
(2020) 09 SHI CK 0368

In the High Court Of Himachal Pradesh

Case No : Criminal Revision No. 146 Of 2020, CR.MMO No. 180 Of 2020

M/s Digital Vision Through Its Partner Konic Goyal And Others	APPELLANT
Vs	
State Of Himachal Pradesh Through Drug Controller	RESPONDENT

Date of Decision : 23-09-2020

Acts Referred:

Drugs And Cosmetics Rules, 1945 — Rule 57
Code Of Criminal Procedure, 1973 — Section 2(g), 2(h), 94
Drugs And Cosmetics Act, 1940 — Section 18, 18A, 18(d), 20, 22, 22(1)(b)(ii), 22(c),
22(1)(c), 22(1)(cc), 22(1)(cca), 22(1)(d), 23, 23(5)(b), 23(6), 25, 25(3), 25(4)

Citation : (2020) 09 SHI CK 0368

Hon'ble Judges : Vivek Singh Thakur, J

Bench : Single Bench

Advocate : K.D.Shreedhar, Shreya Chauhan, Desh Raj Thakur, Shiv Pal
Manhans, Raju Ram Rahi, Gaurav Sharma

Final Decision : Dismissed

Judgement

Vivek Singh Thakur, J

1. These petitions, assailing orders dated 11.03.2020 and 02.05.2020, passed by learned Chief Judicial Magistrate, District Sirmaur at Nahan, H.P. (hereinafter referred to as CJM) arising out of one and the same proceedings/inquiry, are being decided by this common judgment as the same are to be adjudicated on the basis of common material.

2. A partnership firm M/s Digital Vision, having licence and approval from the Drug Licencing Authority, under Drugs and Cosmetics Act, 1940 (hereinafter referred to as the 'Act') and Rules framed thereunder, had been manufacturing amongst others, the drug Coldbest-PC Syrup since 2014, in its Manufacturing Unit at 176, Mauza Ogli, Nahan Road, Kala Amb, District Sirmaur, H.P., till 15.02.2020, when it was directed to stop manufacturing of this drug as well as all drugs having similar formula/composition under generic name or any brand name under its Drugs Manufacturing Licences, till further orders, for the reason

that infant mortalities had taken place in Ramnagar area of Udhampur District (J & K) and it was observed by the team head of PGI, Chandigarh that Diethylene Glycol, purported cause of deaths, was found in Coldbest-PC Syrup pertaining to Batch No.DL5201 manufactured in September 2019, with expiry date August 2021, manufactured by the petitioner-M/s Digital Vision.

3. Vide order dated 11.03.2020, impugned in Cr.MMO No.180 of 2020 preferred by Parshotam Lal Goyal, partner of M/s Digital Vision, learned CJM, on application filed by the Drug Inspector, has permitted the Drug Inspector to draw additional samples of drug from the bulk seized by and in custody of Drug Inspector, for demand received from Government Analyst to send additional sample for testing the drug for Diethylene Glycol, as quantity sent earlier was found to be insufficient by Government Analyst to conduct test/analysis asked for.

4. Vide order dated 02.05.2020, impugned in Cr. Revision No.146 of 2020 preferred on behalf of M/s Digital Vision through its partner Konic Goyal, learned CJM has rejected the objection raised on behalf of the petitioner against sending four bottles of initial sample and twenty bottles of additional sample collectively consequently dismissing the prayer to send only four bottles i.e. sample drawn initially on 26.02.2020 to Central Drug Laboratory Kolkata, but not to send additional samples of twenty bottles, so drawn on 11.03.2020 after receiving the demand from Government Analyst, Chandigarh. Learned CJM has ordered to send initial samples of four bottles as well as additional sample of twenty bottles, but separately with a request to CDL, Kolkata, to open only initial sample at first instance and in case sample is found insufficient for conducting requisite test(s), to open additional sample of twenty bottles for conducting the analysis/test asked for.

5. During hearing, record of proceedings conducted by the Drug Inspector, was summoned through learned Deputy Advocate General, retained and perused.

6. Undisputedly, petitioner-M/s Digital Vision is a partnership firm incorporated vide registered deed of partnership made on 18.05.2009 between Parshotam Lal Goyal and his two sons Konic Goyal and Manic Goyal, residents of 28-A, Govind Nagar, Ambala Cantt, Haryana. The Deed has been registered in the office of Sub-Registrar, Nahan, in Book No.4, bearing registration No.129/09 dated 18.05.2009. Share of partner Parshotam Lal Goyal, as per copy of Deed, available on record is: 34%, whereas his two sons Konic Goyal and Manic Goyal are having share of 33% each.

7. On 15.02.2020, a letter No.DFO/D- 924/7477-7513, sent by Controller Drugs, Drugs and Food Control Organization J & K (Jammu), was received by the State Drugs Controller, Himachal Pradesh, regarding infant mortalities in Ramnagar area of Udhampur District (J & K), whereby it was informed that it had been given to understand by the team Head of PGI, Chandigarh that presence of Diethylene Glycol in Coldbest-PC Syrup, Batch No.DL5201, manufactured by petitioner-M/s Digital Vision in September 2019 with expiry date of August 2021

was cause of deaths and it was requested to conduct thorough inspection of the Unit to evaluate/ascertain aspect of Diethylene Glycol impurity in the said syrup and to recall the product of the said drug, irrespective of batch, in the larger public interest. In furtherance to aforesaid information, received from Controller Drugs (J & K), Assistant Drugs Controller-cum-Drugs Licensing Authority, Himachal Pradesh, vide communication dated 15.02.2020 (By hand) had issued Show Cause Notice and Stop Manufacturing order to petitioner(s)-M/s Digital Vision, with a direction to stop manufacturing of Coldbest-PC Syrup as well as all the drugs having similar formula/composition under generic name or any brand name under its Drugs Manufacturing Licences, till further orders.

8. On 17.02.2020, another Show Cause Notice and Stop Manufacturing order was issued to petitioner-M/s Digital Vision to stop manufacturing under its drugs Manufacturing Licences till further orders for the reason that record was required by the investigation team immediately for investigation in the matter and in view of seriousness of the matter, in public interest, Assistant Drugs Controller was of the opinion that manufacturing cannot be permitted in the circumstances of the case.

9. The Joint Investigation Team had submitted its interim report dated 17.02.2020 with twenty points observation therein. Copy of the said spot/interim report was served upon petitioner(s)-M/s Digital Vision vide Show Cause Notice and 'Stop Manufacturing' order dated 25.02.2020 was also issued with a direction to adhere to 'Stop Manufacturing' order already issued on 17.02.2020 till further orders.

10. On 15.02.2020, Drug Inspector had taken five samples of drug COLDBEST-PC of different batches from premises of petitioner(s)-M/s Digital Vision with intimation to Konic Goel, partner of the firm and offered him fair price of the sample of drugs. Sixth sample of Propylene Glycol Technical Trade was also taken. All these samples are detailed hereinunder:-

Sl.No

Code

Product

Batch No.

Expiry

Manufactured by

1.

NHN/19/94

ColdBest-PC Syrup

DL5201

08/21

Digital Vision, 176 Mauza Ogli, Nahan road, Kala-Amb, Distt. Sirmuor, H.P.

Three sealed sample portions each of 1 bottle of 60 ml labelled claim each.
(Total= 3x1x1 bottle)

2.

NHN 19/95

ColdBest-PC Syrup

DL5872

12/21

-do-

Three sealed sample portions each of 1 bottle of 60 ml labelled claim each.
(Total= 3x1x1 bottle)

3.

NHN/19/96

ColdBest-PC Syrup

DL2831

12/20

-do-

Three sealed sample portions each of 1 bottle of 60 ml labelled claim each.
(Total= 3x1x1 bottle)

4.

NHN/19/97

ColdBest-PC Syrup

DL4302

05/21

Digital Vision, 176 Mauza Ogli, Nahan road, Kala-Amb, Distt. Sirmuor, H.P.

Three sealed sample portions each of 1 bottle of 60 ml labelled claim each.
(Total= 3x1x1 bottle)

5.

NHN/19/98

ColdBest-PC Syrup

DL5028

07/21

-do-

Three sealed sample portions each of 1 bottle of 60 ml labelled claim each.
(Total= 3x1x1 bottle)

6.

NHN/19/99

Propylene Glycol Technical Grade

BN1A1912057

December 12, 2022

SHANDONG SHIDA SHENGHUA CHEMICAL, GROUP CO. LTD.,

Four sealed sample portions each of 1 bottle of approx 100 ml each. (Total= 4x1x1 bottle)

11. The aforesaid samples were sent to the Government Analyst for testing through memorandum, as prescribed in Rule 57, Form-18. During investigation, it had come to the notice that Propylene Glycol used in the manufacturing drug in question was purchased by the petitioner-M/s Digital Vision from M/s Thakur Enterprises, Ambala Cantt., therefore, a notice dated 17.02.2020 under Sections 22(1)(cca) and 18(d) of the Act was also issued to the said firm.

12. On 17.02.2020, documents and the registers were seized by the Drug Inspector under the Act, by supplying receipt thereof, on Form-16 to the petitioner-firm through its partner Purshottam Lal Goyal and, by passing an order on prescribed Form No.15, petitioner-M/s Digital Vision was also directed not to dispose of stock of four drums of Propylene Glycol available with it for twenty days from passing of the order. On the same day, a notice under Sections 22(1)(cca) and 18-A of the Act was also issued to Parshotam Lal Goyal to produce documents referred in this notice before the Drug Inspector immediately after receiving notice with rider that failing which, it shall be deemed that petitioner-M/s Digital Vision had nothing to say in the matter. However, vide reply dated 17.02.2020, it was informed on behalf of the petitioner-M/s Digital Vision that persons, with whom the requisite record was stated to be, were on leave on that day and it was further informed that the said record would be provided within three days. On 17.02.2020 itself, Drug Inspector had asked the firm through Parshotam Lal Goyal to submit report of recall of drug in question pertaining to Batch No.DL5201 every six hourly to the office of Drugs Inspector.

13. On the basis of application dated 18.02.2020, titled as State of Himachal Pradesh (Through Drugs Inspector, HQ. Nahan) vs. Parshotam Lal Goyal, Partner of M/s Digital Vision, filed under Section 23(6) of the Act, vide order dated

19.02.2020, learned CJM had permitted the Drug Inspector to keep all the aforesaid seized documents/records in his possession till the same were produced before the Court of competent jurisdiction, in accordance with law.

14. On 25.02.2020, vide its final recall report, it was informed on behalf of petitioner-M/s Digital Vision that it had sold 5575 bottles of the drug Coldbest-PC Syrup, Batch No.DL5201 to the firm M/s Shiva Medical Hall, Ambala Cantt, vide Bill No.8440 dated 27.09.2019 and the said firm had sent back 565 bottles of the said drug with details and further information of the rest of the stock which was either consumed or sealed by the Department and it was informed that no stock of the said drug was left in the market.

15. On 26.02.2020, the Drug Inspector had taken three sealed sample portions, each of four bottles of 60 ml of drug Coldbest- PC Syrup, pertaining to Batch No. DL5201, from the premises of petitioner-M/s Digital Vision through Parshotam Lal Goyal out of 565 bottles of the drug recalled from the market and intimation thereof was served upon petitioner-M/s Digital Vision through Parshotam Lal Goyal vide Form No.17 and as Parshotam Lal Goyal had refused to accept fair price tendered thereof, receipt of the samples was also served upon him vide Form No.17A. Remaining quantity of drugs i.e. 553 bottles were seized by the Drug Inspector in presence of witnesses and Parshotam Lal Goyal vide Form No.16 and proceedings in this regard were reduced into writing in presence of witnesses and Parshotam Lal Goyal.

16. One sample portion, out of samples taken on 26.02.2020, was sent to the Government Analyst Chandigarh alongwith Form No.18 on the very same day (By hand) for testing. Number/Code NHN/19/103 was assigned to these samples.

17. Vide order dated 27.02.2020, passed in application dated 27.02.2020, titled as State of Himachal Pradesh (Through Drugs Inspector, HQ. Nahan) vs. Parshotam Lal Goyal, Partner of M/s Digital Vision, preferred under Section 23(5) (b) of the Act, by the Drug Inspector, learned CJM had permitted him to keep entire seized drug in his possession till the same was produced before the Court of competent jurisdiction, in accordance with law.

18. On 02.03.2020, a written complaint was submitted by the Assistant Drugs Controller and Drug Inspector to the Station House Officer, Police Station, Kala Amb, District Sirmaur, H.P., for registration of FIR against M/s Digital Vision, its partners and others, on the basis of analysis report of Government Analyst with respect of samples of drug Coldbest-PC Syrup, Batch No.DL5201, taken by Drug Control Officer Ambala/Drug Inspector Zone-IV, Muthi, Jammu and Drug Control Officer, FDA, Panipath (Haryana), wherein it was reported that samples of the above referred drug were 'not of standard quality' as defined in the Drugs and Cosmetics Act, 1940 and Rules thereunder, for the reason the samples did not conform to claim as per Patent & Proprietary in respect of uniformity of volume, pH and Assay of Phenylephrine Hydrochloride and on testing, contents of Diethylene Glycol ranging from 34.24% to 35.87% w/v, were also found in the

samples. On the basis of this complaint, FIR No.0021 dated 02.03.2020, has been registered in Police Station, Kala Amb.

19. Vide Chemical Analyst report dated 05.03.2020, it was informed by the Government Analyst that sample of drug Coldbest-PC Syrup Batch No.DL5201, with sample Code NHN/19/94 dated 17.02.2020 was found of 'standard quality' in respect of test performed, but with remarks that sample was not tested for Diethylene Glycol due to insufficient sample quantity. Further in this report, it was mentioned that test for Average filled volume, Uniformity of volume, pH and contents of Paracetamol, Phenylephrine HCl and Chlorpheniramine Maleate were not done due to insufficient sample quantity.

20. Vide communication dated 06.03.2020, Drug Inspector had requested the Government Analyst to send report of sample bearing Code NHN/19/103 dated 27.02.2020 on top priority, as the same was required for investigation of the case FIR registered in Police Station, Kala Amb. This communication was also sent through E-mail, in response where to, E-mail message dated 09.03.2020 from Government Analyst was received by the Drug Inspector as well as Drug Controller, whereby Drug Inspector was requested to provide additional samples (20x60 ml) to complete analysis as desired.

21. On 09.03.2020, petitioner-M/s Digital Vision was directed by Drug Inspector to provide details of stock of Coldbest-PC Syrup, Batch No.DL5201, received from the market, after 26.02.2020 till date. The said communication was received and replied by the aforesaid Vinod Jangid vide response dated 09.03.2020, informing therein that no physical stock of the drug concerned was received in the Factory after 25.02.2020 and stock received prior to that till 25.02.2020 was already seized by Drug Inspector on 26.02.2020.

22. Vide separate order dated 09.03.2020, order dated 17.02.2020 issued on Form No.15 not to dispose of the stock of four drums of Propylene Glycol Technical Grade, was further renewed for a period of 20 days which was received by Vinod Jangid, Sales Executive of the petitioner(s)-Digital Vision. Report dated 05.03.2020 received from the Government Analyst with respect to sample bearing Code NHN/19/94 drawn on 15.02.2020 was also served upon Vinod Jangid, Sales Executive, on the very same day, whereby it was also informed that in case petitioner-M/s Digital Vision intended to adduce evidence in controversion of the report of the Government Analyst, then it may notify in writing to the Drug Inspector within a period of 28 days from the receipt of notice.

23. On 09.03.2020 itself, for request received from Government Analyst to provide additional quantity of sample to complete the analysis as desired, Drug Inspector had filed an application before learned CJM for permission to draw additional quantity of drug (20x3x60ml bottles), for sample No.NHN/19/103 dated 26.02.2020 from the seized drug.

24. Vide order dated 11.03.2020, passed by learned CJM, application was allowed by permitting drawing of additional quantity of drug, for earlier sample,

out of balance quantity of drug i.e. 553 bottles seized by the Drug Inspector on 26.02.2020 with further rider that the additional quantity of drug for sample would be taken in presence of Court by producing seized bottles in the Court. Thereafter seized drug was produced in the Court, which was sealed in six cardboard boxes and out of those boxes one large sized cardboard box containing 72 bottles was opened in presence of learned CJM and out of that box, 60 bottles were taken out and divided into three portions of 20 bottles each and packed and sealed in three small cartons by appending three impressions of the seal bearing inscription 'C.J.M. SIRMAUR H.P.', and also by appending two impressions of 'LKS' each and balance quantity of 12 bottles were repacked in the same cardboard box, which was earlier containing 72 bottles and the said box was also closed and resealed by appending the seals referred supra and all the three small sized sealed cardboard boxes containing the additional quantity of drug drawn for sample No.NHN/19/103 and one resealed cardboard box containing 12 bottles of Coldbest-PC Syrup alongwith other seized drug were handed over to the Drug Inspector.

25. At the time of taking sample in the Court, Forms No.17, 17A and 18 were filled-in in the Court and on perusal thereof, it is evident that this process was completed in presence of Vinod Jangid, Sales Executive, of petitioner-M/s Digital Vision, as in the backside of Form No.17, the said Vinod Jangid has stated in writing that he is working as a Sales Executive in M/s Digital Vision and Parshotam Lal Goyal, partner of the firm is not in contact from one week and he is present in the Court of learned CJM at Nahan and Drug Inspector has drawn additional quantity of drug for the sample No.NHN/19/103 (quantity-3x1x20x60 ml) in the Court in presence of witnesses after taking permission from the Court. He has further stated that he has received copy of Form No.17 alongwith one sealed sample portion of additional quantity of sample No.NHN/19/103 (quantity 1x20x60 ml) and further that he has signed each sample portion in presence of witnesses and all sealed sample portions were sealed by the Court as well as seal of Drug Inspector.

26. After drawing additional quantity of drug for sample, memorandum of the Government Analyst with respect to additional quantity of sample was prepared in presence of Vinod Jangid and witnesses, who have also signed thereon and additional quantity of sample was sent to the Government Analyst, Chandigarh and Spot Memo was also prepared by Drug Inspector, which is also duly signed by the witnesses and Vinod Jangid.

27. Vide report dated 20.03.2020, with respect to sample No.NHN/19/103, Government Analyst had opined that sample of drug was 'not of standard quality', as defined in Drugs and Cosmetics Act and Rules framed thereunder, for the reason that samples did not conform to claim as per Patent & Proprietary in respect of uniformity of volume, pH and Assay of Phenylephrine Hydrochloride and on testing sample was found positive for Diethylene Glycol with contents of 32.30% w/v thereof in the sample. The said report was delivered upon petitioner-

M/s Digital Vision (By hand) with forwarding letter dated 20.03.2020, which was received by Vinod Jangid on the very same day, whereby petitioner-firm was directed to explain its position in the matter and to show cause as to why action not be taken against it for manufacturing adulterated drug and it was also notified that in case petitioner-M/s Digital Vision intended to adduce the evidence in controversion of the report of Government Analyst, then, it may notify in writing to the Drug Inspector within a period of 28 days from receipt of the report of Government Analyst.

28. In the meantime, Government Analyst had supplied copy of report dated 16.03.2020 with respect to sample No.NHN/19/99 dated 15.02.2020 pertaining to Propylene Glycol Technical Trade, whereby it was informed that sample was 'of standard quality', as defined in the Act and Rules framed thereunder, for the reason that it conformed to claim as per Patent & Proprietary in respect of test performed. This report was also communicated to the petitioner-M/s Digital Vision, which was received by Parshotam Lal Goyal on 27.03.2020.

29. In the meanwhile, two reports of Government Analyst Tamilnadu bearing No.07718 and 7719 dated 21.02.2020 were also received from the office of Director, Drug Control, Tamilnadu, vide letter dated 24.02.2020, whereby it was informed that sample of Coldbest-PC Batch No.DL5201 was reported to be not 'of standard quality', but adulterated. These reports were also served upon the petitioner-M/s Digital Vision vide communication dated 20.03.2020.

30. It has also come on record that partners of petitioner-firm had applied for anticipatory bail in the High Court and vide order dated 23.03.2020 passed in Cr.M.P.(M) Nos.545, 546 and 548 of 2020, they were extended benefit of anticipatory bail, which, as informed, has been confirmed later on.

31. In response to communication dated 20.03.2020, vide which report dated 20.03.2020 of Government Analyst was served upon the petitioner-M/s Digital Vision through Vinod Jangid, petitioner-firm vide communication dated 15.04.2020 had notified its intention to adduce evidence in controversion to the report of Government Analyst, Regional Drugs Testing Laboratory, Chandigarh under Section 25(3) and 25(4) of the Act. Whereupon, Drug Inspector had filed an application dated 28.04.2020 titled as State of Himachal Pradesh (Through Drugs Inspector, H.Q. Nahan) vs. M/s Digital Vision, under Section 25(4) of the Act, with a prayer to the Court to send remaining sample portion of the sample Coldbest-PC Syrup, Batch No.DL5201, numbered as NHN/19/103 to the Director, Central Drugs Laboratory, Kolkata (CDL Kolkata) for retesting and reanalysis as per provisions of Section 25(4) of the Act. Petitioner-M/s Digital Vision had preferred objections in this application, by opposing the sending of additional quantity of sample drawn on 11.03.2020 alongwith initial quantity.

32. As stated supra, vide order dated 02.05.2020, objections of petitioner-M/s Digital Vision have been rejected and learned CJM had ordered to send initial quantity of sample as well as additional quantity of sample to CDL, Kolkata.

33. Vide communication dated 09.04.2020, analysis report of Government Analyst with respect to sample Nos.NHN/19/95, 19/96, 19/97 and 19/98 were also received by Drug Inspector, wherein for want of sufficient sample quantity tests for Average filled volume, Uniformity of volume, pH and contents of Paracetamol, Phenylephrine Hydrochloride and Chlorpheniramine Maleate were not conducted. However, these samples were conformed to claim, as per Patent and Proprietary, in respect of test performed and test for Diethylene Glycol was found negative. These reports were also served upon the petitioner-M/s Digital Vision vide letter dated 04.05.2020, which were received by Parshotam Lal Goyal on 12.05.2020.

34. Cr.Revision No.146 of 2002 has been filed on 04.05.2020 by M/s Digital Vision through its partner Konic Goyal against order dated 02.05.2020, passed by learned CJM, Nahan in Cr.M.A. No.411 of 2020, quashing and setting aside the same, whereby, after rejecting objections raised on behalf of petitioner(s)-Digital Vision, learned CJM has ordered to send, four bottles of drug taken initially as sample on 26.02.2020 alongwith twenty bottles taken as additional quantity of sample on 11.03.2020, to Central Drug Laboratory, Kolkata, for chemical analysis.

35. Cr.MMO No.180 of 2020 has been preferred by petitioner Parshotam Lal Goyal, a partner of M/s Digital Vision, assailing order dated 11.03.2020, passed by learned CJM, Nahan, in Cr.M.A. No.370 of 2020, whereby learned CJM has allowed the Drug Inspector to take additional quantity of sample in absence of petitioner-Parshotam Lal Goyal. In addition, in this petition, prayer for quashing of criminal proceedings against the petitioner(s) culminated on account of FIR No.21 of 2020 and to quash and set aside all subsequent proceedings pursuant to order dated 11.03.2020, have been made.

36. I have heard Mr.K.D. Shreedhar, learned Senior Counsel, assisted by Ms.Shreya Chauhan, learned counsel, and also Mr.Shiv Pal Manhans, learned Additional Advocate General assisted by Mr.Gaurav Sharma, learned Deputy Advocate General, and have also gone through the record placed and produced before the Court.

37. On behalf of petitioner(s)-Digital Vision, referring provisions of the Act, particularly Sections 22 and 23, it has been argued that:

(a) Scheme of the Act provides sampling at only two places i.e. place of retailer or place of manufacturing, but no other place and one sample taken at manufacturing Unit is to be divided into three samples, one portion is to be sent to Government Analyst for test or analysis and second sample is to be retained by the Drug Inspector and third sample is to be given to the manufacturer and nowhere, procedure for taking additional sample has been provided in the Act;

(b) In case sample taken is damaged on the way or its quantity is found to be insufficient then, instead of taking additional sample, re-sampling was to be undertaken that too not in the Court but at the place of manufacturing or retailer but in presence of manufacturer or retailer and to such sampling different

number was to be assigned again and then, it was to be sent for chemical analysis afresh, but not as additional sample;

(c) In alternative, it has been argued that even if, additional sample can be taken, then also material seized by Drug Inspector and custody whereof, through Court order, was with Drug Inspector, was to be released to the manufacturer and then only sample from manufacturer could have been taken;

(d) Custody of seized drug should have been given neither to the Drug Inspector nor to the manufacturer, but, in order to avoid tampering, removal and/or correction of defect during custody, the custody would have been given to third person;

(e) As per Scheme of the Act, learned CJM, in present case, has power to pass custody order, but does not have power to take additional sample;

(f) Even if, it is considered that learned CJM, was having power to take additional sample/re-sampling, then also, presence of manufacturer was necessary at the time of passing such order and taking additional sample/re-sampling, but in present case, as is evident from order dated 11.03.2020, only Drug Inspector Lalit Kumar alongwith Government Advocate, was present and there was none present on behalf of the manufacturer;

(g) Learned CJM had sent Whatsapp message to the petitioner(s) on 30.04.2020, asking to appear on 02.05.2020, a date, fixed for passing order for sending sample to CDL, Kolkata, on the basis of application filed by Drug Inspector, in sequel to notification of the petitioner(s)-M/s Digital Vision expressing intention to adduce evidence in controversion of the report of Government Analyst, but no such exercise was undertaken to ensure presence of petitioner(s) or its representative at the time of taking additional sample on 11.03.2020;

(h) Learned CJM has allowed the sample to be taken in Court premises and by doing so, he has participated in the process and has acted in contravention of provisions of Code of Criminal Procedure (Cr.P.C.), as such act is prohibited under Section 2(h) of Cr.P.C. as the collection of evidence is to be done by Investigating Officer or by any other person, but other than a Magistrate and by acting in this manner, he has assumed role of investigator, making him liable to appear as a witness in the case;

(i) Many samples of drug pertaining to Batch No.DL5201 and other batches of the same drug of the same quantity i.e. 1x3x60 ml sent to the same laboratory i.e. Government Analyst at Chandigarh and Government Analyst had analyzed those samples without asking for additional/further quantity and those samples were found to be of 'standard quality' prescribed under the Act and Rules framed thereunder, therefore requirement of additional sample by the same Government Analyst was not tenable and thus there is no justification to send twenty bottles of additional sample to CDL Kolkata;

(j) In report dated 20.03.2020, received from Government Analyst, with respect

to sample Code NHN/19/103, there is a mention of date 26.02.2020 of taking of sample, but it is silent about additional sample taken on 11.03.2020;

(k) Procedure followed by learned CJM is totally wrong and beyond the scope of the procedure prescribed under the Act and, thus, entire process undertaken for additional sample is vitiated and learned CJM himself is not sure about correctness and validity of process undertaken by him and for that reason only, he has ordered sending four bottles and twenty bottles to CDL, Kolkata separately with further direction to open four bottles at first instance and to open additional twenty bottles only in case requirement of further quantity is felt necessary by the said Laboratory.

(l) The order dated 11.03.2020 and additional sampling allowed thereby is vitiated as there was no information given to the petitioner(s)-M/s Digital Vision, in this regard, and there was no representation of the manufacturer at the time of allowing application and taking additional sample;

(m) In Government Analysis report, received from Chandigarh, with respect to sample Code NHN/19/103, nominal volume is stated to be 60ml and, therefore, quantity of initial sample was sufficient for conducting test. There is no provision under the Act or Rules and Regulations framed therein, however, vide impugned orders dated 11.03.2020 and 02.05.2020, learned CJM, indirectly has tried to frame new Rules and Regulations which is beyond his jurisdiction;

(n) Samples for retesting from CDL Kolkata, are to be sent for analysis with respect to those components, which have been found 'not of standard quality' by the Government Analyst, Chandigarh, and, therefore, for that purpose quantity contained in initial sample would be sufficient and unless or until additional quantity is demanded by CDL, Kolkata, there is no logic and necessity to send twenty bottles of additional sample also to CDL, Kolkata;

(o) In the lot of Batch No.DL5201 more than 5500 bottles of drug were manufactured in September 2019 and were supplied to eight States, but no adverse impact thereof, has been reported from any State except from Ramnagar (J&K), where children died of fever, thus it is wrong to presume that there was adulteration in the drug manufactured by petitioner(s);

(p) Coldbest-PC Syrup, as a scheduled drug is to be administered on the basis of prescription from the Medical Practitioner and further that drug was to be stored in a controlled temperature and the deaths of children may not be because of sub-standard drug, but for administering the drug without supervision/prescription of Medical Officer or for any other reason like storage in adverse temperature, but Drug Inspector, on the basis of letter, received from J & K has stated that petitioner(s)-M/s Digital Vision have committed heinous crime; and

(q) Petitioner(s)-Digital Vision have manufactured drug, in consonance and in compliance with the provisions of the Act and Rules framed thereunder and Schedule attached therewith and that fact also stands proved by reports of other

samples by the same Government Analyst.

(r) It is pleaded that Statute directs a thing to be done in a particular way that cannot be and shall not be done in any other way and according to petitioner(s)-M/s Digital Vision, in present case(s), Drug Inspector as well as learned CJM have acted contrary to the provisions of Statute i.e. the Act and Rules framed thereunder.

38. So far as prayer for quashing FIR No.21/2020 registered in Police Station Kala Amb and proceeding in pursuant thereto is concerned, the same has neither been argued nor pressed reserving petitioners' right to pursue that prayer in appropriate petition as this issue has neither been addressed in arguments nor stated in grounds of petition. It is submitted that in view of judgment passed by this Court in Maman Chand Jain vs. State of Himachal Pradesh, reported in 2018 Cri. L.J. 2914, no prosecution can be launched in violation of provisions of Section 20 of the Act, but that situation has not arrived yet.

39. Learned Additional Advocate General, appearing on behalf of the respondent-State has submitted that:

(a) Though there is no express provision for additional sampling, but additional sample permitted by the Court vide order dated 11.03.2020, is in continuation of sampling earlier done as investigation in this case, is still undergoing and before completion of investigation, learned Magistrate has power to pass order, impugned herein, on the request of Drug Inspector, particularly for the reason that there was a request, received by Drug Inspector from Government Analyst Chandigarh, for providing additional quantity of sample for conducting all the tests desired by Drug Inspector;

(b) Every time Drug Inspector has associated petitioner(s) or their representative(s), but none of the partners of petitioner(s)-M/s Digital Vision, was available on 11.03.2020 as they were absconding to avoid their arrest after registration of FIR on 02.03.2020 and during that period, their only representative Vinod Jangid, Sales Executive of petitioner(s)-M/s Digital Vision, was available in the manufacturing Unit and as partners were not available, the proceedings by Drug Inspector, including taking of additional quantity of samples, have been undertaken by Drug Inspector in presence of the said Vinod Jangid and petitioner(s) have made themselves available only after getting anticipatory bail from the High Court vide order dated 23.03.2020. Therefore, plea of petitioner(s)-M/s Digital Vision that samples have been taken in absence of representative of manufacturer, is not sustainable;

(c) Drug Inspector received a mail from Government Analyst and filed an application for additional sampling in pursuant thereto and, thus, he has acted, in accordance with law;

(d) It is evident from para-13 of order dated 02.05.2020 that till then, no plea against taking additional sample/additional quantity was ever raised and not only

this, in letter dated 15.04.2020, sent by petitioner(s)-M/s Digital Vision to Drug Inspector, intending to adduce evidence in controversion of the report, no objection with respect to additional quantity sent to Government Analyst Chandigarh, has been raised; and

(e) Petitioner(s)-M/s Digital Vision have been protected by learned CJM, as is evident from para-14 of the impugned order dated 02.05.2020, by directing the CDL, Kolkata to conduct test by opening samples of four bottles at first instance and to open additional sample of twenty bottles only in case of necessity.

40. In rebuttal, it is contended on behalf of petitioner(s)-M/s Digital Vision that no notice was ever issued by learned Magistrate for 11.03.2020 and objections, against additional sampling, have been preferred by the petitioner(s)-M/s Digital Vision, immediately after receiving of notice through Whatsapp and had, notice for 11.03.2020, been issued by learned CJM, someone, representative of petitioner(s)-M/s Digital Vision, would have definitely appeared, and in case personal appearance of partners would not have been possible for any reason and/or if personal appearance would not have been considered necessary, petitioner(s) would have appointed/deputed a Lawyer to represent them and in absence of petitioner(s) or their representative, proper hearing has been denied by learned Magistrate and, therefore, order dated 11.03.2020, is not sustainable and resultantly order dated 02.05.2020 is also liable to be quashed.

41. Sections 22 and 23 of the Act, prescribing powers of Inspector and procedure of Inspectors, read as under:-

22.Powers of Inspectors.-(1) Subject to the provisions of section 23 and of any rules made by the Central Government in this behalf, an Inspector may, within the local limits of the area for which he is appointed,-

[(a) inspect,-

(i) any premises wherein any drug or cosmetic is being manufactured and the means employed for standardising and testing the drug or cosmetic;

(ii) any premises wherein any drug or cosmetic is being sold, or stocked or exhibited or offered for sale, or distributed;

(b) take samples of any drug or cosmetic,-

(i) which is being manufactured or being sold or is stocked or exhibited or offered for sale, or is being distributed;

(ii) from any person who is in the course of conveying, delivering or preparing to deliver such drug or cosmetic to a purchaser or a consignee;

(c) at all reasonable times, with such assistance, if any, as he considers necessary,-

(i) search any person, who, he has reason to believe, has secreted about his person, any drug or cosmetic in respect of which an offence under this Chapter

has been, or is being, committed; or

(ii) enter and search any place in which he has reason to believe that an offence under this Chapter has been, or is being, committed; or

(iii) stop and search any vehicle, vessel or other conveyance which, he has reason to believe, is being used for carrying any drug or cosmetic in respect of which an offence under this Chapter has been, or is being, committed, and order in writing the person in possession of the drug or cosmetic in respect of which the offence has been, or is being, committed, not dispose of any stock of such drug or cosmetic for a specified period not exceeding twenty days, or, unless the alleged offence is such that the defect may be removed by the possessor of the drug or cosmetic, seize the stock of such drug or cosmetic and any substance or article by means of which the offence has been, or is being, committed or which may be employed for the commission of such offence;]

[(cc) examine any record, register, document or any other material object found [with any person, or in any place, vehicle, vessel or other conveyance referred to in clause (c)], and seize the same if he has reason to believe that it may furnish evidence of the commission of an offence punishable under this Act or the Rules made thereunder;]

[(cca) require any person to produce any record, register, or other document relating to the manufacture for sale or for distribution, stocking, exhibition for sale, offer for sale or distribution of any drug or cosmetic in respect of which he has reason to believe that an offence under this Chapter has been, or is being, committed;]

(d) exercise such other powers as may be necessary for carrying out the purposes of this Chapter or any rules made thereunder.

(2) The provisions of [the Code of Criminal Procedure, 1973 (2 of 1974)] shall, so far as may be, apply to any search or seizure under this Chapter as they apply to any search or seizure made under the authority of a warrant issued under Section 94 of the said Code.

[2A) Every record, register or other document seized under clause (cc) or produced under clause (cca) shall be returned to the person, from whom they were seized or who produce the same, within a period of twenty days of the date of such seizure or production, as the case may be, after copies thereof or extracts therefrom certified by that person, in such manner as may be prescribed, have been taken.]

(3) If any person wilfully obstructs an Inspector in the exercise of the powers conferred upon him by or under this Chapter or refuses to produce any record, register or other document when so required under clause (cca) of sub-section (1), he shall be punishable with imprisonment which may extend to three years, or with fine, or with both.]

23. Procedure of Inspectors.-(1) Where an Inspector takes any sample of a drug or cosmetic under this Chapter, he shall tender the fair price thereof and may require a written acknowledgement therefor.

(2) Where the price tendered under sub-section (1) is refused or where the Inspector seizes the stock of any drug or cosmetic under clause (c) of section 22, he shall tender a receipt therefor in the prescribed form.

(3) Where an Inspector takes a sample of a drug or cosmetic for the purpose of test or analysis, he shall intimate such purpose in writing in the prescribed form to the person from whom he takes it and, in the presence of such person unless he wilfully absents himself, shall divide the sample into four portions and effectively seal suitably mark the same and permit such person to add his own seal and mark to all or any of the portions so sealed and marked:

Provided that where the sample is taken from premises whereon the drug or cosmetic is being manufactured, it shall be necessary to divide the sample into three portions only:

Provided further that where the drug or cosmetic is made up in containers of small volume, instead of dividing a sample as aforesaid, the Inspector may, and if the drug or cosmetic be such that it is likely to deteriorate or be otherwise damaged by exposure shall, take three or four, as the case may be, of the said containers after suitably marking the same and, where necessary, sealing them.

(4) The Inspector shall restore one portion of a sample so divided or one container, as the case may be, to the person from whom he takes it, and shall retain the remainder and dispose of the same as follows:-

(i) one portion or container he shall forthwith send to the Government Analyst for test or analysis;

(ii) the second he shall produce to the Court before which proceedings, if any, are instituted in respect of the drug or cosmetic; and

[(iii) the third, where taken, he shall send to the person, if any, whose name, address and other particulars have been disclosed under Section 18A.]

(5) Where an Inspector takes any action under clause (c) of section 22,-

(a) he shall use all despatch in ascertaining whether or not the drug or cosmetic contravenes any of the provisions of section 18 and, if it is ascertained that the drug or cosmetic does not so contravene forthwith revoke the order passed under the said clause or, as the case may be, take such action as may be necessary for the return of the stock seized;

(b) if he seizes the stock of the drug or cosmetic, he shall as soon as may be, inform a Judicial Magistrate and take his orders as to the custody thereof;

(c) without prejudice to the institution of any prosecution, if the alleged contravention be such that the defect may be remedied by the possessor of the

drug or cosmetic, he shall, on being satisfied that the defect has been so remedied, forthwith revoke his order under the said clause.

[(6) Where an Inspector seizes any record, register, document or any other material object under clause (cc) of such-section(1) of section 22, he shall, as soon as may be, inform a Judicial Magistrate and take his orders as to the custody thereof.]

42. Section 22(1)(b)(ii) empowers an Inspector to take samples of any drug from any person, who is in course of conveying, delivering or preparing to deliver such drug to a purchaser or a consignee. Therefore, Inspector is empowered to take sample of any drug.

43. Section 22(1)(d) empowers an Inspector to exercise such other power as may be necessary for carrying out the purpose of this Chapter or any Rules made thereunder. Exercise of "such other powers" contained in Clause (d) of Section 22(1) of the Act is to be construed with reference to the powers of the Inspector expressly conferred upon him under Chapter-III of the Act, including Section 22 itself, which empowers him to take samples, search any person, enter and search any place and stop and search any vehicle and also to order in writing, to the person in possession of the drug, not to dispose of the stock and to examine any record, register, documents, or any other material object, including to require any person to produce any record, register or any other documents as prescribed under this Section. This provision definitely empowers Inspector to exercise 'such other power' to perform any act which is incidental and ancillary to the power conferred upon him expressly under the Act and Rules thereunder. Section 22 empowers Inspector to 'investigate' and during 'investigation' power of Inspector cannot be circumvented to express actions enumerated in the Act but it also extends to all other acts for carrying out the purpose of the Act as provided under Section 22(1)(d) of the Act.

44. Section 23 provides procedure to be adopted by the Inspector for taking any sample of drug under Chapter-III of the Act.

45. Section 25 provides procedure with respect to delivery of report of Government Analyst and action to be taken by Drug Inspector as well as person from whom sample was taken with respect to the reports of Government Analyst.

46. It is true that there is no specific provision for taking additional sample or additional quantity of sample specifically prescribed under Chapter-III of the Act, however, as explained hereinabove, Section 22(1)(d) empowers the Inspector to exercise other powers as may be necessary for carrying out the purposes of Chapter-III of the Act and Rules made thereunder.

47. In present case, there is no fault on the part of Inspector, in taking sample at initial stage, including with respect to quantity of the sample. However, as, according to report of team of PGI Chandigarh, Diethylene Glycol was found in Coldbest-PC Syrup of Batch No.DL5201 manufactured by petitioner(s)-M/s Digital

Vision and it was considered to be cause of death of children and, therefore, a specific request was made by the Drug Inspector to Government Analyst to conduct test and analysis for Diethylene Glycol also and in response thereto, Government Analyst had requested to provide additional quantity of sample (20x60ml) to complete the analysis as desired and this additional quantity of sample was required to be taken in continuation to the initial sample taken by the Drug Inspector and, therefore, in order to meet with requirement of the Government Analyst, Drug Inspector, by virtue of provisions of Section 22(1)(d) of the Act, was empowered to take additional quantity of sample but definitely adhering to under such exercise procedure prescribed for taking sample under Section 23 of the Act. So far as, power of Inspector to take additional sample/ additional quantity of sample is concerned, that flows from Section 22(1)(d) of the Act, as there is no provision in the Act describing the method and manner to be adopted for taking additional quantity of sample/additional sample in a situation like present one.

48. Undoubtedly, for sampling, procedure prescribed under Section 23 of the Act, is to be adhered to whether it is initial sample or additional sample. There is no specific provision for taking additional sample, but at the same time, where quantity of sample taken in initial sample, is found to be insufficient for conducting tests, required necessarily for investigation under Chapter-III of the Act, there is no prohibition under the Act for taking additional quantity/additional sample in continuation to initial sample taken by the Inspector.

49. Though, in view of Section 22(1)(d) of the Act, there is no vacuum in law in this regard as this provision empowers the Inspector to cope with any situation like present one and to take appropriate action, in accordance with the provisions prescribed under the Act to take additional quantity/sample also. However, even if, it is considered that there is absence of specific provision, then also, for no prohibition in law to take additional quantity/sample, by adopting procedure, prescribed under Section 23 of the Act. Drug Inspector is definitely entitled to seek permission to do so and learned Magistrate definitely has jurisdiction to allow such request of the Drug Inspector, which is necessary for carrying out purposes of Chapter-III of the Act and Rules made thereunder.

50. Section 23(5)(b) provides that if Inspector seizes the stock of the drug, he shall as soon as may be, inform the Judicial Magistrate and take his orders as to the custody thereof. This provision does not envisage that custody is not to be entrusted to Drug Inspector, rather language of the provision sounds that Drug Inspector shall take order of the Magistrate for custody of the seized stock of the drug. In present case also, vide order dated 27.02.2020, custody of seized stock of the drug was given by learned CJM to the Drug Inspector, in consonance with provisions contained in Section 23(5)(b).

51. Power of the Magistrate to pass an order with respect to custody of the seized drug definitely includes power to call the seized stock of the drug for releasing it or to entrust custody thereof to someone else and also to draw

sample/or additional sample therefrom for carrying out purposes of the Act and Rules made thereunder. Therefore, learned CJM has acted within his jurisdiction under the Act, by asking to produce sample in the Court and to draw additional quantity/sample in his presence.

52. Plea of the petitioner(s)-M/s Digital Vision that additional sample could have been taken only from the place of manufacturer or retailer is also not tenable in view of powers conferred upon Inspector under Section 22 of the Act. Power of Inspector is to be determined not by considering a part of Section in isolation. It is true that Section 22(1)(b) provides that sample can be taken from any person, who is in course of conveying, delivering or preparing to deliver such drug to a purchaser or a consignee, but at the same time, Section 22(1)(c) of the Act also empowers the Inspector to enter and search any place where he has reason to believe that an offence under Chapter-III of the Act has been or is being committed and this provision read with provision of Section 22(1)(d) of the Act definitely empowers the Drug Inspector to take sample at any other place other than, place of manufacturing or retailer depending upon the facts and circumstances of the situation/case.

53. Plea of the petitioner(s)-M/s Digital Vision that before taking additional sample, seized stock of drug would have released to the manufacturer and thereafter sample should have been taken from the manufacturer is also not sustainable for the reason that stock of drug was seized in presence of the manufacturer and custody thereof, was obtained by the Drug Inspector through the order of learned CJM, passed under Section 23(5)(b) of the Act. Further again no such procedure is prescribed under the Act. Therefore, unless prejudice caused is established, plea of petitioner(s) is not sustainable. However, such exercise is definitely to be undertaken by giving opportunity to the manufacturer to remain present either personally or through its representative at the time of drawing additional sample. In present case, it has come on record that after lodging of FIR on 02.03.2020, partners of petitioner(s) -firm were not available for contact as disclosed by Vinod Jangid, Sales Executive of the petitioner(s)-M/s Digital Vision. From the order dated 23.03.2020, passed by the High Court in Cr.M.P.(M) Nos.545, 546 and 548 of 2020, it can be easily inferred that partners of petitioner(s)-firm were available only after 23.03.2020 to the Investigating Agency. In such eventuality, ensuring personal presence of partners of the firm, was not possible for the Drug Inspector. As is evident from the documents placed before him as referred supra, Vinod Jangid, Sales Executive of the petitioner(s)-firm, was available throughout and Drug Inspector has communicated orders/list with the petitioner(s)-firm by delivering the same to Vinod Jangid, Sales Executive.

54. Now, question arises as to whether Vinod Jangid, was true representative of petitioner(s)-firm and its partners or not. Before registration of FIR, Parshotam Lal Goyal, partner of the firm, was dealing with the Drug Inspector on behalf of petitioner(s)-M/s Digital Vision since beginning i.e. 15.02.2020 till registration of

FIR, as he has signed Form No.17 dated 15.02.2020, Form No.17, Form No.17A and Form No.16 on 26.02.2020. Order to recall drug was also served upon Parshotam Lal Goyal and in furtherance thereto, entire remaining stock of the drug, in question, belonging to Batch No.DL5201, was recalled by petitioner(s)-M/s Digital Vision. Documents of petitioner(s)-M/s Digital Vision, were also produced by Parshotam Lal Goyal, custody whereof, was assigned to Drug Inspector by learned CJM vide order dated 19.02.2020.

55. A request for supplying additional sample was received by Drug Inspector from Government Analyst, Chandigarh on 09.03.2020. On that day, Drug Inspector had extended order under Section 22(1(c) of the Act, not to dispose of stock of propylene Glycol Technical Grade, for a further period of 20 days and the said order was delivered upon the petitioner(s) -M/s Digital Vision 'through Vinod Jangid' and was duly complied with by petitioner(s)-M/s Digital Vision. On that day itself, report of Government Analyst, with respect to sample No.NHN/19/94 Coldbest-PC Syrup Batch No.DL5201, drawn on 15.02.2020, was also served upon petitioner(s)-M/s Digital Vision 'through Vinod Jangid' with notice to express intention, if any, of petitioner(s)-M/s Digital Vision to adduce evidence in controversion of the report of Government Analyst by notifying it in writing within a period of 28 days. On that very day, petitioner(s)-M/s Digital Vision, were directed to provide detail of stock Coldbest-PC Syrup Batch No.DL5201, which was received from the market after 26.02.2020 till date. This direction was served upon petitioner(s)-M/s Digital Vision 'through Vinod Jangid', whereto, Vinod Jangid had replied on the very same day, stating in writing that no physical stock of Coldbest-PC Syrup Batch No.DL5201 drug was received after 25.02.2020 and the stock received before 25.02.2020 had already been seized by the Drug Inspector.

56. It is pertinent to mention that on 04.03.2020, 'Vinod Jangid' had informed in writing that Parshotam Lal Goyal and other partners of the firm are not coming to the Factory from two days i.e. from the date of registration of FIR against the firm. Record reveals that on 11.03.2020, when additional sample was drawn in the Court, 'Vinod Jangid' was present and had witnessed production of seized stock of drug and taking of additional sample therefrom and resealing of remaining stock of drug. On the back side of Form No.17, his detailed note is there. He had refused to accept the cost of the sample drawn and, thus, Form No.17A was served upon him, copy whereof, has been duly signed by him. Request of Form No.18 to Government Analyst was also prepared in his presence and he has signed the copy thereof as a witness thereto. Detailed spot memo prepared by Drug Inspector in the Court on 11.03.2020, has also been witnessed and signed by 'Vinod Jangid'.

57. Report of Government Analyst with respect to sample number NHN/19/103, wherein additional sample was drawn and sent to Government Analyst Chandigarh, was also served upon petitioner(s)-M/s Digital Vision on 20.03.2020 alongwith forwarding letter dated 20.03.2020 'through Vinod Jangid' with note

thereon that in case petitioner(s)-M/s Digital Vision intends to adduce evidence in controversion of Government Analyst, firm may notify the same to the Drug Inspector within a period of 28 days from the receipt of report. After three days thereof, petitioner(s)-M/s Digital Vision, were provided protection of anticipatory bail by the High Court. In response to letter dated 20.03.2020 served upon them 'through Vinod Jangid', intention to adduce evidence to controvert report of the Government Analyst, was notified by petitioner(s) - M/s Digital Vision vide letter dated 15.04.2020 and in these circumstances, I find sufficient material to hold that presence of Vinod Jangid, in the Court on 11.03.2020, at the time of production of seized stock of drug and taking additional sample therefrom, was sufficient representation of petitioner(s)-M/s Digital Vision. Though, learned CJM has failed to mark his presence in its order or order-sheet, but the same does not render the order passed by learned CJM and taking additional quantity of sample at the time of production of seized stock of drug in furtherance to the order passed by learned CJM, as illegal. Failure to mark presence of Vinod Jangid, in the order-sheet, is mere irregularity which does not convert presence of Vinod Jangid in the Court into absence.

58. Presence of Vinod Jangid on 11.03.2020 in the Court at the time of production of seized drug and taking sample therefrom, indicates that petitioner(s)-M/s Digital Vision were having knowledge of filing of application by the Drug Inspector for drawing additional sample. Application was filed on 09.03.2020 and before that Drug Inspector had inquired from Vinod Jangid as to whether there is any other stock available in the Factory, received from the market after 25.02.2020 and on the very same day, additional quantity/ sample was drawn in presence of Vinod Jangid. Therefore, plea of petitioner(s)-M/s Digital Vision that they were not having information about filing of application by the Drug Inspector for taking additional quantity of sample, appears an afterthought, particularly for the reason that even after receiving the report of Government Analyst prepared after conducting test on the basis of additional sample, which was supplied on 20.03.2020 'through Vinod Jangid' to him, there is no whisper on the part of petitioner(s)-M/s Digital Vision in its response communication dated 15.04.2020, notifying intention to controvert the report by adducing evidence, objecting additional sampling by Drug Inspector on 11.03.2020 much less about absence of representation of petitioner(s)-M/s Digital Vision.

59. Section 2(h) of Cr.P.C. defines 'investigation', but does not prohibit the Magistrate from allowing investigation or part thereof, including taking of sample in the Court premises in his presence. It only says that investigation includes all proceedings under Cr.P.C. for collection of evidence conducted by Police Officer or any other Officer other than Magistrate, who is authorized by the Magistrate in this behalf. In fact, this definition is to be read with reference to Criminal Procedure Code, particularly definition of 'inquiry' provided under Section 2(g) of Cr.P.C., wherein it is defined that 'inquiry' means every inquiry other than trial conducted under Cr.P.C. by a Magistrate or Court. Further, the Act, dealing with

Drugs and Cosmetics is a special law. Whereas, Cr.P.C. deals with general provisions of investigation and inquiry. In the Act, there is no such prohibition as contended by and on behalf of petitioner(s) -M/s Digital Vision and further allowing taking of sample in presence of learned Magistrate, does not amount collection of evidence by the Magistrate as learned CJM had ordered production of seized stock of Drug and allowed taking of additional sample therefrom on an application filed by Drug Inspector and the Drug Inspector in view of provisions of Section 22(1)(d) and for absence of specific provision for taking additional sample, was not only constrained but also entitled to file such application and learned Magistrate was having jurisdiction to pass an order therein allowing or disallowing the same in given facts and circumstances. Learned Magistrate has not acted for collecting the evidence but it is Drug Inspector who is doing so.

60. It is true, as contended on behalf of petitioner(s)-M/s Digital Vision, that samples of drug taken on 15.02.2020 were found of "standard quality", but in those samples, as per report dated 05.03.2020, sample from NHN/19/94, pertaining to Code No.DL5201, was found of "standard quality" but it was also mentioned in the report that sample was not tested for Diethylene Glyco. Remaining samples were pertaining to different batches and drug therein, as per reports dated 01.04.2020, was tested negative for Diethylene Glycol and sample of propylene Glycol bearing No.NHN/19/99 taken on 15.02.2020, as per report dated 16.03.2020, was also of "standard quality".

61. Perusal of report dated 05.03.2020, pertaining to sample No.NHN/19/94 dated 17.02.2020 from Batch No.DL5201, indicates that tests sample for Average filled volume, Uniformity of volume, pH and contents of Paracetamol, Phenylephrine Hydrochloride and Chlorpheniramine Maleate, was not tested due to insufficient sample quantity. Therefore, in absence of aforesaid tests, it cannot be said that sample of drug sent to Government Analyst was sufficient for conducting tests including test for Diethylene Glycol and further in absence of these tests, report declaring sample of "standard quality" is to be considered only with respect to test conducted by the Government Analyst.

62. As additional sample drawn on 11.03.2020 was sent to the Government Analyst through Form No.18 by mentioning same sample number of initial sample i.e. NHN/19/103, therefore, Government Analyst, in his report dated 20.03.2020, has rightly mentioned serial number and date of Inspector Memorandum as NHN/19/103 dated 26.02.2020. It is for the reason that additional sample was requisitioned by Government Analyst in continuation of Inspector's Memorandum dated 26.02.2020 and the additional sample was sent with reference to original number of initial sample. After resealing seized stock of drug in the Court, it has been resealed by Drug Inspector by its own seal and seal of learned CJM has been put thereon in addition thereto. Provisions of the Act provided sealing of sample by Drug Inspector, which has been done, however, it has also been sealed with seal of learned CJM also. Putting additional seal of learned CJM on the seized stock of drug, does not vitiate the procedure

adopted and completed by Drug Inspector in consonance with Sections 22 and 23 of the Act for taking sample.

63. Plea of the petitioner(s) -M/s Digital Vision that instead of additional sample, re- sampling of sufficient quantity should have been done and different number to the said sample should have been assigned is also not accepted for the reason that in both eventualities, sample would have been taken from the seized stock of drug lying in custody of Drug Inspector and for that purpose no other, but same procedure, as adopted by learned CJM, would have been adopted. In my opinion, no prejudice has been caused to the petitioner(s)-M/s Digital Vision by taking additional sample as assigning of different or new number would not have changed contents of the sample of the drug.

64. Plea that in the report of Government analyst nominal value of sample has been mentioned as 60 ml and, therefore, there was or is no requirement of additional sample for having requisitioned, is not sustainable for the reason that this nominal value of 60 ml is with reference to one Unit of the sample as each bottle as also claimed by petitioner(s)-M/s Digital Vision, contains 60 ml of drug and, therefore, mentioning of nominal value of 60 ml does not construe that only 60 ml of drug was required for conducting test.

65. Plea raised on behalf of petitioner(s)-Digital Vision that retesting by CDL, Kolkata is to be conducted only with respect to components for which drug has been reported "not of standard quality" or "adulterated", is not substantiated from the provisions of the Act as Section 23 nowhere restricts retesting by CDL, in such manner and, therefore, not accepted.

66. There is no explicit prohibition for taking additional sample in situation like present one, but definitely there is explicit provision under Section 22(1)(d) of the Act enabling the Inspector to take all steps to carryout provisions of the Act and taking additional sample on the demand raised by Government Analyst, to provide sufficient quantity of sample for testing, is definitely an act on the part of Drug Inspector for carrying out the purposes of the Act. Otherwise also, Drug Inspector has power to investigate and 'investigation' is a wide term, which cannot be given a restricted meaning, in terms of explicit provisions only, but Investigating Agency would necessarily have independence to adopt process to collect evidence, but definitely within four corners of relevant law and in present case, by approaching learned CJM and following procedure provided under Section 23 read with Section 22 of the Act, Drug Inspector has acted within the parameters of the Act.

67. In aforesaid circumstances, request of Government Analyst for sending additional sample and action in sequel thereto, taken by the Drug Inspector and also order passed by learned CJM, is in consonance with spirit of provisions of the Act and it cannot be termed as a step of framing new Regulations or creating law and procedure beyond the Statute or contrary to provisions and spirit of Statute.

68. Plea of petitioner(s)-M/s Digital Vision that at the first instance only four bottles drawn as a sample at initial stage should be sent and additional sample of twenty bottles should be sent only in case the demand is raised by CDL, Kolkata, is also rejected on the ground that petitioner-firm itself is claiming that delay in process is causing harm to its business whereas by sending four bottles of initial sample at first instance and sending of another twenty bottles of additional sample later on would definitely consume more time in comparison to the manner in which learned CJM, has ordered to send the samples to CDL, Kolkata i.e. both initial and additional sample together with direction to CDL, Kolkata, to open four bottles first to conduct requisite tests and in case quantity is found insufficient, then to open additional sample of twenty bottles.

69. Issue with respect to cause of death is not to be decided in present petition(s) and, therefore, no opinion to the arguments advanced, on this count, is being expressed by this Court.

70. Though, in Cr.MMO No.180 of 2020, prayer for quashing and setting aside criminal proceedings against petitioner(s)-M/s Digital Vision culminated on account of FIR No.21 of 2020, has been made, but learned counsel for the petitioner has not pressed this prayer in this petition with liberty to file fresh comprehensive petition exclusively for the said purpose, if necessity arises to do so. This prayer is accepted with liberty as prayed for.

71. In view of aforesaid discussion impugned orders dated 11.03.2020 and 02.05.2020 passed by learned CJM are upheld and petition(s) are dismissed, in aforesaid terms. Pending application(s), if any, also stand disposed of.