

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKHAT  
SRINAGAR

Reserved on: 17.08.2022

Pronounced on:24.08.2022

CRMC No.272/2017

RISHI SHARMA DIRECTOR HAUSTUS  
BIOTECH PRIVATE LIMITED ... PETITIONER(S)

Through: - Mr. Varut Kumar Gupta, Advocate.

Vs.

BILAL AHMAD RATHER, DRUGS INSPECTOR ...RESPONDENT(S)

Through: - Mr. Sheikh Mushtaq, AAG.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioner has challenged the complaint filed by respondent Drugs Inspector alleging commission of offences under Section 18(a)(i) of the Drugs and Cosmetics Act, 1940, as also order dated 10.10.2017, by virtue of which the learned Chief Judicial Magistrate Pulwama, has impleaded the petitioner as an accused and issued process against him.

1) As per the record, respondent Drugs Inspector had filed a complaint *inter alia* against the Managing Director and proprietor of M/S Haustus Biotech Pvt. Ltd, alleging therein that a sample of the drug, namely, Menthocare-D was lifted from the premises of M/S Guru Nanak Pharmacy, Diver Tral, for testing and analysis. The said sample,

upon analysis by the Government Analyst, was found to be not of standard quality. During investigation, it was found that the drug in question has been manufactured by M/S Haustus Biotech Pvt. Ltd. Tahliwal Una, Himachal Pradesh. At the instance of the manufacturing company, the sample, under the direction of concerned Judicial Magistrate, was sent to Central Drugs Laboratory, Kolkata, for re-analysis. After reanalysis of the sample, it was reported by the Central Drugs Laboratory, Kolkata, that the sample is not of standard quality. Accordingly, the prosecution was launched against the manufacturer, suppliers and the retailer of the drug in question.

2) Initially the petitioner was not impleaded as an accused in the complaint but during the pendency of the complaint, learned trial Magistrate vide impugned order dated 10.10.2017 observed that the accused company has been sold to the petitioner and, as such, he is required to be impleaded as an accused. Accordingly, vide the aforesaid order, the petitioner has been impleaded as an accused in the complaint.

3) The petitioner has raised a number of grounds to challenge impugned complaint and the proceedings emanating therefrom but the main grounds that have prevailed during the course of arguments are that the petitioner has been impleaded as an accused in the complaint without there being any evidence against him and that the learned Magistrate, while impleading the petitioner as an accused, has not followed the procedure prescribed under law. It has also been contended that there are no allegations against the petitioner in the

impugned complaint, inasmuch as it is nowhere stated in the complaint that the petitioner was the person responsible for conducting the day-to-day business of the company. It is further contended that the company, of which the petitioner is the Director, has not been impleaded as an accused and, as such, the complaint cannot proceed against the petitioner.

4) The respondent/complainant in his reply narrated the facts alleged in the impugned complaint and has submitted that the petitioner has avoided his appearance before the trial Magistrate, as a consequence whereof non-bailable warrants were issued against him. It has been contended that proper procedure was adopted by the learned trial Magistrate while impleading the petitioner as an accused.

5) Heard learned counsel for the parties and perused the material on record including the trial court record.

6) At the very outset it has been contended by learned counsel for the petitioner that the learned trial Magistrate, while impleading the petitioner as an accused, has not followed the proper procedure provided under law. It has been submitted that before impleading a person as an accused in a complaint relating to offences under Drugs and Cosmetics Act, the court has to record satisfaction as to the involvement of the proposed accused and the said satisfaction has to be recorded on the basis of the evidence adduced in the court. According

to the learned counsel, no such satisfaction has been recorded by the learned trial Magistrate while impleading the petitioner as an accused.

7) In order to test the merits of this contention, we need to notice the provisions contained in Section 32A of the Drugs and Cosmetics Act which vests power with the court to implead manufacturer etc. as an accused. It reads as under:

**32A. Power of Court to implead the manufacturer, etc.—***Where, at any time during the trial of any offence under this Chapter alleged to have been committed by any person, not being the manufacturer of a drug or cosmetic or his agent for the distribution thereof the Court is satisfied, on the evidence adduced before it, that such manufacturer or agent is also concerned in that offence, then, the Court may, notwithstanding anything contained 3 [in sub-sections (1), (2) and (3) of section 319 of the Code of Criminal Procedure, 1973 (2 of 1974)], proceed against him as though a prosecution had been instituted against him under section 32.*

8) From a perusal of the aforesaid provision, it is clear that for impleading a manufacturer or some other person as an accused, the court has to be satisfied on the basis of the evidence adduced before it that such person is also concerned in that offence. The provision clearly indicates that the impleadment of an additional accused can be resorted to only during the trial of the offence and the satisfaction about the involvement of such additional accused has to be based on the evidence that has been adduced during the trial.

9) The Supreme Court has in the case of **Omprakash Shivprakash vs. K. I. Kuriakose**, AIR 1999 SC 3870, while interpreting similar

provisions contained in Section 20A and 16(1) of the Prevention of Food Adulteration Act 1954, observed as under:

*6. The above provision overrides the ban contained in Section 20 of the Act that no prosecution shall be instituted for the offences under the Act except by or with the consent of the authorities mentioned in the Section, The essential conditions for invoking the power under Section 20-A are that (1) the trial should have begun already; (2) the trial must be of any offence under the Act allegedly committed by a person other than the manufacturer or distributor or dealer of the food article; (3) the court must have been satisfied that such manufacturer or dealer or distributor is also concerned with the offence; (4) such satisfaction must have been formed "on the evidence adduced before the court."*

*7. Section 319 of the Code empowers the court to proceed against any person who is not being made an accused already, if it appears from the evidence collected in the inquiry or trial of an offence that such person has committed an offence for which he could be tried together with the already arraigned accused. One of the differences between Section 319 of the Code and Section 20-A of the Act is that, while in the former even if it appears to the court from the evidence (either during inquiry or trial of the offence), that another person is to be tried along with the already arraigned accused, then the court can proceed against that other person, while in the latter the satisfaction of the court that such manufacturer (distributor or dealer) is also concerned with that offence must be gathered from "the evidence adduced before it during the trial". In other words, the power under Section 20-A cannot be invoked until the trial begins and after the trial ends.*

**10)** From the foregoing analysis of law on the subject it is clear that it is only after trial has commenced and the evidence has been led that power to implead manufacturer or any other person who appears to be involved in the offence can be exercised and prior to that, no such power can be exercised. In the instant case, the trial had yet to commence when the learned Magistrate passed the impugned order directing the impleadment of the petitioner as an accused in the

impugned complaint. In fact, the impugned complaint was still at the summoning stage at the relevant time. The impugned order passed by the learned trial Magistrate impleading the petitioner as an accused is, therefore, contrary to the procedure prescribed under law.

**11)** There is yet another aspect which is required to be noticed in this case. The learned Magistrate has passed the impugned order on the basis of an application filed by the respondent in which the said respondent has merely submitted an information regarding full address of the Managing Director of the manufacturing company and it is not even an application for impleadment of an additional accused. The application nowhere states that the manufacturing company has been sold to the petitioner but the learned Magistrate without there being anything on record to show that the company has been purchased by the petitioner observed that the manufacturing company has been sold to the petitioner and on this ground, he has been impleaded as an accused. The learned Magistrate has not stopped here but has gone ahead and passed the directions regarding the seizure of drugs manufactured by the company and for suspension of its licence. The relevant extracts of the order are reproduced as under:

*Heard Ld. Counsel for the complainant as well as Ld. Counsel for the accused nos. 4 and 5 and perused the complaint which is pending disposal before this court right from 04.04.2015 but till date no effective proceedings have been taken because of non-appearance of accused Nos.1 to 3. Fresh non-bailable warrants are issued against accused nos. 1 to 3 and SSP Pulwama is directed to constitute a team in order to execute the non-bailable warrants and produce the accused 1 to 3 before this court by or before next date of*

*hearing. However, the expenses of the team will be borne by the Dy. Drug Controller Drugs & Food Control Organization Kashmir Division. Further the Drug Controller Drugs & Food Control Organization J&K is directed to seize all the items/products manufactured by M/S Haustus Biotech Pvt Ltd, throughout the state within the period of 10 days from the receipt of this order with further direction to submit the compliance report on the next date of hearing. Further State Drug Controlling authority, Nagar Panchayat Bhawan, Sai Road Baddi, District Sona, (Himachal Pradesh) is directed to suspend the 1icenses of the M/s Haustus Biotech Pvt Ltd till further orders of this court and this action has been taken because of non-appearance of accused nos. 1 to 3.*

*(Emphasis supplied)*

**12)** As per the aforesaid directions, all the items and products manufactured by M/S Haustus Biotech Private Limited throughout the State of Jammu and Kashmir have been directed to be seized and the licence of the company has also been directed to be suspended. This Court fails to understand as to under what provision of law the learned Magistrate has passed these directions. If an accused evades his appearance before the court or evades his arrest, there are sufficient provisions contained in the Code of Criminal Procedure to bring him to justice. Such an accused can be declared as a proclaimed offender and his property can be attached but under no circumstances the products of a manufacturing company can be directed to be seized nor can the licence of the manufacturing company be directed to be suspended just because its director does not respond to the summons issued by the court. In the instant case, the director of the manufacturing company was not even served with the process issued by the court when the aforesaid order came to be passed. This is clear from the record of the

trial court. Therefore, there was no occasion for the trial Magistrate to presume that the director is avoiding the service of the process.

**13)** It seems that the learned Magistrate has acted like a monarch having no respect for the rule of law and the procedure prescribed. He has passed the aforequoted direction at his whim and caprice as if he was law unto himself. Such orders of the courts tend to reflect badly upon the institution of administration of justice and it is high time that such like tendencies are curbed with iron hands and the Magistrates and officers of the District Judiciary are made aware of their responsibility to pass orders within four corners of the law. There may be imperfections or errors in passing of orders by the courts but in no case such orders should be passed in a manner unknown to law nor should the courts issue directions which smack of brazen violation of rule of law. The directions quoted hereinbefore, are a classic example of arbitrariness and irrationality on the part of the trial Magistrate, as such, the same are not sustainable in law.

**14)** It has been next contended that there is no averment either in the complaint or in the application seeking impleadment of the petitioner as an accused that he was the person responsible for the conduct of day-to-day business of the company.

**15)** If we have a look at the impugned complaint, there is no averment in the said complaint that the petitioner is either in charge or responsible for the conduct of day-to-day business of the company.



Even in the application of the respondent, whereby fresh particulars of the petitioner have been furnished to the court, there is not even a whisper that the petitioner is the person responsible for conduct of day-to-day business of the manufacturing company.

**16)** As per Section 34 of the Drugs and Cosmetics Act 1940, it is only the person in charge of and responsible for the conduct of business of the company who can be deemed to be guilty of the offence along with the company but in the instant case the averments in this regard are completely missing. In fact, the trial court record shows that the manufacturing company vide its communication dated 03.07.2011, had informed the respondent that the company is having two working Directors, namely, Surinder Singh and Jatinder Singh. The name of the petitioner is not shown in the said communication. As a matter of fact, the petitioner has placed on record copy of Form No.26 issued by Drugs Control Administration, Himachal Pradesh, which shows that the petitioner has joined the manufacturing company as a director only with effect from 26<sup>th</sup> March 2011 whereas the offending drug, which is subject matter of the impugned complaint, has been supplied by the manufacturing company in the month of February 2010. This clearly indicates that the petitioner was not even a director of the company at the relevant time. Thus, the contention of the petitioner that he was neither in charge of nor responsible for the conduct of day-to-day business of the manufacturing company at the relevant time appears to

be well-founded. On this ground also the impugned complaint as against the petitioner cannot proceed.

**17)** Lastly, it has been contended that the company that has manufactured the drug in question has not been impleaded as an accused. A perusal of the cause title of the impugned complaint reveals that it is only the Director and the proprietor of the company who have been impleaded as accused in the impugned complaint.

**18)** The question whether a director or a proprietor of a company can be proceeded against without impleading the company as accused is no longer *res integra*. The Supreme Court in the case of **Aneeta Hada v. Godfather Travels and Tours Private Limited**, (2012) 5 SCC 661, has clearly laid down that there can be no vicarious liability in criminal law except in a case where a statute specifically provides so. While interpreting the provisions contained in Section 141 of the Negotiable Instruments Act, which are in *pari materia* with the provisions contained in Section 34 of the Drugs and Cosmetics Act, the Supreme Court held that in the absence of arraigning of a company as an accused, the complaint for offences under Section 138 of the Negotiable Instruments Act cannot proceed against the Directors and office bearers of the company. Following the said judgment, this Court in the case of **Ashish Damija & Another vs. UT of J&K** (CRM(M) No.14/2021 c/w CRM(M) No.303/2019 decided on 04.08.2022), has held that a prosecution against a director of a company or a partner of a firm cannot proceed without impleading the company/firm as an

accused. Thus, on this ground also, the impugned complaint as against the petitioner cannot proceed.

**19)** For the foregoing analysis, this petition deserves to be allowed and is, accordingly, allowed. The proceedings pending before the learned trial court in the impugned complaint as well as the impugned complaint to the extent of the petitioner are quashed.

**20)** The trial court record along with a copy of this judgment be sent back.

(SANJAY DHAR)  
JUDGE

Srinagar,  
24.08.2022  
"Bhat Altaf, PS"

