issued to him. He also did not state any reason in the application filed by him on 27.1.2010 for seeking leave except for one that he was not keeping good health. But, he did not explain the circumstances which led to his ill-health or the nature of his not keeping good health.

12. In these facts and circumstances of the case, I find that there is nothing available on record from which one could say that the essential ingredient of 'instigation' is fulfilled. There is also no material on record showing that this petitioner intentionally aided the deceased in committing suicide rather now it appears that the prosecution case is also not based on the theory of intentional aiding. Therefore, it has to be said that there are no sufficient grounds available in this case for proceeding further against this applicant. The petition deserves to be discharged and the impugned order needs to be quashed and set aside.

13. The writ petition is allowed.

14. The impugned order dated 8th January, 2015, passed by the Ad-hoc Additional Sessions Judge, Achalpur, is hereby quashed and set aside.

15. The application vide Exh.-12 is granted.

16. The petitioner is discharged.

17. Rule is made absolute in above terms.

Result:- Writ Petition allowed.

ABC 2016 (II) 520 BOM
ACQUITTAL & BAIL CASES

HIGH COURT OF BOMBAY

(V.K. Jadhav, J.)
Criminal Application No. 1904 of 2003
Decided on 28 September, 2016
Aurangabad Bench

D R SALGAOCAR ***- Applicant(s).***

Versus

STATE OF MAHARASHTRA & ANR. ***- Respondent(s).***

Law Covered:- ***(A) Code of Criminal Procedure, 1973 — Section 204 —Issue of process — Managing Director of a company — Prosecution of —No averments in the complaint that the accused is***

in charge and responsible to the company for the conduct and business of the company — Order not sustainable. (Para 7)

(B) Companies Act, 1956 — Section 2 (24) — 'Manager' — Responsibilities of— by virtue of his office has the management of whole or substantially whole of the affairs of the company. (Para 8)

(C) Companies Act, 1956 — Section 2 (26) — Managing Director — Responsibilities of— has to be entrusted with such powers of the management — and powers of management are required to be delegated upon Managing Director either, by an agreement with the company — or by resolution passed by the Board of Directors in its general meeting — or by virtue of its memorandum — or article of association. (Para 8)

(D) Code of Criminal Procedure, 1973 — Section 204 —Issue of process — In-charge of a company — Determining of — Duty of the Court — Held, It is not the name by which the person is called but the position he occupies and the functions and duties which he discharges that determines — whether infact, he is in-charge of and responsible to the company or not — Companies Act, 1956 —Section 2(26). (Para 8)

Facts:- *As per the facts of the case, drug inspector, allegedly, drawn sample of a drug, for the purpose of test and analysis. After analysis it was found that the drug was not of standard quality. A complaint was filed in the Court of CJM. The learned CJM directed to proceed against 3 accused persons alongwith the manufacturer. Being aggrieved by the same, the State has preferred Criminal Revision Application before the Sessions Court. The learned Additional Sessions Judge confirmed the order passed by the Magistrate except the order passed against present applicant, which gave result to the present application before the High Court.*

It was observed by the honourable High Court that present applicant was the Managing Director of the company. Except this, there are no further averments in the complaint that original applicant accused no.5 was in-charge and responsible to the company for the conduct and business of the company. the Court held the impugned order as not sustainable. However it was held that the prosecution can at any stage if produce evidence which satisfies the Court that present applicant-original also committed the offence, the Court can take cognizance against him by taking recourse to the section 319, CrPC.

Law of relief:- ***The nature of duty defines the responsibility of a person.***

Held:- On careful perusal of the complaint, it appears that, in the nomenclature of the complaint, it is mentioned that present applicant-original accused no.5 is the Managing Director of accused no.13 M/s Geno Pharmaceuticals Limited. It has also mentioned in paragraph no.5 of the complaint that accused no.5 is the Managing Director of accused no.13 company. Except this, there are no further averments in the complaint that original applicant accused no.5 is in charge and responsible to the company for the conduct and business of the company. (Para 7)

In a case of Umesh Sharma and Another Vs. S.G. Bhakta and Others (supra) relied upon by the learned counsel for the applicant, this Court had an occasion to deal with similar question and accordingly, this Court has considered the definition of 'Managing Director' as provided under section 2 (26) of the Companies Act, 1956. This Court has also referred the definition of 'Manager' as provided under section 2 (24) of the Companies Act, 1956. By referring those two definitions this Court has observed that Manager by virtue of his office has the management of whole or substantially whole of the affairs of the company, and the Managing Director has to be entrusted with such powers of the management and powers of management are required to be delegated upon Managing Director either, by an agreement with the company or by resolution passed by the Board of Directors in its general meeting or by virtue of its memorandum or article of association. It is not the name by which the person is called but the position he occupies and the functions and duties which he discharges that determines whether infact, he is in-charge of and responsible to the company or not as defined in Section 2 (26) of the Companies Act. (Para 8)

Counsel:- ***For Petitioner(s):*** *Mr S G Ladda, Advocate.*

For Respondent(s): *Mr P G Borade, APP.*

Cases Referred:-

1. *Umesh Sharma and another Vs. S.G. Bhakta and others; 2003 Bom.C.R. (Cri.) 1522. (Para 4)*
2. *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others; (1983) 1 Supreme Court Cases 1. (Para 4)*
3. *State of Haryana Vs. Brij Lal Mittal and Others; AIR 1998 SC 2327. (Para 4)*
4. *Narendrakukar Mangilal Dani and Others Vs. State of Maharashtra and Another; 2001(4) Mh.L.J. 341. (Para 5)*

5. *Venkaiah Chowdary Nannapaneni and Others Vs. State of Maharashtra; 2003 ALL MR (Cri) 758. (Para 5)*

a 6. *U.P. Pollution Control Board Vs. Mohan Meakins Limited and Others; (2000) 3 SCC 745. (Para 5)*

JUDGMENT

b ***V.K. JADHAV, J.: -*** 1. Being aggrieved by the judgment and order dated 12.8.2003 passed by the Additional Sessions Judge, Nanded in Criminal Revision Application No.23/2000, the original accused no.5 preferred this criminal application.

2. Brief facts, giving rise to the present Criminal Application are as follows :-

c

On 19.12.1994 the drug inspector alleged to have drawn sample of "Cypon Paediatric 30 ml" manufactured by the original accused no.13 i.e. M/s. Geno Pharmaceuticals Ltd., for the purpose of test and analysis by completing all the formalities. Thereafter, the d Drug Inspector sent the sample to the Government Analyst Bombay for the purpose of test and analysis and report dated 1.7.1995 of the analysis was received by him on 6.7.1995. As per said report, the drug was not of standard quality as the contents of L-Lysine Mono hydrochloride in the sample was less than the labeled amount (65.88%). Drug Inspector after completing all the formalities including e sending copy of the said report to the original accused no.13 i.e. Geno Pharmaceutical Ltd., Mapusa, Goa, a Company registered under theCompanies Act filed a complaint in the Court of Chief Judicial Magistrate on 14.4.1996. So far as accused nos. 4 to 12 are concerned, they are the members of the Board of Director of the Company. f Subsequently, accused Nos. 4 to 13 moved an application Exh.28 on 2.10.1999 for recalling of order of process and after hearing the parties, the learned Chief Judicial Magistrate by order dated 30.12.1999 passed order below Exh.1 and called back the process issued against accused nos. 4 to 12 and discharged them accordingly. g However, the learned Chief Judicial Magistrate directed to proceed against original accused nos. 1 to 3 and 13 i.e. manufacturer Geno Pharmaceuticals Limited. Being aggrieved by the same, the State has preferred Criminal Revision Application No.23/2000 before the Sessions Court, Nanded. The learned Additional Sessions Judge, h Nanded by its impugned judgment and order dated 12.8.2003 confirmed the order passed by the Magistrate except the order passed against present applicant/original accused no.5. Hence, this criminal

application to that extent of the order passed against applicant-original accused.

3. The learned counsel for the applicant submits that, in the nomenclature of the complaint, it is only mentioned that, the present applicant is a Managing Director of M/s Geno Pharmaceuticals Limited. There are no averments in the complaint that, the present applicant-original accused no.5 is in-charge and responsible to the company for the conduct of the business of the company. The learned counsel submits that, merely because present applicant-original accused no.5 is described as Managing Director that by itself is not sufficient to draw a presumption that he is in-charge of or responsible to the conduct of the business of the company. The applicant-original accused no.5 may have a control over the matter such as policy decision, however, in absence of any averment in the complaint, it cannot be said that the applicant-original accused no.5 is also in-charge of the production or manufacture of the objectionable drugs.

4. The learned counsel in order to substantiate his submissions places his reliance on a judgment in case of ***Umesh Sharma and another Vs. S.G. Bhakta and others reported in 2003 Bom.C.R.(Cri.) 1522,*** wherein, this Court had an occasion to deal with the similar question and this Court by referring the judgment of the Apex Court in a case of ***Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others reported in (1983) 1 Supreme Court Cases 1*** and ***State of Haryana Vs. Brij Lal Mittal and Others reported in AIR 1998 SC 2327,*** held that process issued against the petitioners therein required to be recalled with the further observations that, merely because process is recalled against the said petitioner will not prevent the trial court from exercising discretion if it is fully satisfied that case for taking cognizance against them has been made out on the additional evidence that may be lead before it by taking recourse to it by section 319 of the Code of Criminal Procedure.

5. Learned counsel for the applicant further places his reliance on the following three cases to substantiate his submissions :-

I] Narendrakukar Mangilal Dani and Others Vs. State of Maharashtra and Another reported in 2001(4) Mh.L.J. 341.

ii] Venkaiah Chowdary Nannapaneni and Others Vs. State of Maharashtra reproted in 2003 ALL MR (Cri) 758. iii] U.P. Pollution Control Board Vs. Mohan Meakins Limited and Others reported in (2000) 3 SCC 745.

6. The learned APP submits that, the present applicant is Managing Director of the company and as such he is a person in-charge of the conduct of the business of company. The learned APP submits that Managing director is supposed to look after the entire business of the company right from manufacturing of the drugs product up to sale. Furthermore, the present applicant has no where stated in his application for recalling of the order of issue process that he is not responsible for the conduct and business of the company. Thus, the impugned order passed by the Additional Sessions Judge, Nanded dated 12.8.2003 in the said criminal revision application calls for no interference. There is no substance in the criminal application and criminal application is thus liable to be dismissed.

7. On careful perusal of the complaint, it appears that, in the nomenclature of the complaint, it is mentioned that present applicant-original accused no.5 is the Managing Director of accused no.13 M/s Geno Pharmaceuticals Limited. It has also mentioned in paragraph no.5 of the complaint that accused no.5 is the Managing Director of accused no.13 company. Except this, there are no further averments in the complaint that original applicant accused no.5 is in charge and responsible to the company for the conduct and business of the company.

8. In a case of Umesh Sharma and Another Vs. S.G. Bhakta and Others (supra) relied upon by the learned counsel for the applicant, this Court had an occasion to deal with similar question and accordingly, this Court has considered the definition of 'Managing Director' as provided under section 2 (26) of the Companies Act, 1956. This Court has also referred the definition of 'Manager' as provided under section 2 (24) of the Companies Act, 1956. By referring those two definitions this Court has observed that Manager by virtue of his office has the management of whole or substantially whole of the affairs of the company, and the Managing Director has to be entrusted with such powers of the management and powers of management are required to be delegated upon Managing Director either, by an agreement with the company or by resolution passed by the Board of Directors in its general meeting or by virtue of its memorandum or article of association. It is not the name by which the person is called but the position he occupies and the functions and duties which he discharges that determines whether infact, he is in-charge of and responsible to the company or not as defined in Section 2 (26) of the Companies Act. Even this

Court has distinguished the case in U.P. Pollution Control Board Vs. Mohan Meakins Limited and Others (supra). In the said case there are specific allegations in the complaint by which the Manager or Director of the company can also proceeded against when the company is alleged to be guilty of the offence. Thus, by referring the two cases of the Supreme Court i.e. Municipal Corporation of Delhi Vs. Ram Kishan Rohatagi (supra) and State of Haryana Vs. Brij Lal Mittal and Others (supra) this Court held that in absence of any averment in the complaint, that the accused who is named in the complaint as Managing Director is responsible and in charge of the entire affairs of company, the process issued against such an accused is required to be recalled. A similar view is taken by this Court in a case Narendrakumar Mangilal Dani and Others Vs. State of Maharashtra and Another and Venkaiah Chowdary Nannapaneni and Others Vs. State of Maharashtra (supra).

9. In the light of the above discussion and the ratio laid down by the Supreme Court in the said two judgments i.e. Muncipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others and State of Haryana Vs. Brij Lal Mittal and Others (supra), I do not think that the order passed by the Additional Sessions Judge, Nanded is sustainable. However, in the light of the observations made by the Supreme Court in the case of Muncipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others (supra) in the instant case, the prosecution can at any stage if produce evidence which satisfies the Court that present applicant-original accused no.5 also committed the offence, the Court can take cognizance against him by taking recourse to the section 319 of the Code of Criminal Procedure. Thus, with these observations I proceed to pass the following order.

O R D E R

I. Criminal application No.1904/2003 is hereby allowed in terms of prayer clause "B".

II. Rule is made absolute in the above terms and application is accordingly disposed off.

***Result*:-** Application allowed.