are arranged as A-2 to A-6 are the Directors of A-1 Company have questioned the order of the Magistrate court taking cognizance and issuing summons to them by raising following grounds:

(i) Petitioners are only Directors of the A-1 industry and they are not incharge of the day to day affairs or control of the company.

(ii) The averments made in the complaint regarding petitioners is bald and vague statement and there is no specific allegation made in the complaint against their role and participation in the day to day administration and affairs of A-1 industry.

(iii) Except making a vague statement in the complaint that petitioners are Directors of the company there are no specific averments made in the complaint pointing out the specific act of each of the Directors and how they are responsible for the working of day to day affairs of A-1 industry.

(iv) The license issued to A-1 industry itself clearly specifies the names of the persons who are incharge and as such prosecuting of petitioners for any for alleged violation of the provisions of the Drugs and cosmetics Act, 1940, if any cannot be proceeded against them and if there is any offence committed as alleged complaint it has to be proceed to prosecute those persons who are responsible for it and not the petitioners who are only Directors of A-1 industry and not incharge of day to day affairs of the A-1 industry.

(v) Section 34 of the Act would fix the liability and responsibility on those persons who are responsible for the manufacturing and testing of drugs and admittedly the petitioners herein are not the persons who are responsible for the manufacturing and testing the drugs that are manufactured by A-1 industry.

5. In support of their submission they would rely upon the following judgments.

(i) STATE OF NCT OF DELHI VS. RAJIV KHURANA 2011 (1) SCC (CRIMES) 195

(ii) PEPSICO INDIA HOLDINGS (P) LTD., vs. FOOD INSPECTOR AND ANOTHER CrI.A.836/2010

(iii) DRUGS INSPECTOR, PALACE ROAD, BANGALORE vs. DR. B.K. KRISHNAIAH AND ANOTHER 1981 (2) SC 454.

(iv) STATE OF HARYANA vs. BRIJ LAL MITTAL AIR 1998 SC 2327.

(v) SANJAY G. REVANKAR vs. STATE BY DRUGS INSPECTOR, UTTAR KANNADA DISTRICT, KARWAR ILR 2002 Karnataka 475.

(vi) Order dated 12.04.2011 passed in CrI. P. 7128 C/w 7129/2010 by Co-ordinate Bench of this Court.

(vii) Order dated 02.06.2011 passed in CrI. P. 7262/2010 and 7427/2010 by Co-ordinate Bench of this Court.

6. Per contra the Learned Addl. SPP, Smt. Anuradha M. Desai appearing for the State would support the order of the Trial Court in taking cognizance of the

complaint filed by the respondent (Complainant) and submits that on testing of the samples taken at A-1 industry, notice came to be issued to A-1 industry as required under Sections 18 and 23 of the Act calling upon it to furnish the details of the persons incharge of day to day affairs if any and on not furnishing the said information and on further enquiry/investigation complainant has noticed that its Directors are incharge of day to day affairs of the company as evidenced from the Memorandum and Articles of Association of the company particularly paragraphs 154,155 and as such it has been specifically averred and pleaded in the complaint as per paragraph 6 to 10 and 30 (2) to 30 (9) about the role of each of the accused persons and as such she contends that petitioners herein being in Directors of A-1 industry and being responsible for conduct of its business are guilty of the offence alleged against them and as such the ingredients of Section 34 of the Act is squarely applicable to the petitioners. In support of her submission she relies upon the judgment of the Honorable Apex Court in the case of DINESH B.PATEL AND OTHERS 2010 (11) SCC 125.

7. She would also further contend that after the test analysis report was secured from the Analyst same was forwarded to A-1 industry to furnish the details of those persons who are responsible for day to day affairs so as to proceed against them and on its failure to furnish such information sought for, enquiries / investigation has been made and it was found that petitioners being the Directors of the A-1 industry are conducting the day to day affairs of the industry and they are responsible for the day to day affairs of the company and as such it has been specifically averred and pleaded in the complaint about the role of each of the accused persons in conducting the affairs of the company and as such she seeks for dismissal of these petitions.

8. She would further submit that judgment of the Honorable Apex court in DINESH PATEL CASE (Supra) was not brought to the notice of this Court while disposing of Criminal petitions 7128, 7129 of 2010 and 7262 and 7427 of 2010. She would also rely upon judgment of the Honorable Apex Court reported in the case of DRUGS INSPECTOR, PALACE ROAD BANGALORE vs. DR. B.K. KRISHNAIAH AND OTHERS (Supra) to contend that when the Magistrate finds that the allegations made in complaint make out a prima-facie case of the offence alleged

and petitioners being the Directors and responsible for carrying on business taking of cognizance and issuance of summons by the Magistrate is therefore justified and not to be interfered by this Court and as such she prays for rejection of petitions.

9. Having heard Sri. Sandeep Gupta, Learned Advocate appearing on behalf of Sri. Veeresh. B. Patil, for petitioner Sri Prakash Yeli, Learned Advocate, Smt. Anuradha Desai, Learned Addl. SPP appearing for the State and on perusal of the original records made available and produced by Addl. SPP, I am of the considered view that following points would arise for my consideration:

(a) Whether the order of the Learned Magistrate taking cognizance and issuing summons to petitioners is sustainable in law?

(b) Whether the proceedings against the petitioner in 15093/2011 can be proceeded since he had resigned from A-1 industry as on the date of collecting of samples by the Assistant Drugs Controller/ Drug Inspector from A-1 industry.

10. In order to adjudicate and answer the points formulated herein above it would be necessary to divide the following order in to five parts namely History of the Legislation, Relevant Provisions of Drugs and Cosmetics Act, Authorities on the Issue, Facts and Answers to the points formulated.

## **I. HISTORY OF LEGISLATION and PROVISIONS OF LAW.**

11. The Central Legislative Assembly to give effect to the recommendations of drugs an enquiry committee constituted by it to regulate import of drugs into British India introduced a Bill in 1937 which came to be referred to select committee which opined that a more comprehensive measure for the uniform control, manufacture and distribution of drugs as well as import was desirable and as such the Central Government suggested to Provincial Governments to pass a resolution empowering the Central Legislature to pass an Act for regulating such matters relating to control of drugs which falls within the Provincial sphere. On such resolution being passed by the Provincial legislatures, the Drugs Bill was introduced in the Central Legislative Assembly. After having considered to what

extent the provision can be made to secure the maintenance of uniformity in standards and any other important matters in which uniformity is desirable, the Central Legislative Assembly passed the Bill and assent of the then Governor-General of India was given on 10<sup>th</sup> April 1940 and thus came on the Statute Book Drugs Act, 1940. Subsequently same came to be amended by adding the words “and Cosmetics” and now it stands as “Drugs and Cosmetics Act, 1940”.

12. Chapter II of the Act deals with Constitution of Drugs Technical Advisory Board, Central Drugs Laboratory and Drugs Consultative Committee. Chapter III relates to import of drugs and cosmetics, power of Central Government to make rules, punishment for offences relating thereto, power of confiscation and jurisdiction of the court to try the offence punishable thereunder. Chapter IV is the one which relates to facts and circumstances on hand namely it relates to manufacture, sale and distribution of drugs and cosmetics. Section 18A mandates every person not being the manufacturer of drug or cosmetic to disclose to the Inspector the name, address and other particulars of the person from whom he acquired the drug or cosmetic. As per section 21 Central Government or State Government is empowered to appoint such persons as it thinks fit as “Inspectors” by prescribing their qualifications whose duties are circumscribed by Section 22 of the Act. The procedure required to be adopted by Inspectors while taking sample of drugs under this chapter is regulated by section 23. Chapter V relates to Miscellaneous provisions and section 34 explains as to who are to be proceeded with when offence has been committed by a company.

## **11. “PROVISIONS OF DRUGS and COSMETICS ACT”**

Some of the provisions which are relevant for the purposes of considering rival contentions urged in these petitions are extracted herein below. Section 18(A), 18 (B) and 21 read as under:

**Section 18A. - Disclosure of the name of the manufacturer, etc. -** Every person, not being the manufacturer of a drug or cosmetic or his agent for the distribution thereof, shall, if so required, disclose to the Inspector the name, address and other particulars of the person from whom he acquired the drug or cosmetic.

**Section 18B. - Maintenance of records and furnishing of information** - Every person holding a licence under Clause (c) of section 18 shall keep and maintain such records, registers and other documents as may be prescribed and shall furnish to any officer or authority exercising any power or discharging any function under this Act such information as is required by such officer or authority for carrying out the purposes of this Act.

**Section 21: - Inspectors** - (1) The Central Government or a State Government may by notification in the Official Gazette, appoint such persons as it thinks fit, having the prescribed qualifications, to be Inspectors for such areas as may be assigned to them by the Central Government or the State Government, as the case may be.

(2) The powers which may be exercised by an Inspector and the duties which may be performed by him, the drugs or [classes of drugs or cosmetics or classes of cosmetics] in relation to which and the conditions, limitations or restrictions subject to which, such powers and duties may be exercised or performed shall be such as may be prescribed.

(3) No person who has any financial interest [in the import, manufacture or sale of drugs or cosmetics] shall be appointed to be an Inspector under this section.

(4) Every Inspector shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code (45 of 1860), and shall be officially subordinate to such authority [having the prescribed qualifications.] as the Government appointing him may specify in this behalf.

**Section 23. Procedure of Inspectors: - (1)** Where an Inspector takes any sample of a drug (or cosmetic under this Chapter, he shall tender the fair price thereof and may require a written acknowledgement therefore.

(2) Where the price tendered under sub-section (1) is refused or where the Inspector seizes the stock of any drug (or cosmetic) under Clause (c) of section 22, shall render a receipt therefore in the prescribed form.

(3) Where an Inspector takes a sample of a drug (or cosmetic) for the purpose of test or analysis, he shall intimate such purpose in writing in the prescribed form to the person from whom he takes it and, in the presence of such person unless he willfully absents himself, shall divide the sample into four portions and effectively seal and suitably mark the same and permit such person to add his own seal and mark to all or any of the portions so sealed and marked:

Provided that where the sample is taken from premises whereon the drug (or cosmetic) is being manufactured, it shall be necessary to divide the sample into three portions only:

Provided further that where the drug (or cosmetic) is made in containers of small volume, instead of dividing a sample as aforesaid, the Inspector may, and if the drug (or cosmetic) be such that it is likely to deteriorate or be otherwise damaged by exposure shall, take three or four, as the case may be, of the said containers after suitably marking the same and, where necessary, sealing them.

(4) The Inspector shall restore one portion of a sample so divided or one container, as the case may be, to the person from whom he takes it, and shall retain the remainder and dispose of the same as follows:-

(i) one portion or container he shall forthwith send to the Government Analyst for test or analysis:

(ii) the second he shall produce to the court before which proceedings, if any, are instituted in respect of the drug (or cosmetic); and

(iii) the third where taken, he shall send to the person, if any, whose name, address and other particulars have been disclosed under Section 18A.

(5) Where an Inspector takes any action under Clause (c) of section 22.

(a) he shall use all dispatch in ascertaining whether or not the drug (or cosmetic) contravenes any of the provisions of Section 18 and , if its forthwith revoke the order passed under the said clause or, as the case may be, take such action as may be necessary for the return of the stock seized;

(b) if he seizes the stock of the drug (or cosmetic), he shall as soon as may be, inform (a Judicial Magistrates) and take his orders as to the custody thereof;

(c) without prejudice to the institution of any prosecution, if the alleged contravention be such that the defect may be remedied by the possessor of the drug (or cosmetic), he shall, on being satisfied that the defect has been so remedied, forthwith revoke his order under the said clause.

(6) Where an Inspector seizes any record, register, document or any other material object under Clause (cc) of sub-section (1) of section 22, he shall, as soon as may be, inform (a Judicial Magistrate) and take his orders as to the custody thereof

**(34) Offences by companies:** -(1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any Director, Manager, Secretary or other officer of the company, such Director, Manager, Secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

**AUTHORITIES / CITIATIONS:-**

**(I) DRUGS INSPECTOR, PALACE ROAD, BANGALORE vs. DR. B.K. KRISHNAIAH AND ANOTHER (SUPRA).**

“4.) This order of the Magistrate was challenged before the High Court, the High Court considered Section 34 (1) of the Act and held that the complainant “has not complained against accused 2 and 4, the petitioners in this case making out that they were, in any manner, in charge of and responsible to the firm, namely accused 1 for the conduct of the business of the firm, namely, accused 1.”

6.) The only question for consideration for the High Court in this case was whether the accused or any of them were liable. In paragraph 17 of the complaint petition the complainant quoted the provisions of the Act. In addition, he cited the names of witnesses, submitted a list of documents including a copy of the partnership deed at Item 13 of the list of documents. The Learned Magistrate perused the partnership deed and prima-facie found that the respondents as well as the deceased accused were liable for the offence and proceeded for trial. The Learned High Court committed an error in holding that there was no allegation that the respondents were not (sic) responsible for the management and conduct of the firm. The extent of their liability would be established by evidence during trial. In our opinion the judgment of the Learned High Court is erroneous and is liable to be set-aside”.

**(ii) STATE OF HARYANA vs. BRIJ LAL MITTAL AND OTHERS (SUPRA).**

“10.) Since we are in respectful agreement with the view to be express we dismiss this appeal and uphold the order of the High court quashing the prosecution against the three respondents on a different ground”.

**(iii) STATE OF NCT OF DELHI THROUGH PROSECUTING OFFICER, INSECTICIDES, GOVERNMENT OF NCT, DELHI. Vs. RAJIV KHURANA (Supra).**

“17.) The ratio of all these cases is that the complainant is required to state in the complainant 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 incharge of the business of the company. If that is the position with regard to a Director, it is needless to emphasize 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.

20.) The legal position which emerges from a series of judgments is clear and consistent that it is imperative to specifically aver in the complaint that the accused was incharge of and was responsible for the conduct of the business of the company. Unless clear averments are specifically incorporated in the complaint, the respondent cannot be compelled to face rigmarole of a Criminal Trial”.

#### **(IV) Pepsico India holdings vs. Food Inspector and Another (supra)**

“29.) From the submissions made on behalf of the respective parties, it is apparent that the width of the dispute to be settled in these appeals is not very wide. We are only required to consider as to whether the presence of 0.001 mg of Carbofuran per litre found in the sweetened carbonated water, manufactured by the appellant - Company, can be said to be adulterated as per Rule 65 of the 1955 Rules and under Section 2 (ia) (h) of the 1954 Act, particularly in the absence of any validated standard of analysis provided for under the 1954 Act or 1955 Rules.

37.) On the question of liability of the Directors of the company with respect to an offence alleged to have been committed by the Company, the High Court went beyond the ratio of the decision of this Court in S.M.S. Pharmaceuticals Ltd.’s case (supra) upon holding that the principles set out in the said decision could not be understood in any mechanical or rigid manner. Instead, the High court based its judgment on the decision of this court in N. Rangachari vs. Bharat Sanchar Nigam Ltd. (2007) 5 SCC 108), which was a case where the complaint clearly and categorically alleged that the named Directors were in charge of and responsible to the company for the conduct of its business. It is in such circumstances that the prayer for quashing of the proceedings was rejected.

39.) As mentioned hereinbefore, the High Court erred in giving its own interpretation to the decision of this court in S.M.S. Pharmaceuticals Ltd.’s case

(supra), which was reiterated subsequently in several judgments, some of which have been indicated hereinabove, and relying instead on the decision of Rangachari's case (supra), the facts of which were entirely different from the facts of this case. It is now well established that in a complaint against a company and its Directors, the complainant has to indicate in the complaint itself as to whether the Directors concerned were either incharge 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 the company against which certain allegations had been made is not sufficient to make such Director liable in the absence of any specific allegations regarding his role in the management of the company”.

**(v) DINESH B. PATEL AND OTHERS vs. STATE OF GUJARAT AND ANOTHER 2010 (11) SCC 125.**

“7.) We have gone through the decision of Brij Lal Mittal. In Brij Lal Mittal Case the offence complained of was under section 27 of the Act. The High Court had quashed the proceedings therein on the ground that the prosecution was launched after shelf-life of drugs had expired in the month of July, 1991 and as a consequence thereof, the accused were deprived of their right under Section 25(4) of the Act to get the drugs tested by the Central Drugs Laboratory. This court did not agree with the reasoning of the High Court, however, upheld the quashing of the proceedings.

8.) In our opinion, the factual situation in both the matters is quite different which is apparent from the fact that firstly, the controversy of the complaint not having any necessary averments was not present before the High court in the reported decision. Secondly, in that case, there was only a bald statement that the respondents were Directors of the manufacturers. In the present matter, however, the respondents were not arrayed only because they were the Directors. That is certainly one reason. However, in addition to that, a statement has been made in Para 6 of the complaint that by manufacturing of the medicine concerned for sale, the Company and its Directors had committed the breach of the Act. Thus, there was an allegation that the Directors were privy to the manufacturing of medicine by

the company.

9.) In our opinion, the averments in Paras 4,5, 6 and 8 of the complaint cannot be described as bald statements. The emphasized portion in Para 6 of the complaint suggests manufacturing of the medicine by the company and its Directors. The averments in all these paras would have to be read together and Para 6 of the complaint would have to be read in the light of the other averments. It seems that in the reported decision in the complaint, there was no link pleaded in the Directors and the manufacturing process. That is not the situation here. This was a case of the manufacture of the drug for human consumption and , after it was tested in laboratory, was found to be defective since there was a growth of fungus, which is a very serious matter related to public health”.

**(vi) SANJAY G. REVANKAR vs. STATE BY DRUGS INSPECTOR, UTTAR KANNADA DISTRICT, KARWAR (SUPRA).**

“By looking into the provision of section 34 of the Act it is apparent that vicarious liability of persons for being punished 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 (as per section 34 (i) of the Act): Even otherwise under section 34 (2) of the Act where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any Director, Manager, Secretary or other officer of the company, each of them would be deemed guilty of the offence.

**FACTS OF THE CASE**

13. In pursuance of power vested under the Act Drugs Inspector in the instant case namely Assistant Drugs Controller and the Drugs Inspector visited A-1 factory took legal samples of “Folic Acid” and “Ferrous tablet NFI” from Deputy Director of Education Department, Gulbarga for the purpose of testing and analysis. The sealed portion of the sample drawn was forwarded to the Government analyst for the purpose of test and analysis and on receipt of reports from the Government analyst, test report was forwarded to Deputy Director

Education Department, Gulbarga District calling upon it to disclose the name and address of the person from whom the drug in question was acquired/ purchased as required under Section 18A. On intimation being received from the Deputy Director of Education Department, Gulbarga, disclosing that Drug in question was received from "M/s. Bright Drug Industry" (A-1 herein) the above said Assistant Drugs Controller and Drugs Inspector sent a portion of the sealed sample "Drug in question" along with test report received from the Analyst to A-1 as required under section 23 and section 25 of the Act and obtained an acknowledgement for having delivered the sealed portion of "Drug in question" and its report.

14. The Assistant Drugs Controller Food, Drugs Administration, Indore, Madhya Pradesh, submitted a letter requesting furnishing of information to A-1 factory.

"On receipt of the report from the Analyst as referred to supra namely under section 25 it has been forwarded to A-1 factory".

15. Thereafter a complaint came to be lodged under section 200 Cr.P.C. by the State through Drugs Inspector, Gulbarga circle, Gulbarga against accused No.1 factory and its Directors A-2 to A-6 and Chemists, Manufacturing Chemists, Analytical Chemist of A-1 factory for the offences punishable under section 18 (a) (i) of the Drugs and Cosmetics Act, 1940 punishable under section 27 (d) of the act. It has been alleged by the prosecution that petitioners have committed offence punishable under section 27 (d) of the Act namely manufacturing, sale and distribution of drugs referred to in clause (a) and Clause (b) of Section 18 of the same section and thus the accused persons are liable to be punished with imprisonment for a term not less than one year but which may extend upto two years.

16. A careful reading of the complaint in question when read in the background of the judgments of Honorable Apex Court as well as this court it would go to show that a omnibus allegations or averments have been made in the complaint and it would not suffice for igniting punitive action against the Directors/ petitioners. There may be a situation where a person who has been a Director of the accused factory / industry may not be a person who is incharge of day to day affairs of the company. For instance a non-resident person can also be a Director of company

under the provisions of companies Act, 1956. There may also a situation where a person may not be a Director but may be incharge of day to day affairs of company. Thus, it depends upon the facts and circumstances of each case which determine as to whether said person was in charge of day to day affairs of the company. Only then Jurisdictional Magistrate would be empowered to take cognizance of alleged offence and this has to be done by careful reading and by examining the averments made in the complaint. No Straight Jacket formula can be made applicable to all the cases and a situation may arise where the averments made in the complaint is as vague as vagueness could be or in other words there may be a situation where the averments made in complaint is sufficient to hold that Magistrate was well within his powers to take cognizance of the alleged offence which ultimately rests on the averments made in the complaint. Thus, it boils down to the fact, that averments made in the complaint against accused persons would be foundation for the Magistrate to take cognizance. Keeping the principles enunciated in the above judgments the facts on hand are required to be examined and it is so examined.

#### **RE:POINT No. 1**

17. It has been contended by the complainant that “Ferrous Sulphate tablet NFI” is a drug within the meaning of Section 3 (b) of the Act which has been manufactured and sold and it is not of standard quality thus attracting section 18 (a) (i) of the Act. In the complaint at paragraph 6 to 10 it has been alleged as under:

**“That the accused persons are responsible for conducting the business of A-1 factory”.**

18. Again at paragraphs 30 (2) to 30 (6) it has been alleged by the prosecution that Accused persons being the Directors of accused No. 1 and responsible for the conduct of business of A-1 are responsible for the omission and commission of offence and as such it has been contended that there is vicarious liability.

19. In the light of averments made in the plaint when the contention raised by Learned Advocates appearing for the parties are examined by taking into

consideration the judgments referred to supra. It is notice that in Rajiv Khurana's 2011 (1) SCC (Crimes) 195 case it has been held that, it is incumbent upon the complainant to state how a Director who is sought to be proceeded as an accused was incharge of business of the company are responsible for the conduct of company's business and it has been further held that complainant has to aver in the complaint that accused was incharge and was responsible for the conduct of the business of the company. It has also been held averments made in the complaint should be clear and specific. The Honorable Supreme Court in Pepsico Holdings Pvt. Ltd., case referred to supra referring to the earlier judgments has held that Directors who are incharge of day to day affairs of the company are vicariously liable and a mere bald statement that a person was the Director of the company would not suffice and it was found on facts that a particular Director had been nominated to be the person incharge and responsible for the company for the conduct of its business and he alone being responsible for day to day affairs, proceedings against others cannot be proceeded with and as such quashed the proceedings against the appellants therein.

20. Yet again in DINESH B. PATEL'S CASE the Honorable Supreme Court was considering the very same provision namely section of 34 (2) of the Act, and it has been held therein that paragraph 6 of the complaint would disclose that directors therein had manufactured the medicine for sale in breach of the act and thus it was held that it is a punitive offence. While examining the facts therein at paragraph 9 it has been held as under:

"9.) In our opinion the averments in Paras 4,5,6 and 8 of the complaint cannot be described as bald statements. The emphasized portion in Para 6 of the complaint suggests manufacturing of the medicine by the company and its Directors. The averments in all these paras would have to be read together and para 6 of the complaint would have to be read in the light of the other averments. It seems that in the reported decision in the complaint, there was no link pleaded in the Directors and the manufacturing process. That is not the situation here. This was a case of the manufacture of he drug for human consumption and, after it was tested in laboratory, was found to be defective since there was a growth of fungus, which is a very serious matter related to public health".

21. A perusal of the complaint filed against the petitioners in the instant case would disclose that only an assertion has been made in the complainant that petitioners have committed offence by manufacturing and selling the drugs that are not of standard quality. It is nowhere stated in the complaint as to the role of petitioners in either participating in the day to day affairs of the A-1 industry and as to their actual role in manufacturing the drugs in question. It would also be of relevance to note at this juncture itself that licence issued to A-1 factory would specifically state as to who are the persons namely persons who are engaged in the manufacture and it is specifically stated therein the approved expert staff of A-1 factory would specifically state as to who are the persons namely persons who are engaged in the manufacture and it is specifically stated therein the approved expert staff of A-1 factory and testing officials and laboratories engaged in testing and certifying the drug manufactured by A-1 industry are specified in the License granted who can be construed as persons manufacturing the drugs in question.

22. Thus, on examination of facts namely the averments made in the complaint and the case laws extracted herein above, I am of the considered view that the averments made in the complaint regarding the role and responsibilities of the petitioners not being specific precise, they cannot be proceeded against and complaint does not reveal that petitioners herein were incharge and responsible for the conduct of the business A-1 firm except a bald and vague statement made in the complaint stating that petitioners were the Directors of the firm and they were incharge of day to day affairs when the license issued goes to show the persons involved in the manufacturing process as some one else. In that view of the matter, I am of the considered view that Learned Magistrate was not justified in taking cognizance of the offence alleged against petitioners herein and issuing summons.

23. Accordingly point No.1 as answered in favour of the petitioners and against respondent/complainant.

**RE: POINT No: 2**

24. The petitioner in Crl. P.No. 15093/2011 was a Director of the accused A-1 company and he ceased to be the Director with effect from 26.08.2006. To

evidence this fact Form No.32 has been filed before the Jurisdictional Registrar of Companies as is evidenced from Annexure - C filed along with Criminal Petition No. 15093 /2011. The samples of the Drug was obtained on 17.10.2006. Petitioner not being a Director of A-1 company as on the date the samples were drawn i.e., 17.10.2006 no proceedings could have been continued against the petitioner for the said reason also. In view of the discussion made hereinabove following order is passed:

## **ORDER**

25. In the result, petitions are allowed. The proceedings registered in CC No. 179/2009 by I Addl. Civil Judge (Jr. Dn.) and JMFC, Gulbarga for the offence punishable under sections 18 (a) (1) and 27 (d) of the Drugs and Cosmetics Act, 1940 are hereby quashed in so far as petitioners are concerned and impugned order of Learned Magistrate taking cognizance and issuing summons to the petitioners are hereby quashed.

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