

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

Reserved on: 12.02.2025

Pronounced on: 21.02.2025

CRM(M) No.453/2022

c/w

CRM(M) No.454/2022

**M/S NAVA HEALTHCARE PVT. LTD
M/S MANCARE LABORATORIES PVT. LTD.**

... PETITIONER(S)

Through: - Mr. Sikander Hayat Khan, Advocate.

Vs.

UT OF J&K

...RESPONDENT(S)

Through: - Mr. Syed Musaib, Dy. AG.

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

JUDGMENT

1) Through the medium of present judgment, the afore-titled two petitions arising out of the same complaint filed by the respondent against the petitioners and co-accused before the Court of Chief Judicial Magistrate, Anantnag, are proposed to be disposed of.

2) The petitioners, who happen to be the accused in the impugned complaint, have challenged the complaint filed by the respondent against them before the trial Magistrate. By virtue of the impugned complaint, prosecution for offences under Section 18(a)(1) read with Section 27(d), Section 18A read with Section 28 of the Drugs and Cosmetics Act has been

launched against the petitioners and the co-accused. Challenge has also been thrown by the petitioners to the order passed by the learned trial Magistrate whereby cognizance of offences has been taken and the process has been issued against the petitioners.

3) It appears that the respondent Drug Control Officer, Anantnag, filed a complaint against the petitioners as also against their Directors and three more accused persons before the trial Magistrate. As per contents of the complaint, the respondent visited the premises of accused M/S Three Star Medical Agency on 09.01.2020 for inspection and lifted sample of drug "Tab Pantolid" manufactured by petitioner Mancare Laboratories Pvt. Ltd. The sample was divided into four equal portions and sealed by following the procedure prescribed under law. One portion of the sample was handed over to the proprietor of accused M/S Three Star Medical Agency against proper receipt, another portion of the sample was sent to the Government Analyst in terms of memorandum dated 09.01.2020. As per test report submitted by the Government Analyst, the sample was found not of standard quality as the same was not complying to IP requirement with respect to disintegration test. In this regard, the Government Analyst furnished his report dated 30.05.2020. A copy of the said

report was furnished to proprietor of accused M/S Three Star Agency and it was directed to submit the procurement/purchase records as also the distribution pattern of drug in question. The available quantity of tablets of “Pantolid” was seized and kept in safe custody after obtaining permission from the Chief Judicial Magistrate, Anantnag.

4) It is further averred in the impugned complaint that as per the information furnished by accused M/S Star Medical Agency, the drug in question had been purchased from accused M/S J. S. Traders, Anantnag. Accordingly, the details were sought from M/S J. S. Trader with regard to the supplier of the drug. Vide communication dated 1st June, 2020, accused M/S J. S. Traders disclosed the name of M/S Rather Traders, Srinagar, accused No.4, as supplier of the drug. M/S Rather Traders, in turn, disclosed that it had purchased the said drug from petitioner M/S Nava Health Care Private Limited, New Delhi, vide invoice dated 03.04.2019. The original copy of the test report along with portion of drug sample was forwarded to the manufacturer petitioner M/S Mancare Laboratories Limited and information was sought from the said petitioner. Vide communication dated 02.06.2020, petitioner M/S Mancare Laboratories desired re-testing of the drug sample and to adduce evidence in controversion of the report of the Government Analyst.

5) In terms of the order of the Chief Judicial Magistrate, Anantnag, the sample of drug was sent to Director, Central Drugs Laboratory, Kolkata, for re-testing and vide report dated 23.09.2020, of the said Laboratory it was declared that the drug in question is not of a standard quality as the sample does not conform to claim with respect to “disintegration”.

6) On the basis of the aforesaid allegations, it has been stated in the impugned complaint that the petitioner M/S Mancare Laboratories Pvt. Ltd. being the manufacturer and the petitioner M/S Nava Healthcare Pvt. Ltd being the marketer of the drug in question, are liable to be prosecuted for having committed offences under Section 18(a)(1) and 18A punishable under Sections 27(d) and 28 of the Drugs and Cosmetics Act and the rules framed thereunder. The impugned complaint has been lodged by the respondent after obtaining the requisite sanction.

7) The petitioners have challenged the impugned complaint and the impugned order whereby cognizance of the offences has been taken and process has been issued against the petitioners on the grounds that the procedure prescribed under Section 23 of the Drugs and Cosmetics Act has not been followed by the respondent in the present case. It has been further contended that the report of the Laboratory relating to

the test of the sample of the drug is not specific and in tune with the rules framed under the Drugs and Cosmetics Act. It has also been contended that there is nothing on record to show that the sample of the drug in question was kept in a cool and dry place and away from moisture and sun light, as such, the test report cannot be relied upon. It has also been contended that the learned trial court has issued the process without there being any specific role having been attributed to the Directors of the petitioner companies. It has been contended that that simply because a person is Director of a company does not necessarily mean that he is to be prosecuted unless it is shown that he was incharge of and responsible to the company for the conduct of business and in the absence of specific averments in the impugned complaint, no prosecution could have been launched against the Directors. It has also been contended that both the petitioner companies are located outside the territorial jurisdiction of the trial Magistrate, as such, it was incumbent upon the learned Magistrate to undertake a preliminary enquiry in terms of Section 202 of the Cr. P. C before issuing process against the petitioners.

8) I have heard learned counsel for the parties and I have also gone through the grounds urged in the petitions, the impugned complaint and the documents available on the record of the trial court

9) The first ground on which much emphasis has been laid by learned counsel for the petitioners is that in the impugned complaint no specific role has been attributed to the Directors of the petitioner companies, as such, it was not open to the learned trial court to issue process against the Directors of the petitioner companies and, in fact, the impugned complaint in the present form is not maintainable against the Directors of the petitioner companies. The learned counsel, to support his contention has relied upon the judgment of a Coordinate Bench of this Court in the case of **Reema Arora and Ors. vs. Department of Agriculture** (CRM(M) No.156/2021 decided on 10.03.2023). He has also relied upon the judgments of the Supreme Court in the case of **Aneeta Hada vs. Godfather Travels and Tours Pvt. Ltd**, (2012) 5 SCC 611, **Maksud Saiya vs. State of Gujarat**, (2008) 5 SCC 668, and **Sunil Bharti Mittal vs. Central Bureau of Investigation**, AIR 2015 SC 923, to support his aforesaid contention.

10) The argument raised by learned counsel for the petitioners may be available to the Directors of the petitioner companies but the present petitions have not been filed by the Directors in their individual capacity but the same have been filed by the petitioner/accused companies through their Directors. So far as petitioner M/S Nava Healthcare Pvt. Ltd is

concerned, there is a specific allegation in the impugned complaint that it is involved in the marketing of the drug in question and this information was provided to the respondent by accused M/S Rather Traders. Copies of the invoices in this regard form part of the trial court record being annexures to the impugned complaint. Therefore, it cannot be stated that there is no specific allegation against petitioner M/S Nava Health Care Pvt. Ltd to proceed against it. Similarly, so far as petitioner M/S Mancare Laboratories Pvt. Ltd is concerned, it is specifically pleaded in the impugned complaint that the said company is the manufacturer of the drug in question.

11) It is true that Director of a company cannot be roped in a prosecution against the company unless it is specifically pleaded that the said Director is incharge of and responsible for business of the company but in the instant case, the challenge to the impugned complaint has not been laid by the Directors. We are only dealing with the challenge to the impugned complaint by the companies themselves. Therefore, the ratio laid down by this Court and the Supreme Court in the judgments referred to by the learned counsel for the petitioners does not apply to the facts of the instant case.

12) Another contention raised by learned counsel for the petitioners is that the test report on which respondent has

placed reliance for launching prosecution against the petitioners is not reliable, inasmuch as it does not conform to the requirements of the rules framed under the Drugs and Cosmetics Act and that the sample was not kept in safe custody away from moisture and sun light etc.

13) In the above context, if we have a look at Explanation (1) to Rule 46 of the Drugs and Cosmetics Rules, it provides that for pharmacopoeial drug, where the tests or methods of analysis prescribed in the official pharmacopoeia are followed, references to the specific tests or analysis in the pharmacopoeias are to be given in the report. A perusal of the report furnished by Central Drugs Laboratory, Kolkata, which has been relied upon by the respondent while launching prosecution against the petitioners, reveals that it is recorded therein that the test has been carried out as per the method laid down in I.P. under “General requirements for Enteric Coated Tablets” and that the sample does not conform to IP with respect to test for dissolution. The report also bears reference to the method as I.P. 2018. Thus, prima facie, it cannot be stated that the test report relied upon by the respondent does not conform to Rule 46 of the Rules. In any case contention of the petitioners in this regard can be decided and determined after the author of the test report is examined

and cross-examined during the trial of the case. Similarly, the question whether the samples were kept in a proper and secure place is also a matter of trial and cannot be decided at this stage.

14) During the course of arguments, learned counsel for the petitioners has contended that in view of the provisions of Section 32 of the Drugs and Cosmetics Act, it was not open to the learned trial Magistrate to take cognizance of the offences and issue process against the petitioners as the offences are triable by a Court of Sessions.

15) In the above context, it is necessary to notice the provisions of Section 32 of the Drugs and Cosmetics Act. It reads as under:

32. Cognizance of offences—(1) *No prosecution under this Chapter shall be instituted except by—*

- (a) *an Inspector; or*
- (b) *any gazetted officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government or a State Government or by a general or special order made in this behalf by that Government; or*
- (c) *the person aggrieved; or*
- (d) *a recognised consumer association whether such person is a member of that association or not.*

(2) *Save as otherwise provided in this Act, no court inferior to that of a Court of Session shall try an offence punishable under this Chapter.*

(3) *Nothing contained in this Chapter shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence against this Chapter.*

16) From a perusal of the aforesaid provision, it is clear that certain offences under the Act are triable by a Court of Sessions but the provision does not bar the cognizance of the offences by a Magistrate. The expression used under subsection (2) of Section 32 is “try any offence”, meaning thereby that trial of the offence under Chapter IV of the Act could be held by a court inferior to the Court of Sessions. What is barred under Section 32(2) of the Act, is trial of the offences under Chapter IV of the Act and not taking of cognizance of such offences. In terms of Section 193 of Cr. P. C, a Sessions Court cannot take cognizance of any offence unless expressly provided for . Section 32(2) of the Act only provides for trial of cases by Sessions Court and not for taking of cognizance of offences by the said Court. Therefore, it is open to a Judicial Magistrate to take cognizance of offences under Chapter IV of the Act and thereafter commit the case for trial to the Sessions Court in terms of Section 209 of the Cr. P. C. This is the only possible interpretation of the provisions contained in Section 32 of the Act read with the relevant provisions of the Cr. P. C. Thus, the contention of the learned counsel for the petitioner is without any merit.

17) That takes us to the last ground urged by the petitioners which relates to non-compliance with the requirements of

Section 202 of the Cr. P. C. If we have a look at the provisions contained in sub-section (1) of Section 202 of the Cr. P. C, it provides that a Magistrate taking cognizance of an offence may, if he thinks fit and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction, postpone the issue of process against the accused and either enquire 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. From this it is clear that in a case where the accused is residing at a place beyond the territorial jurisdiction of a Magistrate, the Magistrate has to undertake a preliminary enquiry before proceeding to decide whether or not there is sufficient ground for issuing process against the accused whereas in other cases the discretion lies with the Magistrate to undertake or not to undertake any such exercise.

18) The Supreme Court in the case of **Vijay Dhanuka and Ors. vs. Najima Mamtaz,** (2014) 14 SCC 638, while interpreting the provisions contained in Section 202 of Cr.P.C, held that the requirement to conduct enquiry or direct investigation before issuing process where accused is residing beyond territorial jurisdiction of Magistrate concerned is

mandatory. In the same case, the Supreme Court has observed that in the enquiry envisaged under Section 202, the witnesses are examined whereas under Section 200, examination of the complainant only is necessary with the option of examining witnesses, if any. It has been further held that the exercise by the Magistrate for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused is nothing but an enquiry envisaged under Section 202.

19) The aforesaid view has been reiterated and reaffirmed by the Supreme Court in its subsequent judgments in the cases of **Abhijit Pawar vs. Hemant Madhukar Nimbalkar & Anr.**, (2017) 3 SCC 538 and, **Odi Jerang vs. Naba Jyoti Baruah & Ors**, 2023 LiveLaw SC 702.

20) In view of the aforesaid legal position, it is clear that undertaking an enquiry under Section 202(1) of the Cr. P. C before issuing process against the accused in a case where the accused is residing beyond the territorial jurisdiction of the Magistrate is an absolute necessity. In the present case, admittedly, the learned trial Magistrate has not conducted any preliminary enquiry under Section 202(1) of Cr. P. C nor any investigation has been directed in terms of the said provision. Therefore, the impugned order whereby process has been issued against the petitioners is not sustainable in law.

21) For what has been discussed hereinabove, both the petitions are allowed and the impugned order passed by the learned Chief Judicial Magistrate, Anantnag, whereby the process has been issued against the petitioners, is set aside, and a direction is issued to the learned trial court to hold a preliminary enquiry in terms of Section 202(1) of Cr. P. C and thereafter proceed afresh in the matter in accordance with the law.

22) A copy of this order be sent to the learned trial court for information and compliance.

Srinagar,
21.02.2025
"Bhat Altaf-Secy"

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No

(Sanjay Dhar)
Judge