

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

**CRM (M) No. 459/2021
CrIM No. 1482/2021**

Sandeep Vijn

... Petitioner

Through: Mr. Salih Pirzada, Advocate

V/s

State through Drug Inspector Baramulla (HQ)

... Respondent(s)

Through: Mr. Hakeem Aman Ali, Advocate

CORAM: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE

ORDER
20.07.2024

Oral

1. The petitioner herein has filed the instant petition under section 482 Cr.P.C., [now Section 528, Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS)], seeking quashment of complaint titled as '*State through Drug Inspector Baramulla (HQ) versus Managing Director and others*', pending before the court of Additional Sessions Judge, Baramulla (for short the trial court) including the proceedings initiated thereon.
2. The facts giving rise to the filing of the instant petition as stated therein are that the petitioner is Managing Director/Proprietor of a drug manufacturing company namely M/s Knox Life Sciences with its registered office at village Gullarwala, Sai Road, Baddi, District Solan (H.P.).

The impugned complaint is stated to have been instituted by the respondent herein under and in terms of the provisions of the Drugs and Cosmetics Act of 1940 (hereinafter referred to as the Act of 1940) on 20.11.2012 before the court of Principal Sessions Judge, Baramulla, whereupon had been assigned for trial to the trial court whereafter the said trial court had taken cognizance and issued process for summoning of the accused persons including the petitioner herein for commission of offences under section 18(a)(i) and section 27 of the Act of 1940.

3. The petitioner herein has maintained the instant petition on the following grounds:

- a. That the process initiated against the petitioner in terms of impugned order dated 20.11.2012 is misdirected as no satisfaction has been drawn for taking cognizance of the complaint. Since the impugned order dated 20.11.2012 does not reveal the cognizance of offence which is prerequisite for issuing process, as such, the entire proceedings being bad in law are liable to be set aside.
- b. That the complaint and the impugned order are totally illegal and unlawful as the learned trial court on being in receipt of complaint is vested with the powers to take cognizance of the complaint under relevant sections of Drugs & Cosmetics Act after proper application of mind which is faulty in the impugned order dated 20.11.2012. Therefore, the impugned order dated 20.11.2012 and the proceedings being bad in law are liable to be set aside.
- c. That an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the alleged accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is *prima facie* case against the accused, though the order needs not contained detailed reasons. Therefore, the cognizance taken by the learned Additional Sessions Judge, Baramulla, by issuing process and proceeding ahead with the complaint against the petitioner is liable to be set aside.
- d. That the offences committed by a company have been specified distinctly under The Drugs and Cosmetics Act, 1940. The provision relating to such offences is as follows:

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

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

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

Explanation.—For the purposes of this section—

(a) "Company" means a body corporate, and includes a firm or other association of individuals; and

(b) "Director" in relation to a firm means a partner in the firm.'

A literal perusal of the above mentioned provision makes it manifestly evident that "every person" who "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". The words "Director", "Manager", or "Secretary" have not been used for the construction of sub-section 1 of Section 34 of the Act but are used in *non obstante clause* of sub-section 2. The legislative intent behind the deliberate omission of such words in sub-section 1 and the inclusion of "every person" as a substitute for such terminology specifying the designation of the officials of a company, makes it imperative for the entire provision to be construed in a way which would imply that the directors, managing director, etc. of a company may not be the persons in charge or responsible for the conduct of the business of the company at the time of commission of the offence. The principle of *Expressio unius est exclusio alterius* (inclusion of one thing means exclusion of other) and *id certum est quod certum reddi potest* (this is certain which may be rendered to be certain) would apply in such a case. It is thus seen that the vicarious liability if 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 or was also responsible to the Company for the conduct of its business. Simply because a person is the 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.

e. That simply because a person is the Director of the Company, it does not necessarily mean that he fulfills both the above requirements so as to make him liable under Section 34 of the Act. 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 impugned complaint, it is revealed that except a bald statement that the petitioner is a Director of the manufacturing company, there is no allegation to indicate, even *prima facie*, that the petitioner was in charge of the company and also responsible to the company for the conduct of its business. In the instant case, the impugned complaint is bereft of the requirements of Section 34 of the Act and as such the petitioner in his capacity as Managing Director cannot be made an accused. Therefore the impugned complaint as well as the impugned cognizance order is without jurisdiction, hence liable to be set aside.

f. That it is further submitted that oath has not been administered while recording the statement of complainant which also vitiates the prosecution. A severe miscarriage of justice is likely to occasion in case the proceedings are sustained. In order to prevent the abuse of process of court, the Hon'ble Court may be pleased to quash the proceedings in the interests of justice.

g. That the impugned complaint does not reveal commission of offence under Drugs and Cosmetics Act, 1945. The complaint does not fulfill the prerequisites of Section 18 or Section 34 of the Act, therefore the subsequent cognizance taken by the Learned Additional District Judge is contrary to law as no express satisfaction stands drawn in the order impugned to bring home the charge under Section 18. Hence the impugned prosecution as well the order is liable to be quashed.

h. That a severe miscarriage of justice is likely to occasion in case the proceedings are sustained. In order to prevent the abuse of process of Court the Hon'ble Court may be pleased to quash the proceedings in the interests of justice.”

4. **Response** to the petition has been filed by the respondent herein and the petition is being opposed, *inter alia*, on the grounds that the petition is not maintainable and that the petitioner has no *locus standi* to maintain the same and that the petition has been filed at a belated stage after a period of nine years and that the complaint under challenge does disclose commission of cognizable offence by the accused petitioner herein which

offence require to be tried by the trial court in accordance with law.

Heard learned counsel for the parties, perused the record and considered the matter.

5. The learned counsel for the petitioner at the outset while making his submissions would contend that the impugned complaint *ex facie* is not maintainable, in that, the offence covered in the impugned complaint are alleged to have been committed by the Company and that the complaint has not been filed in tune with the provisions of section 34 of the Act of 1940 against the petitioner herein rendering the same legally untenable *ab initio*.

Learned counsel for the petitioner would further contend that owing to the fact that the complaint is not maintainable *ab initio*, the plea of delay raised by the respondent is rendered legally insignificant.

On the contrary the counsel for the respondent would submit that the complaint is maintainable against the accused petitioner and that same has been filed validly and lawfully before the trial court which court has legally proceeded thereupon while taking cognizance and issuing process against the accused persons including the petitioner herein.

6. Before proceeding to advert to the rival submissions of the learned counsel for the parties, a reference to the provisions of section 34 of the Act of 1940 becomes imperative being relevant herein 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.

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

Explanation.—For the purposes of this section—

(a) “Company” means a body corporate, and includes a firm or other association of individuals; and

(b) “Director” in relation to a firm means a partner in the firm.”

A plain reading of the aforesaid section postulates that the person in charge of and responsible to the company for the conduct of the business of the company must be a person in overall control of the day-to-day business of the company or firm and that such person in charge of the conduct of the business of the company shall be deemed to be guilty besides the company/firm itself suggesting further that if the prosecution establishes that the offence committed by the company has been committed with the consent of the Director, Manager, Secretary or any other officer of the company such person shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

7. It is settled position of law that although, Section 34(1) *supra* creates a presumption as to the guilt of every person in charge and responsible to the company for the conduct of its business, yet in absence of a specific averment in the complaint attracting the ingredients of section 34(1) of the Act of 1940 that person was in charge of and responsible for the conduct of the business of the company so far as it related to the manufacture of the drug, such person he will not be liable for prosecution along with the company and even a mere description of such a person as Managing Director of the Company will not be sufficient to sustain the process issued against him.
8. Thus, what is required under section 34 of the Act of 1940 is that the person(s) who are sought to be made criminally liable should be at the time of the commission of the offence in charge of and responsible for the conduct of the business of the company. Therefore, every person connected with the company may not fall within the ambit of the provisions of section 34 of the Act of 1940, in that, it is only that person/s who was/were in charge of and responsible for the conduct of the business of the company at the relevant time who are liable for the offence as the liability would arise on account of the conduct, act or omission on the part of the person/s and not merely on account of holding an office or position in the company.
9. Having regard to the aforesaid position of law and coming back to the case in hand, a bare perusal of the complaint manifestly

tends to show that the complainant respondent herein has miserably failed to allege in the complaint the commission of offence covered in the complaint by the accused petitioner as neither an averment nor a whisper has been alleged thereto in the complaint, so much so, the company of which the petitioner herein is the Managing Director has not been implicated as an accused.

A bare perusal of the impugned complaint *prima facie* tends to show that the same is vague, ambiguous and cryptic, having been drawn and drafted mechanically without application of mind and being oblivious to the provisions of the Act of 1940 in general and section 34 *supra* in particular.

10. The impugned complaint and the proceedings initiated thereon by the trial court cannot, thus, but said to be abuse of process of law rendering the same legally unsustainable *ab initio* and rendering the plea of delay raised by the respondents irrelevant and insignificant, thus, warranting exercise of inherent power vested in this court.
11. Resultantly, the petition succeeds, as a consequence whereof the impugned complaint and proceedings initiated thereon are **quashed** insofar as the petitioner herein is concerned.

(JAVED IQBAL WANI)
JUDGE

Srinagar
20.07.2024
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Whether the order is Reportable:	Yes/No
Whether the order is Speaking:	Yes/No