

R

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 7TH DAY OF JANUARY, 2021

BEFORE

THE HON'BLE MR. JUSTICE SURAJ GOVINDARAJ

CRIMINAL PETITION NO.4676 OF 2020

AND

CRIMINAL PETITION NO 4712 OF 2020

IN CRIMINAL PETITION NO.4676 OF 2020

BETWEEN:

1. SRI. KUNAL BAHL
CHIEF EXECUTIVE OFFICER AND
DIRECTOR OF M/S JASPER
INFOTECH PRIVATE LIMITED, 238
1ST FLOOR, OKHLA INDUSTRIAL
ESTATE, NEW DELHI-110020
 2. SRI. ROHIT KUMAR BANSAL
CHIEF OPERATIVE OFFICER AND DIRECTOR
OF M/S JASPER INFOTECH PRIVATE LIMITED
238, 1ST FLOOR, OKHLA INDUSTRIAL
ESTATE, NEW DELHI-110020
- ... PETITIONERS

(BY SRI.C.V. NAGESH, SR. COUNSEL FOR
SRI. SANJANTHI SAJAN POOVAYYA, ADVOCATE)

AND:

STATE OF KARNATAKA
REPRESENTED BY
DRUGS INSPECTOR (INTELLIGENCE)-2
REGIONAL OFFICE, MYSORE
REGIONAL OFFICE OF THE
DEPUTY DRUGS CONTROLLER-CA-08
2ND PHASE, 4TH STAGE
VIJAYANAGAR, MYSURU-570032

... RESPONDENT

(BY SMT. RASHMI JADHAV, HCGP)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.PC., PRAYING TO QUASH THE COMPLAINT DATED 05.06.2020 IN C.C.NO.156/2020 PENDING BEFORE THE COURT OF THE PRINCIPAL SENIOR CIVIL JUDGE AND CJM, MYSURU (ANNEXURE-A) AND ETC.

IN CRIMINAL PETITION NO.4712 OF 2020
BETWEEN:

SNAPDEAL PRIVATE LIMITED
(FORMERLY KNOWN AS
JASPER INFOTECH PRIVATE LIMITED
HAVING ITS REGISTERED OFFICE AT:
SPROUTBOX SURYAVILLAS
SUITE #181 TR-4, FIRST FLOOR
D-181, OKHLA INDUSTRIAL AREA, PHASE-1
NEW DELHI, SOUTH DELHI-110020
REPRESENTED BY ITS
AUTHORIZED SIGNATORY
MR. VIJAY KUMAR SRIVASTAVA ... PETITIONER

(BY SRI.C.V. NAGESH, SR. COUNSEL FOR
SRI. SANJANTHI SAJAN PCOVAYYA, ADVOCATE)

AND:

STATE OF KARNATAKA
REPRESENTED BY
DRUGS INSPECTOR (INTELLIGENCE)-2
REGIONAL OFFICE, MYSORE
REGIONAL OFFICE OF THE
DEPUTY DRUGS CONTROLLER-CA-08
2ND PHASE, 4TH STAGE
VIJAYANAGAR, MYSURU-570032 ... RESPONDENT

(BY SMT. RASHMI JADHAV, HCGP)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.PC., PRAYING TO QUASH THE COMPLAINT DATED 05.06.2020 IN C.C.NO.156/2020 PENDING BEFORE THE COURT OF THE PRINCIPAL SENIOR CIVIL JUDGE AND CJM, MYSURU (ANNEXURE-A) AND ETC.

THESE CRIMINAL PETITIONS COMING ON FOR ADMISSION AND HAVING BEEN RESERVED FOR ORDERS ON 06.11.2020, THIS DAY, **THROUGH VIDEO CONFERENCE**, THE COURT PRONOUNCED THE FOLLOWING:

ORDER

1. The Petitioners in CrI.P. No.4676/2020 are the Directors of Snapdeal Private Limited, accused No.2. They are before this Court seeking for the following reliefs:
 - a) Call for records in C.C.No.156/2020 pending before the Court of the Principal Senior Civil Judge and CJM, Mysuru;
 - b) Quash the Complaint the Complaint dated 5.6.2020 in C.C.No.156/2020 pending on the file of the PrI. Senior Civil Judge and CMM, Mysuru; and
 - c) Quash the order dated 8.6.2020 and further proceedings pending in C.C.No.156/2020 pending before the PrI. Senior Civil Judge and CMM, Mysuru taking Cognisance of the offences punishable under Section 27(a)(ii) of the Drugs and Cosmetics Act, 1940 and issuing Summons to the petitioners.

2. The Petitioner in CrI.P. No.4712/2020 is Snapdeal Private limited who is seeking for the following reliefs:

- a) Call for records in C.C.No.156/2020 pending before the Court of the Principal Senior Civil Judge and CJM, Mysuru;
 - b) Quash the Complaint the Complaint dated 5.6.2020 in C.C.No.156/2020 pending on the file of the PrI. Senior Civil Judge and CMM, Mysuru; and
 - c) Quash the order dated 8.6.2020 and further proceedings pending in C.C.No.156/2020 pending before the PrI. Senior Civil Judge and CMM, Mysuru taking Cognisance of the offences punishable under Section 27(b)(ii) of the Drugs and Cosmetics Act, 1940 and issuing Summons to the petitioners.
3. Though there are two petitions filed, essentially the averments made in both the petitions are one and the same. Both the petitions arise out of the Criminal proceedings in C.C.No.156/2020 initiated against the petitioners in both the matters and certain others for alleged violation of Section 18(c) of the Drugs and Cosmetics Act, 1940 punishable under Section 27(b)(ii) of the Drugs and Cosmetics Act, 1940.

4. In the petitions it is contended as under:

Background of Snapdeal

4.1. Jasper Infotech Private Limited [now Snapdeal Private Limited (**Petitioner**)], was incorporated in 2007 (hereinafter referred to as '**Snapdeal**'), the said company started an online marketplace in February 2010, namely "Snapdeal.com" which is claimed to be India's largest online marketplace, with the widest assortment of 60 million plus products across 800 categories from regional, national and international brands and retailers.

4.2. Snapdeal is 'intermediary' as defined under Section 2(1)(w) of the Information Technology Act, 2000 (hereinafter referred to as the '**IT Act**'). An

'intermediary' under the Information Technology Act, 2000, includes an online-market place. Section 2(1)(w) of the IT Act, is reproduced hereunder for easy reference.

"Section 2(1) in The Information Technology Act, 2000

(1) In this Act, unless the context otherwise requires, -

(w) "intermediary", with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes;]"

4.3. **DIRECTORS:**

The directors in Crl.P. No.4676/2020 are the directors of the Petitioner in Crl.P.No.4712/2020. They have been

arraigned as accused Nos.3 and 4 in the Complaint.

Snapdeal's relationship with Selier and Seller obligations

4.4. In order to upload, sell or even 'offer for sale' any product on Snapdeal, a seller has to create an account with Snapdeal and contractually agree to the terms of the following documents:-

4.4.1. **Snapdeal's Terms of Use**, which contains the basic terms and conditions of using Snapdeal that every user (including every Seller) has to agree with. These terms are publicly available at <https://www.snapdea1.com/offers/terms-of-use>.

4.4.2. **Snapdeal's Terms of Offer for Sale**, which contains the basic terms

and conditions pertaining to sale of products on Snapdeal which every user/ seller has to agree with. These terms are publicly available at <https://www.snapdeal.com/page/terms-of-sale>.

4.4.3. **Snapdeal's Policies:** which includes the policy relating to privacy and data collection of every user ("**Privacy Policy**"), the policy dealing with abuse of Snapdeal's Terms of Service ("**Abuse Policy**"), the policy dealing with prohibited items on Snapdeal and the consequences of violation ("**Prohibited Seller Activities and Consequences Policy**").

4.4.4. **Seller Agreement**: which contains the basic terms and conditions of selling products over Snapdeal which every Seller has to agree with.

4.5. Snapdeal's business as per its 'Terms of Offer for Sale', is "a platform that facilitates the online sale and purchases of branded merchandise and services ("Services") offered by Snapdeal's various affiliate/ registered merchants/ vendors/ service providers ("Vendor/s"). The Vendors are the Sellers of products and services on the Website who are stated to be solely responsible to the purchaser/customer for the products sold or for redemption of any Voucher purchased by the purchaser/customer through the Website."

4.6. Snapdeal enters into seller agreements with various sellers, the seller agreements are accompanied by a Schedule of banned products, which categorically includes "21. *Prescription Medicines and Drugs*".

4.7. Under the Seller Agreement, the sellers are stated to have agreed to several conditions the relevant conditions for the present matter are as under:

4.8. Seller shall upload the Product listings for the sale of the Products in the appropriate category, through the Seller Panel. Seller shall also be required to provide all details relevant to the sale / purchase of the Products, including the Selling Price, an informative description of each Product (including but not limited to the length, breadth and height of the

Product) and its contents, by way of text descriptions, graphics, or pictures or videos. These Product listings and details shall be displayed on the Website, along with the Selling Price.

4.9. Seller has represented that the Seller shall provide accurate Product information on the Seller Panel/Website. The Product description shall not be misleading and shall describe the actual condition of the Product. If the sold Product does not match the Product description displayed on the Website, Seller agrees to refund any amounts that Seller may have received from the Buyer.

4.10. Seller shall not attempt to sell any products falling in the category of Snapdeal Banned Products" List on this

Website. Snapdeal shall be entitled to block all such products and shall also have the right to suspend or terminate the Seller's access to the Seller Panel and the Website or terminate this Agreement forthwith.

4.11. When a Buyer elects to purchase a Product through the Website, Snapdeal shall receive the order for the Product only in the capacity of an online marketplace. Seller also has agreed that the payment facility provided by Snapdeal is neither a banking service nor a financial service but is merely a facilitator/ facilitating the service of providing an automated online electronic payment system, using the existing authorised banking infrastructure and credit card payment gateway networks or payment

through cash on delivery, for the transactions on the Website. Further, by providing the payment facility, Snapdeal is neither acting as a Trustee nor acting in a fiduciary capacity with respect to any transaction on the Website.

4.12. Seller confirm and understand that selling and delivering fake, duplicate, spurious, counterfeit, refurbished or previously owned Products through the Website will cause great prejudice and harm to the reputation and goodwill of Snapdeal and may also cause harm and prejudice to the Buyers. Seller acknowledge and warrant that Seller shall not sell any Product which may cause prejudice or harm to the reputation and goodwill of Snapdeal. Further, if Snapdeal receives any complaint from any Buyer or if Seller sells

or delivers fake, duplicate, spurious, counterfeit, refurbished or previously owned Products through the Website then Seller shall be debited with an amount of equivalent to total GMV(Gross Merchandise Value) of all products sold through Snapdeal's Website or Rs 5,00,000, whichever is higher and will lead to immediate delisting of all of Seller's products from Snapdeal. Snapdeal reserves the right to adjust the above amount from any amount accrued to Seller pursuant to this Agreement.

4.13. Snapdeal has also published a document titled '*Prohibited Seller Activities and consequences Policy Document*', where one of the Prohibited seller activities is clearly specified as:

Advertising, exhibiting, publishing, representing, listing, delivering, exposing for sale, offering to sell or selling products which are banned as per "Banned Product List" annexes to the Seller Agreement including illegal or prohibited products as per Applicable Laws or regulated product without license(s) from proper authority(ies)	Hazardous materials Narcotic Drugs and Psychotropic Substances Prescription Medicines and Drugs.
--	--

4.14. On the basis of the above, it is contended that Snapdeal has put in place a robust system to inform all sellers on its platform of their responsibilities and obligations under applicable laws and therefore discharged its role and obligation as an intermediary.

4.15. It is contended that the above documents indicate the due diligence exercised by *Snapdeal* in accordance with Section 79(2)(c) of the Information Technology Act, 2000, read in conjunction with the Information Technology (Intermediaries Guidelines) Rules, 2011, in ensuring that Sellers who register on its Website conduct themselves in accordance with and in compliance with the applicable laws.

Complaint and Allegations:

4.16. The Respondent Inspector appointed under Section 21 of the Act (as per G.O No. HFW/ 20/ IMM/ 2010 dated 20/ 04/ 2010), has filed the Complaint on the basis of information allegedly received by the Deputy Drugs Controller, Mysore on 20/11/2014.

4.17. The allegations made in the Complaint are as follows:

4.17.1. It is alleged that in October 2014, M/s Adept Biocare, a proprietary concern of one Mr. Amandeep Chawla, Plot No. 1 53, Industrial Area, Phase II, Opp. Amartex, Panchakula (Accused No.1 in the Impugned Complaint), created a seller account on Accused No. 2s' online marketplace www.snapdeal.com for listing and selling his own products.

4.17.2. It is further alleged that the said Accused No.1 confirmed having sold SUHAGRA-100 Tablets (Sildenafil Citrate Tablets 100 mg), during the

period between 13.10.2014 and
16.12.2014,

4.17.3. Snapdeal warned Accused No.1 not to sell the said tablets on the Website. It is further alleged that Accused No.1 possessed the wholesale licence.

4.17.4. On 10/11/2014, one Mr. Manjunath placed an online order through the Petitioners' Website, for SUHAGRA 100 Tablets (Sildenafil Citrate Tablets 100 mg) under retail Invoice bearing No. S9C12D/ I4-1S/ 200 raised by Accused No. 1 and the same was delivered to him on 20/11/2014 and payment of Rs.390/ was made under Cash on Delivery (COD) in the

presence of Investigations Officers and Panch witnesses.

4.17.5. It is alleged that Snapdeal has exhibited SUHAGRA-100 mg Tablets for sale and provided platform to Seller and purchaser.

4.17.6. On 10.08.2017, the Respondent addressed a letter to the Assistant Drugs Controller - 02, Belgaum Circle, to furnish certified copies of the Constitution details and other documents of Snapdeal.

4.17.7. On 21.05.2017, Snapdeal addressed a letter to the Assistant Drugs Controller-02, Belgaum Circle furnishing all the required documents as requested.

4.17.8. On 22.08.2017 and 29.05.2017, the Deputy Drugs Controller, Mysuru sent emails to Snapdeal to ascertain whether the Constitution details of Snapdeal were the same as before.

4.17.9. Sri. Krishna Mohan Chaudary, Authorized Signatory of Snapdeal replied to the email and furnished the list of Directors of Snapdeal and on subsequent dates, the same exercise was repeated. On 15.01.2020, Snapdeal replied to the Respondent.

4.17.10. On the basis of the above it is alleged that there is a violation under Section 18(c) of the Act,

which is punishable under Section 27(b)(ii) of the Act, which sections are reproduced hereunder for easy reference:

Section 18(c) :

(c) manufacture for sale or for distribution, or sell, or stock or exhibit or offer for sale,] or distribute any drug [or cosmetic], except under, and in accordance with the conditions of, a licence issued for such purpose under this Chapter: Provided that nothing in this section shall apply to the manufacture, subject to prescribed conditions, of small quantities of any drug for the purpose of examination, test or analysis: Provided further that the [Central Government] may, after consultation with the Board, by notification in the Official Gazette, permit, subject to any conditions specified in the notification, the [manufacture for sale or for distribution, sale, stocking or exhibiting or offering for sale] or distribution of any drug or class of drugs not being of standard quality.

Section 27 (b)(ii). Penalty for manufacture, sale, etc., of drugs in contravention of this Chapter

(b) any drug—

(ii) without a valid licence as required under clause (c) of section 18, shall be punishable with imprisonment for a term which shall [not be less than three years but which may extend to five years and with fine which shall not be less than one lakh rupees or three

times the value of the drugs confiscated, whichever is more:]

Provided that the Court may, for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a term of [less than three years and of fine of less than one lakh rupees;]

4.17.11. As regards the above, criminal proceedings are initiated against the Petitioner in C.C. 156/2020 and vide order dated 08.06.2020, Cognisance Of offence under Section 27(b)(ii) is taken and Summons is issued to the Petitioners.

4.17.12. It is being aggrieved by the above Complaint and the order of Cognisance that the Petitioners are before this Court seeking for the aforesaid reliefs.

5. Shri C V Nagesh Learned Senior Counsel appearing for the Petitioners while reiterating the contents of the petition submitted that:

5.1. Even if all the contents of the Impugned Complaint are taken at their face value and accepted in their entirety, they do not *prima facie* constitute the commission of an offence by the Petitioner.

Order of Cognisance to be Speaking

5.2. An order taking Cognisance is required to be done by way of a speaking order and the said order requires to be passed after due application of mind.

5.3. The *sine qua non* for taking Cognisance of an offence is the application of mind by the Magistrate and his satisfaction that the allegations, if proved, would constitute an offence, in the present case, a mere

perusal of the Impugned Order makes it abundantly clear that the same does not disclose application of mind.

5.4. He relied on the decision of the Apex Court in ***GHCL Employees Stock Option Trust v. India Infoline Limited (2013) 4 SCC 505*** more particularly para 19 thereof which is reproduced hereunder for easy reference.

19. In the order issuing Summons, the learned Magistrate has not recorded his satisfaction about the prima facie case as against Respondents 2 to 7 and the role played by them in the capacity of Managing Director, Company Secretary or Directors which is sine qua non for initiating criminal action against them. Recently, in Thermax Ltd. v. K.M. Johny while dealing with a similar case, this Court held as under:

"38. Though Respondent 1 has roped all the appellants in a criminal case without their specific role or participation in the alleged offence with the sole purpose of settling his dispute with the appellant Company by initiating the criminal prosecution, it is pointed out that Appellants 2 to 8 are the ex-Chairperson, ex-Directors and senior managerial personnel of Appellant 1 Company, who do not have any personal role in the allegations and claims of Respondent 1. There is also no specific allegation with regard to their role.

39. Apart from the fact that the Complaint lacks necessary ingredients of Sections 405, 406, 420 read with Section 34 IPC, it is to be noted that the concept of 'vicarious liability' is unknown to criminal law. As

observed earlier, there is no specific allegation made against any person but the members of the Board and senior executives are joined as the persons looking after the management and business of the appellant Company."

5.5. He relied on the decision of the Apex Court in ***M/s. Pepsi Foods Ltd and anr. vs. Special Judicial Magistrate and Ors (1998) 5 SCC 749***, more particularly para 28 thereof which is hereunder reproduced for easy reference:

28. *Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the Complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the Complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.*

5.6. A mere statement that the Court has gone through the Complaint, documents and heard the complainant is not sufficient. What weighed in the mind of the Magistrate while passing such an order must be reflected in his order.

5.7. That Section 204 of the Code contains the words "*sufficient grounds for proceedings*" which are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself, though the order need not contain detailed reasons. In the present case, a mere perusal of the Impugned Order, makes it apparent that the same does not

disclose any application of mind for the purpose of coming to the conclusion as to why each of the accused including the Petitioner herein, are required to be proceeded against. When there are multiple accused, the order is required to disclose the application of mind by the Magistrate as regards each accused.

Role of an Intermediary under the Act

5.8. That the need for an independent inquiry as per the requirements of Section 202(1) Cr.P.C. is borne out by the fact the Court of the Learned Trial Court passed the Impugned Order without ascertaining (i) the role of Snapdeal in the sale of a product on its platform and (ii) the exact role of the Petitioners.

5.9. Snapdeal is an intermediary as defined under Section 2(1)(w) of the Information Technology Act, 2000, as amended by the Information Technology (Amendment) Act, 2008, and is therefore entitled to the exemption from liability in terms of Section 79 Information Technology Act, 2000, for the following reasons:

5.10. Snapdeal had no role in the said transaction.

5.11. Snapdeal merely provides access to a communication system over which information is made available to third parties. In the present instance, the information regarding the products offered for sale by Accused No. 1 was enabled for display to the buyers/ customers on the

online marketplace of Accused No. 2 Company.

5.12. Snapdeal as an intermediary has no control on what users may post on its platform.

5.13. Snapdeal has exercised 'due diligence' under Section 79(2)(c) of the Information Technology Act, 2000, read in conjunction with the Information Technology (Intermediaries Guidelines) Rules, 2011. Section 79(2)(c) of the IT Act is reproduced hereunder for easy reference:

Section 79(2)(c) in The Information Technology Act, 2000

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf."

5.14. Intermediary protection provided to Snapdeal under Section 79 of the

Information Technology Act, 2000 has been acknowledged by the Respondent in the impugned Complaint and hence the Respondent could not have arrayed the Petitioner as accused in the Complaint.

5.15. That the only liability of an intermediary under Section 79(3)(b) of the IT Act is to take down third-party content upon receipt of either a court order, or a notice by an appropriate government authority and not otherwise. Section 79 of the IT Act is reproduced hereunder for easy reference:

79 Exemption from liability of intermediary in certain cases.

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.

(2) The provisions of sub-section (1) shall apply if-

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

(b) the intermediary does not-

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if-

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful Act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource, controlled by the intermediary is being used to commit the unlawful Act, the intermediary fails to expeditiously remove or

disable access to that material on that resource without vitiating the evidence in any manner.

Explanation. -For the purpose of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary.

5.16. An intermediary cannot be responsible for the listing and sale of allegedly products by independent third-party sellers on its marketplace by relying on the decision of the Apex Court in ***Bharat Bribe Digumarti v. State (2017) 2 SCC 18*** and ***Shreya Singhal vs. Union of India, (2015) 5 SCC 1.***

5.17. The Magisterate failed to consider that "market place model of e-commerce" is recognised in Indian law and policy by referring to Press Note 3 of 2016 issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and

Industry, Government of India recognises whereunder the e-commerce entity only plays the role of a facilitator between the buyer and Seller, and does not have ownership over the goods sold. Relevant paragraphs of Press Note 3 of 2016 are extracted hereunder:

"Definitions:

- i. E-Commerce-** *E-commerce means buying and selling of goods and services including digital products over digital & electronic network.*
- ii. E-commerce entity-** *E-commerce entity means a company incorporated under the Companies Act 1956 or the Companies Act 2013 or a foreign company covered under section 2 (42) of the Companies Act, 2013 or an office, branch or agency in India as provided in section 2 (v) (iii) of FEMA1999, owned or controlled by a person resident outside India and conducting the e-commerce business.*
- iii. Inventory based model of e-commerce-** *Inventory based model of e-commerce means an e-commerce activity where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly.*

- iv. Marketplace based model of e-commerce-** Marketplace based model of e-commerce means providing of an information technology platform by an e-commerce entity on a digital & electronic network to act as a facilitator between buyer and Seller.

Guidelines for Foreign Direct Investment on e-commerce sector:

- i. 100% FDI under automatic route is permitted in marketplace model of e-commerce.
- ii. FDI is not permitted in inventory-based model of e-commerce.

Other Conditions:

- i. Digital & electronic network will include network of computers, television channels and any other internet application used in automated manner such as web pages, extranets, mobiles etc.
- ii. Marketplace e-commerce entity will be permitted to enter into transactions with sellers registered on its platform on B2B basis.
- iii. E-commerce marketplace may provide support services to sellers in respect of warehousing, logistics, order fulfilment, call centre, payment collection and other services.

- iv. *E-commerce entity providing a marketplace will not exercise ownership over the inventory i.e., goods purported to be sold. Such an ownership over the inventory will render the business into inventory based model.*
- v. *An e-commerce entity will not permit more than 25% of the sales affected through its marketplace from one vendor or their group companies.*
- vi. *In marketplace model goods/services made available for sale electronically on Website should clearly provide name, address and other contact details of the Seller. Post sales, delivery of goods to the customers and customer satisfaction will be responsibility of the Seller.*
- vii. *In marketplace model, payments for sale may be facilitated by the e-commerce entity in conformity with the guidelines of the Reserve Bank of India.*
- viii. *In marketplace model, any warrantee/guarantee of goods and services sold will be responsibility of the Seller.*
- ix. *E-commerce entities providing marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field.*
- x. *Guidelines on cash and carry wholesale trading as given in para 6.2, 16.1.2 of*

the FDI Policy will apply on B2B e-commerce.

5.18. That subsequent to the enactment of the Consumer Protection (E-Commerce) Rules, 2020, a distinction has been drawn between marketplace e-commerce websites (such as Snapdeal, Amazon and Flipkart) and inventory e-commerce websites (such as Lifestyle and Decathlon).

5.19. Rule 5(1) of Consumer Protection (E-Commerce) Rules, 2020, specifically provides that in order to claim an exemption under Section 79 of the Information Technology Act, 2000 as regards a marketplace e-commerce entity, Snapdeal has complied with the requirements of subsections (2) and (3) of Section 79, as well as the Information Technology (Intermediaries Guidelines) Rules, 2011. Rule 5(1) of the

Consumer Protection (e-commerce) Rules, 2020, is reproduced hereunder for easy reference.

5(1) Liabilities of marketplace e-commerce entities. –

(1) A marketplace e-commerce entity which seeks to avail the exemption from liability under sub-section (1) of section 79 of the Information Technology Act, 2000 (21 of 2000) shall comply with sub-sections (2) and (3) of that section, including the provisions of the Information Technology (Intermediary Guidelines) Rules, 2011.

(2) Every marketplace e-commerce entity shall require sellers through an undertaking to ensure that descriptions, images, and other content pertaining to goods or services on their platform is accurate and corresponds directly with the appearance, nature, quality, purpose and other general features of such good or service.

(3) Every marketplace e-commerce entity shall provide the following information in a clear and accessible manner, displayed prominently to its users at the appropriate place on its platform:

(a) details about the sellers offering goods and services, including the name of their business, whether registered or not, their geographic address, customer care number, any rating or other aggregated feedback about such Seller, and any other information necessary for enabling consumers to make informed decisions at the pre-purchase stage:

Provided that a marketplace e-commerce entity shall, on a request in writing made by a consumer after the purchase of any goods or services on its platform by such consumer, provide him with information regarding the Seller from which such consumer has made such purchase, including the principal geographic address of its headquarters and all branches, name and details of its Website, its email address and any other information necessary for communication with the Seller for effective dispute resolution;

(b) a ticket number for each Complaint lodged through which the consumer can track the status of the Complaint;

(c) information relating to return, refund, exchange, warranty and guarantee, delivery and shipment, modes of payment, and grievance redressal mechanism, and any other similar information which may be required by consumers to make informed decisions;

(d) information on available payment methods, the security of those payment methods, any fees or charges payable by users, the procedure to cancel regular payments under those methods, charge-back options, if any, and the contact information of the relevant payment service provider;

(e) all information provided to it by sellers under sub-rule (5) of rule 6; and an explanation of the main parameters which, individually or collectively, are most significant in determining the ranking of goods or sellers on its platform and the

relative importance of those main parameters through an easily and publicly available description drafted in plain and intelligible language.

(4) Every marketplace e-commerce entity shall include in its terms and conditions generally governing its relationship with sellers on its platform, a description of any differentiated treatment which it gives or might give between goods or services or sellers of the same category.

(5) Every marketplace e-commerce entity shall take reasonable efforts to maintain a record of relevant information allowing for the identification of all sellers who have repeatedly offered goods or services that have previously been removed or access to which has previously been disabled under the Copyright Act, 1957 (14 of 1957), the Trade Marks Act, 1999 (47 of 1999) or the Information Technology Act, 2000 (21 of 2000):

Provided that no such e-commerce entity shall be required to terminate the access of such Seller to its platform pursuant to this sub-rule but may do so on a voluntary basis.

Delay in filing Complaint

5.20. The Complaint was filed with an inordinate delay of nearly six years, though the transaction occurred in the year 2014. No explanation or justification has been afforded for the unreasonable delay

caused by the Respondent, and as such the same is fatal.

Sine Qua Non for 18(1)(c) of the Act

5.21. For 18(1)(c) of the Act to apply it is imperative that a person either manufactures for sale or for distribution, or sells, or stocks or exhibits or offers for sale, any drug or cosmetic, without a license issued under the Act. In the instant case, Snapdeal has neither manufactured for sale or distribution, nor sold, or stocked or exhibited or offered for sale, any drug or cosmetic. It is Accused No. 1, who exhibited and offered its products for sale on the Website of Snapdeal/Accused No. 2 Company. Hence neither Snapdeal nor its Directors the Petitioners can be made liable for offences punishable under Section

27(b)(ii) of the Act. The essential ingredients of Section 18 (1)(c) of the Act not having been fulfilled neither Snapdeal nor its Directors/Petitioners can be prosecuted for the offence under Section 27(b)(ii) of the Act.

Vicarious Liability of Directors in Criminal Offences

5.22. Vicarious liability in criminal law is not automatic and that necessary averments ought to be contained in the Complaint before any person can be subjected to criminal process, in the instant case, there are no averments against the Petitioner.

5.23. The Petitioners are only Directors of the Company and are not involved in day to day affairs of the Company, like the sale of the products, which was done only by

Accused No. 1, therefore no offence can be alleged against them since they have no personal knowledge as to the legality or otherwise of the products that are being sold by third-party sellers.

5.24. He relied upon the decision of the Apex court in in ***Maksud Saiyed vs. State of Gujrat, (2008) 5 SCC 668*** more particularly para 13 thereof which is reproduced hereunder for easy reference:

"13. *Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious*

liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability”.

5.25. Merely being a director is not sufficient to bring a person within the dragnet of a prosecution under Section 34 of the Act and that there is no deemed liability of directors for offences committed under the Act.

Accused residing outside the jurisdiction of the Magistrate.

5.26. Section 202 of the Cr P.C, mandates that where the accused resides beyond the jurisdiction of the Court, such court 'shall' postpone issuance of process and conduct an inquiry in the manner provided thereunder, by relying on the decision of the Apex Court in ***Vijay Dhanka vs. Najima Momtaj, (2014) 14 SCC 638***, more

particularly Para 12 thereof which are reproduced hereunder for easy reference:

12. *The words "and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction" were inserted by Section 19 of the Code of Criminal Procedure (Amendment) Act (Central Act 25 of 2005) w.e.f. 23-6-2006. The aforesaid amendment, in the opinion of the legislature, was essential as false complaints are filed against persons residing at far off places in order to harass them. The note for the amendment reads as follows:*

"False complaints are filed against persons residing at far off places simply to harass them. In order to see that innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused."

The use of the expression "shall" prima facie makes the inquiry or the investigation, as the case may be, by the Magistrate mandatory. The word "shall" is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. The use of the word "shall" in all circumstances is not decisive. Bearing in mind the aforesaid principle, when we look to the intention of the legislature, we find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, in our opinion, the use of the expression "shall" and the background and the purpose for which the amendment has been brought, we have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate.

5.27. All of the Accused, including the Petitioners, reside beyond the jurisdiction of the Learned Trial Court. Therefore, the Impugned Order is *ex facie* illegal and is liable to be set aside since the same has been passed without conducting the mandatory enquiry as per Section 202 of the Cr.P.C.

6. C.Nageshwarappa, learned HCGP on the other hand would submit that: Whether the Petitioner is a manufacturer or not, the fact that the Petitioner owns market place Snapdeal is sufficient to prosecute the Petitioner for any offence or violation committed by any seller on the platform.

6.1. That the order of cognisance dated 8.6.2020 passed by the Magistrate is proper and correct. The Magistrate cannot be expected to write a detailed order. His *prima facie*

satisfaction is sufficient for the purpose of taking cognizance, as also for issuance of summons. The order dated 8.6.2020 satisfies both the requirements and therefore, is not required to be interfered with.

6.2. In relation to the e-commerce transaction since the transaction occurs across the country, it cannot be expected for a purchaser of a product in one part of the country to proceed against the e-commerce website only where it is registered and therefore, the Mysore Court where the item was ordered and delivered could exercise jurisdiction. The Mysore Court where the transaction has occurred would have jurisdiction.

6.3. The fact of whether accused No.2 is registered outside the State of Karnataka or outside the jurisdiction of the Magistrate, as also whether accused Nos.3 and 4 are residing outside the

jurisdiction of the Magistrate is not relevant for the reason that the transaction has occurred within the jurisdiction of the Magistrate at Mysore. Therefore, there is no requirement to hold an enquiry under Section 202(2) of Cr.P.C.

6.4. Irrespective of whether accused No.2 is considered as an intermediary or not, there could be no product which could have been advertised for sale contrary to the prohibitions under the Drugs and Cosmetics Act.

6.5. Accused No.2 being the entity which provided a platform and permitted advertisement for sale of the said prohibited item, accused No.2 and in turn accused Nos.3 and 4 being its directors are liable to be prosecuted. Neither accused No.2 nor accused Nos.3 and 4 can claim any benefit of being an intermediary as alleged or otherwise.

6.6. There is no delay in filing of the complaint.

The government entities have processed the matter, have taken necessary approval which took some time, therefore even if there is any delay, the said delay would not materially or adversely affect the prosecution of the accused.

6.7. On these basis, he submits that the petitions as filed are liable to be dismissed.

7. Having heard Shri C V Nagesh the learned Senior counsel for the Petitioner and Shri Nageshwarappa learned HCGP, the points that would arise for determination by this Court are:

- (i) **Whether the order of Cognisance dated 8.6.2020 complies with the requirement of Section 191(1)(a) of the Cr.P.C?**
- (ii) **Whether Summons could have been ordered without following the procedure under Section 204 of Cr.P.C ?**
- (iii) **Whether the Magistrate could have issued Summons to accused Nos. 2 who**

is stated to be not registered within the Jurisdiction of the Magistrate without holding an enquiry under Section 202(1) of Cr.P.C.?

- (iv) Whether the Magistrate could have issued Summons to the accused Nos. 3 and 4 i.e. petitioners in CrI.P.No.4676/2020 since they are residing outside the jurisdiction of the Magistrate without holding an enquiry under Section 202(1) of Cr.P.C. ?**
- (v) Which Court could exercise Jurisdiction as regards an offence relating to an e-commerce transaction?**
- (vi) Whether an intermediary as defined under Section 2(w) of the Information Technology Act would be liable for any action or inaction on party of a vendor/seller making use of the facilities provided by the intermediary in terms of a website or a market place?**
- (vii) Whether Snapdeal/accused No.2 would be responsible and/or liable for sale of any item not complying with the requirements under the Drugs and Cosmetics Act, 1949 on its platform accused No.2 being an intermediary?**
- (viii) Effect of delay in filing a Criminal Complaint?**
- (ix) What Order ?**

8. I answer the above points as under.
9. **POINT NO. (i): Whether the order of Cognisance dated 8.6.2020 complies with the requirement of Section 191(1)(a) of the Cr.P.C?**

POINT NO. (ii): Whether Summons could have been ordered without following the procedure under Section 204 of Cr.P.C ?

9.1. Both the above points being inter-related are taken up together.

9.2. It is sought to be contended by relying on the decisions in ***GHCL Employees Stock Option Trust v. India Infoline Limited (2013) 4 SCC 505*** and ***M/s. Pepsi Foods Ltd and anr. vs. Special Judicial Magistrate and Ors (1998) 5 SCC 749***, that the Court taking Cognisance is required to apply its mind, which should be apparent from a reading of the order of Cognisance to indicate that the requirement of "*sufficient*

grounds for proceedings” in terms of Section 204 of the code has been complied with.

9.3. As held by the Hon’ble Apex Court as also this Court, any Court taking Cognisance of a matter is required to follow the due procedure relating thereto since it is on taking Cognisance that criminal law is set in motion as against the accused in that matter. For that purpose, at the time of taking Cognisance, there must be a proper application of judicial mind to the materials before the said Court either oral or documentary, as well as any other information that might have been submitted or made available to the Court.

9.4. The test that is required to be applied by the Court while taking Cognisance is as to whether on the basis of the allegations made

in the Complaint or on a police report or on information furnished by a person other than a police officer, is there a case made out for initiation of criminal proceedings.

9.5. For the above purpose, there is an assessment of the allegations required to be made applying the law to the facts and thereby arriving at a conclusion by a process of reasoning that Cognisance is required to be taken.

9.6. An order of Cognisance cannot be abridged, formatted or formulaic. The said order has to make out that there is a judicial application of mind. Since without such application, the same may result in the initiation of criminal proceedings when it was not required to be so done.

9.7. The order of taking Cognisance is a safeguard inbuilt in the criminal justice system so as to avoid malicious prosecution and/or frivolous complaints.

9.8. When a complaint or a police report or information by a person other than police officer is placed before the Court, the judicial officer must apply judicious mind coupled with discretion which is not to be exercised in an arbitrary, capricious, whimsical, fanciful or casual way.

9.9. Any offence alleged being one of commission or omission attracting penal statutes; Cognisance can be taken only if the allegations made fulfil the basic requirement of the said penal provision. At this point, it is not required for the Court taking Cognisance to ascertain the truth or veracity of the

allegation but only to appreciate if the allegations taken at face value, would amount to the offence complained of or not. If Yes, Cognisance could be taken, if No, taking Cognisance could be refused. The only manner of ascertaining the above is by the manner of recordal made by the Court in the order taking Cognisance. The order passed by the court taking cognisance would therefore reflect such application of mind to the factual situation

9.10. In the above background that the order passed by the Magistrate taking Cognisance has to be appreciated. The said order reads as follows:

“Persued entire records.

Pursuant to which Cognisance is taken as against accused for the offence p/u/s 27(b)(ii) of Drugs & Cosmetics Act.

Office is hereby directed to register same as C.C. in register No.III.

Issuance summons to accused through R.P.A.D, if P/S, P/c along with other particular d/furn.

Await & call on by 01/09/2020."

9.11. Applying the above requirement to the order passed by the Magistrate, it can be ex facie seen that the order of the Magistrate does not satisfy the requirement of arriving at a prima facie conclusion to take cognisance and issue process let alone to the accused residing outside the Jurisdiction of the said Magistrate.

9.12. There has to be an application of mind by the Court taking Cognisance that prima facie or ex facie the offences are made out on reading of the Complaint filed. A perusal of the impugned order dated 8.6.2020 referred in the case that the Magistrate has perused the entire records pursuant to which he has taken Cognisance as against the accused for

offences punishable under Section 27(b)(ii) of the Drugs and Cosmetics Act, 1940. This order, in my considered opinion would not establish any application of mind on the part of the Magistrate inasmuch as there is no appreciation of the offence, the role of each of the accused and how they are alleged to have committed the offence as regards which Cognisance is said to have been taken.

9.13. The same in my considered opinion would not satisfy the requirement of law. The Court taking Cognisance while taking Cognisance under Section 190 of Cr.P.C. is required to apply its mind follow the process and procedure prescribed under Section 204 of the Cr. P.C. and pass a sufficiently reasoned order indicating such application of mind, the reasons for coming to a conclusion that prima facie there exists material to indicate that the

offence alleged against the Accused is indeed committed by such accused.

9.14. Mere reference to the provisions in respect of which offences are alleged to have been committed would not be in compliance with the aforesaid requirement of the statutes as also the various decisions of the Honb'le Apex Court extracted hereinabove.

9.15. It is the words used in the order, which would have to suggest that the opinion to take Cognisance is formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself, though the order need not contain detailed reasons.

9.16. In the present case, a mere perusal of the Impugned Order, makes it apparent that the same does not disclose any application of mind for the purpose of coming to the conclusion as to why each of the accused including the Petitioner herein, are required to be proceeded against.

9.17. When there are multiple accused, the order is required to disclose the application of mind by the Court taking Cognisance as regards each accused.

9.18. The Court taking Cognisance ought to have referred to and recorded the reasons why the said Court believes that an offence is made out so as to take Cognisance more so on account of the fact that it is on taking Cognisance that the criminal law is set in motion insofar as accused is concerned and

there may be several cases and instances where if the Court taking Cognisance were to apply its mind, the Complaint may not even be considered by the said Court taking Cognisance let alone taking Cognisance and issuance of Summons.

9.19. In view of the above, I am of the considered opinion that the order dated 08.06.2020 taking Cognisance is not in compliance with applicable law and therefore is set aside.

9.20. I answer Point No. (i) and (ii) by holding that the order of Cognisance dated 8.6.2020 is not in compliance with the requirement of Section 191(1)(a) of the Cr.P.C and further does not indicate the procedure under Section 204 of Cr.P.C having been followed. At the time of taking Cognisance and issuance of process, the Court taking Cognisance is required to pass a sufficiently detailed order to support

the conclusion to take cognisance and issue process, in terms of the discussion above. The judicious application of mind to the law and facts of the matter, should be apparent on the ex-facie reading of the order of Cognisance.

10. **POINT NO. (iii): Whether the Magistrate could have issued Summons to accused Nos. 2 who is stated to be not registered within the Jurisdiction of the Magisterate without holding an enquiry under Section 202(1) of Cr.P.C.?**

And

POINT NO. (iv) Whether the Magistrate could have issued Summons to the accused Nos. 3 and 4 i.e. petitioners in CrI.P.No.4676/2020 since they are residing outside the jurisdiction of the Magistrate without holding an enquiry under Section 202(1) of Cr.P.C. ?

10.1. Both the above points being connected to each other are considered and answered together as under:

10.2. Section 202 of Cr.P.C. is extracted hereunder for easy reference:

"202. Postponement of issue of process.-

1. Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take Cognisance or which has been made over to him under section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding: Provided that no such direction for investigation shall be made,--
 - a. where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or
 - b. where the Complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.
2. In an inquiry under sub- section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath: Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.
3. If an investigation under sub- section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer- in- charge of a police station except the power to arrest without warrant.

10.3.A perusal of the Complaint indicates that the address of accused Nos.3 and 4 provided by the complainant himself is that of New Delhi.

There is no address of accused Nos.3 and 4 within the jurisdiction of the Magistrate at Mysuru which has been provided. A perusal of the entire Complaint also does not indicate any address or presence of accused Nos.3 and 4 within the jurisdiction of the Magistrate in Mysuru. The only allegation which has been made is that they are Directors of accused No.2-Snapdeal Private Limited and proceedings have been initiated merely on the ground that Sri.C.M.Shivakumar, CW-9 vide his E-mail dated 29.08.2019 having informed about accused Nos.3 and 4 being Directors of accused No.2, there has been no correspondence by the complainant that accused Nos.3 and 4 prior to the filing of the Complaint.

10.4. In so far as Snapdeal is concerned it is not registered within the Jurisdiction of the Magistrate.

10.5. Admittedly all of the Accused reside beyond the Jurisdiction of the Learned Trial Court.

10.6. The protection under Section 202 (2) of the Cr P.C. is provided so as to not inconvenience an Accused to travel from outside the Jurisdiction of the Court taking Cognisance to attend to the matter in that Court. Therefore, before issuing Summons to an accused residing outside the Jurisdiction, there has to be an application of mind by the Court issuing Summons and after conducting an enquiry under Section 202 (2) of Cr.P.C. the Court issuing Summons has to come to a conclusion that such Summons are required to be issued to an accused residing outside its Jurisdiction.

10.7. Sri. Nageshwarappa, Learned HCGP submitted that the offence of sale having been committed within the Jurisdiction of the

Magistrate, it cannot be said that the accused is residing outside the Jurisdiction of the Court by contending that the Registered office of the Company is situate outside the Jurisdiction of the said Court.

10.8. Admittedly Snapdeal/Accused no.2 neither has a registered office within the Jurisdiction of the Magistrate nor does it have a branch office, corporate office, sales office or the like.

10.9. Section 202 of Cr.P.C. extracted above provides for the safeguard in relation to persons not residing within the jurisdiction of the said Magistrate, not to be called or summoned by the said Court unless the Magistrate were to come to a conclusion that their presence is necessary and only thereafter issue process against the accused.

10.10. In the present case, as could be seen from the extract of the order dated 8.06.2020, the answer to point No.1 above, there is no such postponement made by the Magistrate, but as soon as the Magistrate received a complaint, he has issued process to accused No.2, who is registered outside the jurisdiction of the Magistrate and also does not have any office within the territorial Jurisdiction of the Magisterate. Accused Nos.3 and 4 are residing outside the jurisdiction of Magistrate and none of the accused Nos.2, 3 and 4 have any connection with any place within the jurisdiction of the Magistrate.

10.11. In view of the above, it was required for the Magisterate fo conduct a mandatory enquiry as per Section 202 (2) of the Cr.P.C.

10.12. There being a violation of the requirement under Section 202 of Cr.P.C., I am of the considered opinion that the Magistrate could not have issued Summons to the petitioners in both the matters without following the requirement and without conducting an enquiry under Section 202 of Cr.P.C. as held by the Apex court in ***Vijay Dhanka vs. Najima Momtaj, (2014) 14 SCC 638*** as also by this court in ***B.S.YEDIYURAPPA - vs- State of Karnataka [Crl.P. No.100964/2020 DD 11.09.2020]***.

10.13. I answer Point No. (iii) and (iv) by holding that :

10.14. When the accused is having an office, branch office, corporate office, sales office or the like within the Jurisdiction of the Magistrate where the offence has been committed and or continues to be

committed, there would be no requirement for any enquiry under Section 202 of Cr.P.C. It would, however, be required for the Magistrate to in the order of issuance of summons/process record as to why the enquiry under Section 202 of Cr.P.C is not being held.

10.15. In the event of accused being an individual, if the said accused has a temporary residence within the Jurisdiction of the Magistrate, again merely because he does not have a permanent residence, there is no enquiry which is required to be conducted under Section 202 of Cr.P.C. It would, however, be required for the Magistrate to in the order of issuance of summons/process record as to why the enquiry under Section 202 of Cr.P.C is not being held.

10.16. When the accused has no presence within the Jurisdiction of the Magistrate where the offence has been committed, then it would be mandatory for an enquiry under Section 202 of the Cr.P.C to be held.

10.17. In the event of accused being aggrieved by the issuance of Summons, the said accused immediately on receipt of the Summons and/or on appearance before the Magistrate is required to make out his grievance before the Magistrate and/or by petition under Section 482 Cr.P.C. If there is any delay, in such challenge and/or if challenge has not made within reasonable time, the accused would not be entitled to raise the grievance that the procedure under Section 202 of Cr.P.C. has not been followed on account of delay and latches.

11. Point No. (v): Which Court could exercise Jurisdiction as regards an offence relating to an e-commerce transaction?

11.1. Whenever an offence is committed or alleged to have been committed, the first question of importance which arises is that in whose jurisdiction the offence would fall.

11.2. The jurisdictional issue is for that reason the most important issue which needs to be resolved so that the proceedings can begin. Sections 177-189 of Cr. P.C deals with the concept of jurisdiction. Under normal circumstances, the case shall be inquired and tried by a court under whose jurisdiction the offence has been committed.

11.3. However, there are certain cases where more than one Court could have the power to inquire into and try the matter. Such issues

have been explicitly dealt with by the provisions of the Code of Criminal Procedure.

11.4. In terms of Section 177 of the Cr. P.C, the Court under whose jurisdiction the offence has been committed only has the authority to inquire into and try such case.

11.5. It could be that an offence or a series of offences connected to the particular offence could be committed at different place. Situations where the offence has been committed in more than one place is dealt with by Section 178 of the Cr. P.C, this would arise for the reason that:

11.5.1. The place of commission of the offence is uncertain because it has been committed in several places.

11.5.2. Where an offence is partly committed in one local area and the rest in another area.

11.5.3. When the offence comprises of several acts, committed in different local areas.

11.6. When an act is an offence because of anything which has been done and a consequence has ensued, the said offence may be inquired into or tried by a court of competent jurisdiction in terms of Section 179 of the Cr. P.C.

11.7. The place of trial when the Act committed is an offence because it is related to some other offence is as per Section 180 of the Cr. P.C. According to it the offence which has been committed first has to be inquired into or tried, when two acts are done in connection with each other and both are offences, by the Court under whose jurisdiction either of the

Act has been committed. In all such provisions, the emphasis is always on the place where the offence has been committed, to find the jurisdiction.

11.8. According to Section 181(1) of Cr. P.C, the trial can also be commenced where the accused is found, besides the place where the offence was committed and deals with the following cases.

11.8.1. A murder committed while performing the Act of dacoity - where the offence is committed or where the accused is found.

11.8.2. Kidnapping or abduction of a person- the place from where the person was kidnapped/ abducted or where the person was concealed or conveyed or detained.

11.8.3. Theft, extortion or robbery – the Court where the offence has been committed or where the stolen property is possessed, received or delivered, has the jurisdiction to try such a case.

11.8.4. Criminal misappropriation or criminal breach of trust- where the offence has been committed or where any part of the property which is the subject matter of the offence has been received or retained, required to be returned or accounted for, by the accused.

11.9. Offences committed by letters etc., is dealt with by Section 182 of the Cr. P.C whereunder, if any offence includes cheating, if the victim has been deceived by means of letters or telecommunication messages, it shall be looked into by the Court under whose

local jurisdiction such letters or messages have been sent or received; and under the local jurisdiction of the Court in which the property has been delivered by the person deceived or has been received by the accused person.

11.10. When a person commits an offence, during journey or against a person who is travelling, or the thing in respect of which, the offence has been committed is in due course of its journey or voyage, the offence has to be inquired into or tried by a Court through or into whose local jurisdiction that person or thing has passed, during the journey, in terms of Section 183 of Cr. P.C.

11.11. The State Government may in terms of Section 185 of the Cr. P.C direct that any cases or class of cases which have been

committed for trial in any district, may be tried in a sessions court.

11.12. In the event of Cognisance of a particular offence has been taken by two or more courts and confusion arises as to which of the Courts shall inquire into or try that offence, in such a case, in terms of Section 186 of the Cr. P.C only the High Court has the authority to resolve the confusion.

11.13. A Magistrate can issue Summons or warrant for offences which have been committed beyond his local jurisdiction and has authority to order such a person to be produced before him and then send him to the Magistrate of competent jurisdiction, in terms of Section 187 of the Cr. P.C.

11.14. The present case is one of an unauthorised sale or sale of a prohibited item. The present case is not one of Cyber Crime.

11.15. In the present case is not that there was a sale of a product physically, meaning that the product was not handed over immediately on sale. If that were so, jurisdictional matters would be very simple in that the Court where the physical transaction happened would have Jurisdiction.

11.16. In the present case as in all e-commerce transactions, the sale took place on the internet, in that once the product was put up for sale on the marketplace, anyone could have bought the same from any place so long as the product could be delivered at the place where the buyer was located. A buyer could also place an order from one place and get the

product delivered at another. It is for this reason that the concept of Jurisdiction of courts in e-commerce transactions gets complicated.

11.17. In so far as civil matters are concerned the courts have over a period of time developed several tests to determine as to which court could have jurisdiction, the tests as regards a criminal matter would be different. Essentially when a criminal prosecution is initiated against a person or entity, such person or entity cannot be made to face such a prosecution at any place within the country or outside. The Court having jurisdiction should be determined in such a manner that neither the complainant nor an accused is put to unnecessary harassment.

11.18. In a prosecution for criminal offences, white collared or otherwise the accused is required to be present physically on each date of hearing, so long as such appearance is not exempted. As such the court would have to protect the accused from possible forum shopping and or from complaints being filed in multiple jurisdictions, which could cause undue harassment to such an e-commerce entity.

11.19. Therefore I answer point no. (v) by holding that only a Court in which the accused has a presence, like registered office, branch office, corporate office or the like could exercise Jurisdiction as regards an offence relating to an e-commerce transaction.

11.20. This of course would not apply to a Cyber Crime, which comes under global jurisdiction according to the IT Act, 2000. This means that any cyber-crime complaint can be registered with any of the cyber cells in India, irrespective of where the crime was originally committed.

12. **Point No. (vi): Whether an intermediary as defined under Section 2(w) of the Information Technology Act would be liable for any action or inaction on party of a vendor/seller making use of the facilities provided by the intermediary in terms of a website or a market place?**

12.1. It is stated that Snapdeal has established a Marketplace on the World Wide Web, more popularly known as the internet, enabling a Seller to upload, sell or even 'offer for sale' any product on Snapdeal. For this purpose, a seller has to create an account with

Snapdeal and contractually agree to Snapdeal's Terms of Use, Snapdeal's Terms of Offer for Sale, Snapdeal's Policies, Seller Agreement: which contains the basic terms and conditions of selling products over Snapdeal which every Seller has to agree with.

12.2. Snapdeal's business as per its 'Terms of Offer for Sale', is "a platform that facilitates the online sale and purchases of branded merchandise and services ("Services") offered by Snapdeal's various affiliate/ registered merchants/ vendors/ service providers ("Vendor/s").

12.3. Snapdeal being an intermediary can not be disputed, it comes with the meaning and definition of Intermediary under Section 2(1)(w) of the Information Technology Act,

2000, as amended by the Information Technology (Amendment) Act, 2008. Snapdeal would be entitled to the exemption from liability in terms of Section 79 Information Technology Act, 2000 if the requirements thereof are met.

12.4. Snapdeal is not the Seller, it is the Vendors registered with Snapdeal who are the Sellers of products and services on its platform, it is the Vendors who are solely responsible to the purchaser/customer.

12.5. For its part Snapdeal has entered into seller agreements with various sellers, the seller agreements are accompanied by a Schedule of banned products, which categorically includes "21. *Prescription Medicines and Drugs*".

- 12.6. The Seller Agreement, details out the terms and conditions relevant to the transaction, which are extracted hereinabove.
- 12.7. Snapdeal has also published a document titled 'Prohibited Seller Activities and consequences Policy Document', where one of the Prohibited seller activities is clearly specified to be the sale of the drug subject matter of the present criminal proceedings.
- 12.8. It cannot be expected that the provider or enabler of the online marketplace is aware of all the products sold on its Website. It is only required that such provider or enabler put in place a robust system to inform all sellers on its platform of their responsibilities and obligations under applicable laws in order to discharge its role and obligation as an intermediary. If

the same is violated by the Seller of goods or service such seller can be proceeded with but not the intermediary.

12.9. The manner in which the above documents have been executed, contents thereof as also the obligation of the parties stated therein establishes the due diligence exercised by *Snapdeal* to be in accordance with and compliance of Section 79(2)(c) of the Information Technology Act, 2000, read in conjunction with the Information Technology (Intermediaries Guidelines) Rules, 2011, in ensuring that Vendors/Sellers who register on its Website conduct themselves in accordance with and in compliance with the applicable laws.

12.10. The Consumer Protection (E-Commerce) Rules, 2020, makes a distinction between

marketplace e-commerce websites and inventory e-commerce websites. As such Snapdeal would come within the meaning of a marketplace e-commerce website, thereby affording the above exemption to Snapdeal so long as the requirements under section 79 are followed by Snapdeal.

12.11. In the present case as detailed above Snapdeal has complied with the requirements of sub-sections (2) and (3) of Section 79, as well as the Information Technology (Intermediaries Guidelines) Rules, 2011.

12.12. In my considered opinion Snapdeal has exercised 'due diligence' under Section 79(2)(c) of the Information Technology Act, 2000, read in conjunction with the Information Technology (Intermediaries Guidelines) Rules, 2011.

12.13. When Snapdeal/Accused to. 2 Company is exempted from any liability under Section 79 of the Information Technology Act, 2000, no violation can ever be attributed or made out against the directors or officers of the intermediary, as the same would be only vicarious, and such proceedings as initiated against them would be unjust and bad in law.

12.14. The only liability of an intermediary under Section 79(3)(b) of the IT Act is to take down third-party content upon receipt of either a court order or a notice by an appropriate government authority and not otherwise, which as per the Complaint filed indicates has been complied with by Snapdeal, by removing the information regarding the sale of the offending item.

- 12.15. **I answer Point No. (vi) by holding that an intermediary as defined under Section 2(w) of the Information Technology Act or its directors/officers would not be liable for any action or inaction on part of a vendor/seller making use of the facilities provided by the intermediary in terms of a website or a market place.**
13. **POINT NO. (vii): Whether Snapdeal/accused No.2 would be responsible and/or liable for sale of any item not complying with the requirements under the Drugs and Cosmetics Act, 1949 on its platform accused No.2 being an intermediary?**

13.1. Section 18(1)(c) of the **Drugs and Cosmetics Act, 1949** applies to a manufacturer of a drug or cosmetic, coming within the perview and ambit of the Act. Such manufacture is also required to be for

sale or for distribution of any drug or cosmetic.

13.2.The only allegation in the present matter is as regards Snapdeal having made available its platform for sale by Accused No.1 of a drug. There are no allegation that Snapdeal has either manufactured for sale or distributed or sold, or stocked or exhibited or offered for sale, any drug or cosmetic.

13.3.Though the platform is owned and operated by Snapdeal it is Accused No. 1, who has exhibited and offered its products for sale on the Snapdeal's platform. Snapdeal being an intermediary is exempt from criminal prosecution as aforestated.

13.4.In this background neither Snapdeal nor its Directors can be or made liable for alleged

offences punishable under Section 27(b)(ii) of the Drug and Cosmetics Act.

13.5. Hence I answer Point No. (vii) by holding that Snapdeal/accused No.2 would not be responsible and/or liable for sale of any item not complying with the requirements under the Drugs and Cosmetics Act, 1949 on its platform by accused No.1 since the essential ingredients of Section 18 (1)(c) of the Act not having been fulfilled neither Snapdeal nor its Directors can be prosecuted for the offence under Section 27(b)(ii) of the Act.

14. Point No. (viii): Effect of delay in filing a Criminal Complaint?

14.1. The object and essence of prompt lodging of FIR had been explained by the Hon'ble Apex

Court in ***State of Andhra Pradesh vs M. Madhusudhan Rao (2008) 15 SCC 582***,
observed as under:

14.1.1. That delay in lodging the FIR, more often than not, results in embellishment and exaggeration, which is a creature of an afterthought.

14.1.2. That a delayed report not only gets bereft of the advantage of spontaneity, the danger of the introduction of coloured version, exaggerated account of the incident or a concocted story as a result of deliberations and consultations, also creeps in, casting a serious doubt on its veracity.

14.1.3. Therefore, it is essential that the delay in lodging the report should be

satisfactorily explained. Resultantly, when the substratum of the evidence given by the complainant is found to be unreliable, the prosecution case has to be rejected in its entirety.

14.2. It is in that background that there is required to be a Prompt and early reporting of the incident by the informant with all its vivid details gives an assurance regarding its true version. In case, there is some delay in filing the FIR, the complainant must give an explanation for the same.

14.3. In ***Sahib Singh v. State of Haryana (AIR 1997 SC 3247)*** and ***Gorge Pentaiah v. State of A.P. & Ors. (2008) 12 SCC 531*** it has been held that delay in lodging the FIR does not make the complainant's case improbable when such delay is properly explained. However, deliberate delay in

lodging the Complaint may prove to be fatal. In such cases the Court has to carefully examine the facts before it, for the reason, that the complainant party may initiate criminal proceedings just to harass the other side with mala fide intentions or with ulterior motive of wreaking vengeance. The proceedings before a court ought not to be permitted to degenerate into a weapon of harassment and persecution. In cases, where an FIR is lodged clearly with a view to spite the other party because of a private and personal grudge and to enmesh the other party in long and arduous criminal proceedings, the Court may take a view that it amounts to an abuse of the process of law.

14.4. In the present case the Complaint was filed with an inordinate delay of nearly six years,

though the transaction is stated to have occurred in the year 2014.

14.5. In the Complaint filed there is no explanation or justification which has been given for the unreasonable delay caused by the Respondent, more so when the Respondent/Complainant is a government official.

14.6. Such a delay would result in arriving at a rebuttable presumption that there was no offence committed.

14.7. Even if there may be no embellishments, criminal proceedings cannot be initiated after a period of 6 years, irrespective of the applicability of limitation period in terms of Section 468 of the Cr. P.C or not. The only excuse for the delay provided is that the complainant being a government employee

the process of obtaining permission to file the complaint took some time. In my considered opinion a period of 6 years cannot be said to be some time. It is required for the state to act with alacrity, the fact that there was a delay of 6 years in filing would itself indicate and/or establish that even the authorities might have probably considered that there is no offence as such made out.

14.8. In the present case, I am of the considered opinion that there being no acceptable explanation for the highly belated lodging of the Complaint, the delay is fatal to these proceedings.

15. **What Order:**

16. The answers to the above points formulated are summarised as under:

16.1. The order of Cognisance dated 8.6.2020 is not in compliance with the requirement of Section 191(1)(a) of the Cr.P.C and further does not indicate the procedure under Section 204 of Cr.P.C having been followed. At the time of taking Cognisance and issuance of process, the Court taking Cognisance is required to pass a sufficiently detailed order to support the conclusion to take cognisance and issue process, in terms of the discussion above. The judicious application of mind to the law and facts of the matter, should be apparent on the ex-facie reading of the order of Cognisance.

16.2. When the accused is having an office, branch office, corporate office, sales office or the like within the Jurisdiction of

the Magistrate where the offence has been committed and or continues to be committed, there would be no requirement for any enquiry under Section 202 of Cr.P.C. It would, however, be required for the Magistrate to in the order of issuance of summons/process record as to why the enquiry under Section 202 of Cr.P.C is not being held.

16.3. In the event of accused being an individual, if the said accused has a temporary residence within the Jurisdiction of the Magistrate, again merely because he does not have a permanent residence, there is no enquiry which is required to be conducted under Section 202 of Cr.P.C. It would, however, be required for the Magistrate to in the order of issuance of summons/process

record as to why the enquiry under Section 202 of Cr.P.C is not being held.

16.4. When the accused has no presence within the Jurisdiction of the Magistrate where the offence has been committed, then it would be mandatory for an enquiry under Section 202 of the Cr.P.C to be held.

16.5. In the event of accused being aggrieved by the issuance of Summons, the said accused immediately on receipt of the Summons and/or on appearance before the Magistrate is required to make out his grievance before the Magistrate Court and/or by petition under Section 482 Cr.P.C. If there is any delay, in such challenge and/or if challenge has not made within reasonable time, the accused would not be entitled to raise the

grievance that the procedure under Section 202 of Cr.P.C. has not been followed on account of delay and latches.

16.6. Only a Court in which the accused has a presence, like registered office, branch office, corporate office or the like could exercise Jurisdiction as regards an offence relating to an e-commerce transaction.

16.7. This of course would not apply to a Cyber Crime, which comes under global jurisdiction according to the IT Act, 2000. This means that any cyber-crime complaint can be registered with any of the cyber cells in India, irrespective of where the crime was originally committed.

16.8. An intermediary as defined under Section 2(w) of the Information Technology Act or its directors/officers would not be liable for any action or inaction on part of a vendor/seller making use of the facilities provided by the intermediary in terms of a website or a market place.

16.9. An intermediary would not be responsible and/or liable for sale of any item not complying with the requirements under the Drugs and Cosmetics Act, 1949 on its platform since the essential ingredients of Section 18 (1)(c) of the Act not having been fulfilled. Neither Snapdeal nor its Directors can be prosecuted for the offence under Section 27(b)(ii) of the Act.

16.10. There being no acceptable explanation for the highly belated lodging of the

Complaint, the delay is fatal to these proceedings.

17. **In the result, both the petitions are allowed. The proceedings in C.C.No.156/2020 pending before the Court of the Principal Senior Civil Judge and CJM, Mysuru are quashed.**

**Sd/-
JUDGE**

In