
(2009) 02 KL CK 0027

In the High Court Of Kerala

Case No : Criminal M.C. No's. 1814, 1893 etc. of 2008

Pepsico India Holdings Pvt. Ltd.

APPELLANT

Vs

The Food Inspector, Thiruvananthapuram and Another

RESPONDENT

Date of Decision : 19-02-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 205, 218, 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 141
Prevention of Food Adulteration Act, 1954 — Section 13, 13(2), 16, 17, 17(1)(a)

Citation : (2009) CriLJ 2224 : (2009) 1 ILR (Ker) 809 : (2009) 1 KLJ 665 :
(2009) 2 KLT 69 : (2010) 6 RCR(Criminal) 2612

Hon'ble Judges : R. Basant, J

Bench : Single Bench

Advocate : M.A. Shaffique, E.K. Nandakumar and A.K. Jayasankar Nambiar, for the Appellant; P. Raveendra Babu (P.P), for the Respondent

Final Decision : Dismissed

Judgement

R. Basant, J.—M/s. Pepsico India Holdings Pvt. Ltd. - a beverages manufacturer and its Directors, face prosecutions before various courts in the State of Kerala. They have come to this Court with these CrI. M.Cs. with a prayer that the prosecutions launched against them may be quashed on various grounds raised by them invoking the extraordinary inherent jurisdiction of this Court under Sec. 482 Cr.P.C. To the skeletal facts first. Samples of carbonated beverages allegedly manufactured by M/s. Pepsico India Holdings Pvt. Ltd., were purchased by the Food Inspectors at various centres in the State. They were sent to the Public Analysts. The Public Analysts analysed the samples in these cases and reported that the samples of carbonated beverages analysed by them were adulterated. They have furnished their opinion in the prescribed form. Thereupon, prosecutions were launched. It is important to straightaway note that the option under Sec. 13(2) of the Prevention of Food Adulteration Act, 1954 (for short "the Act") was not invoked by the inditees in all these cases. They have come up in challenge against the cognizance taken against them on various grounds.

2. At the outset it must be mentioned that the learned Public Prosecutor was requested to specify why and how it is said that the article is adulterated. The learned Public Prosecutor was also requested to specify the precise allegation as to how the samples of carbonated beverages can be said to be adulterated. The learned Public Prosecutor, after elaborate discussions at the Bar and after taking specific instructions, has stated categorically that the prosecution stands by the allegation in all these cases that the samples of carbonated beverages purchased were adulterated under Sec.2(ia)(h) of the Act. The crux of the allegations now is only that the samples in question were found to contain pesticide residue-carbofuran carbaryl etc., which render the articles injurious to health and consequently they are adulterated under Sec.2 (ia)(h) of the Act. At the very outset I would like to note that there were certain other allegations raised when the hearing started; but, in the course of discussions, it is now stated unambiguously that the State wants to prosecute the indicates herein on the sole allegation that the samples of carbonated beverages purchased by the Food Inspectors are adulterated under Sec.2(ia)(h) of the Act. I say so because initially it appears that there was confusion as to whether the articles can be said to be adulterated under Sec.2(ia)(1) or Sec.2(ia)(m) of the Act or whether the prosecution is for violation of Rule 65 of the Prevention of Food Adulteration Rules, 1955 (for short "the Act"). In the light of the specific stand taken by the learned public Prosecutor it is not necessary for me to advert to those aspects in detail at all. The allegation now, I note, is only that the articles are adulterated under Sec.2(ia)(h) of the Act.

3. It is unnecessary for me to specifically advert to the precedents which define and delineate the jurisdiction of this Court under Sec.482 Cr. PC. The Supreme Court in a number of decisions has laid down the parameters within which this Court has to consider whether the powers under Sec.482 Cr.P.C. deserve to be invoked or not. Where the indictment is grossly unjustified and unreasonable and the very initiation of the proceedings amounts to abuse of the process of court, such powers can be invoked. It is not necessary for me to advert to the various precedents on the point. Suffice it to say that the relevant precedents have been brought to my notice. The mantra to unlock the door of Sec.482 Cr.P.C. is failure/misconduct of justice and consequent abuse of process. If the proceedings suffer from that vice, the door opens.

4. The learned counsel for the petitioners submits that the cognizance taken against the petitioners is totally unjustified and prays for invocation of the extraordinary inherent jurisdiction under Sec.482 Cr.P.C. to quash the prosecutions against the petitioners on the following six specific grounds:

(1) No rules having been framed at the relevant time under Sec.23(1-A)(ee) of the Act by the Central Government defining the laboratories where samples of articles of food or adulterants may be analyzed by the Public Analysts under this Act., the Public Analysts who have submitted the relevant reports in all these prosecutions cannot be held to have complied with the law and therefore their

reports are liable to be eschewed and ignored.

(2) No methods of analysis having been defined under Sec.23(1A)(hh) of the Act by the Central Government, the reports submitted by the Public Analysts by following whatever methods submitted by the Public Analysts by following whatever methods they thought to be appropriated are not valid and correct and cannot be accepted at all - even at this stage.

(3) At any rate, there are no validated methods of analysis identified by the scientist so far to ascertain the percentage pesticide residue present in a carbonated beverage (i.e., a complex matrix article) and therefore the reports of the Public Analysts cannot be reckoned as legally acceptable to found prosecutions against the petitioners.

(4) The Public Analysts the reports issued by them have not specifically opined that the presence of pesticide residue at the levels detected by them is injurious to health and consequently their conclusion that the article is adulterated under Sec.2(ia)(h) of the Act cannot be legally taken cognizance of.

(5) Even assuming that the Public Analysts in their reports have opined that the presence of pesticide residue at the levels detected by them are injurious to health, their opinion that the presence of pesticide residue at that level renders the articles injurious to health under Sec.2(ia) of the Act is perverse and cannot be accepted - even at this stage.

(6) At any rate, in the light of the decision in S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, , the indicates who are only Directors of the company and against, whom no better or specific allegations are raised are not liable to face prosecution.

5. Detailed arguments have been heard. I shall now proceed to consider the challenge raised on the six specific grounds referred above.

6. Grounds 1 and 2: The challenge raised on grounds (1) and (2) above relate to the non-framing of the rules as enabled by Sec.23(1-A)(ee) and (hh) of the Act. I extract the relevant statutory provisions in Section 23(1-A)(ee) and (hh) of the Act.

23. Power of the Central Government to make rules - (1) The Central Government may, after consultation with the Committee and after previous publication by notification in the Official Gazette, make rules to carry out the provisions of this Act:

(1-A) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

(ee) defining the laboratories where samples of articles of food or adulterants may be analysed by public analysts under this Act.

(hh) defining the methods of analysis.

It is accepted that at the relevant time there were no rules framed by the Central Government invoking the powers under Sec.23(1-A)(ee) and (hh) of the Act. The learned counsel for the petitioners advances a contention that in the absence of such rules and in the absence of specification of the laboratories where the tests can be undertaken as also the methods of analysis for conducting such tests, the reports of the public Analysts have got to be ignored and eschewed. The learned counsel for the petitioners contends that when law mandates certain things to be done in a certain manner, such acts cannot be performed in any other manner and therefore in the absence of rules, the Public Analysts cannot test the articles in any laboratory of their choice and adopting any method in their professional discretion.

7. The point has been canvassed very seriously. But I am afraid I cannot concur with the arguments advanced by the learned counsel for the petitioners. It will not be inapposite in this context to note that Sec.23(1-A)(ee) and (hh) of the Act were introduced long after the enactment of the Act by amendment in 1976. Till then, such provisions were not there enabling the Central Government to frame rules on these aspects. The Public Analysts and the CFL were following appropriate methods using their professional acumen. I shall straight away take note of the provisions for appointment of a Public Analyst under Sec.8 of the Act and for setting up of a Central Food Laboratory under Sec.4 of the Act. Law obliges the State and Central Governments to appoint and constitute Public Analysts and Central Food laboratories. They are supposed to be scientific and technical experts. Their duty/responsibility is to analysis the samples forwarded to them and opine whether they are adulterated. The persons to be appointed as Public Analysts and in the Central Food Laboratories are persons who must possess the requisite scientific and technical qualifications. Their reports can be accepted. It is easy for me to presume that the law has assumed that they are competent to give reports on question referred to them. They can follow whatever methods are available to them in their field of expertise to analyses and examine the samples. I find it impossible to accept the contention that if the Laboratories are not specified and the methods of analysis are not defined as per Rules framed under Sec. 2(1-A)(ee) and (hh) of the Act, the mechanism of the Act and Rules must come to a grinding halt and the courts will have to discard the reports submitted by the Public Analysts and the Central Food Laboratories for that simple reason. That cannot obviously be the law. That is indicated convincingly by the Act. From the fact that the Act till it was amended in 1976 did not contain provisions enabling the formulation of rules specifying laboratories and defining methods of analysis, it is evident that it is not mandatory that such Rules must be framed and until such Rules are framed, no test can be conducted by the Public Analyst/Central Food Laboratory. The scheme of the Act and the Rules mandate that the court has to presume that the Public Analysts and Central Food Laboratories are competent to give opinion on the questions referred to them and that they shall do them in accordance with the expertise which is expected from them.

8. Why then has the Act been amended to include Sec.23(1-A)(ee) and (hh) of the act? I find the answer simple. It is possible that the Central Government may feel that certain particular tests cannot be conducted or permitted to be conducted in every laboratory set up. If the Government is satisfied that special equipment and infrastructure or special competence is required for analysis of a specified article, it is open to the Government to make rules and insist that such samples cannot be tested at all places; but must be tested at certain specified places where alone the requisite infrastructure for such test is available. Similarly, if a particular method of analysis has got to be followed in the analysis and examination of any given article because of certain peculiar demands or challenges in the analysis of such an article, it is open to the Central Government to formulate rules defining methods of analysis for such articles. Sec. 23(1-A) (ee) and Sec. 23(1-A)(hh), according to me, are only enabling provisions and not provisions which are mandatory. If there be a dispute in the scientific community as to what tests are to be followed in the analysis of an article, the Central Government can settle the controversy by formulating rules under Sec. 23(1-A) (hh) of the Act insisting that specified tests have to be conducted. Similarly, if there be a controversy as to what infrastructure of materials or personnel, is necessary to conduct a proper analysis, the Central Government can frame rules under Sec. 23(1-A)(ee) of the Act to specify that only specified laboratories having such infrastructure or competent personnel alone shall be competent to conduct such analysis. There is no contention that any such rules have been formulated for analysis of carbonated beverages. Non-formulation of rules and Sec.2(1A)(ee) and (hh) cannot therefore be held to be fatal to these prosecutions.

9. In these circumstances, I turn down the challenge raised against the prosecutions initiated against the petitioners on these two grounds. I may hasten to observe that the option of the medicates to challenge such reports of the Public Analysts on the ground that the laboratory in which the test was conducted was not adequately equipped and did not have the infrastructure to conduct the analysis or that the tests which the Public Analysts claim to have conducted are not the appropriate tests for the occasion shall always be available to them in the course of trial.

10. Grounds 3, 4 & 5: We now come to the challenge raised on grounds (3), (4) and (5). I choose to take up the three grounds together as in all of them one common argument, inter alia, is advanced by the learned Public Prosecutor. The learned Public Prosecutor submits that these are all contentions which the court should not bother to consider now and the court must take note of the fact that the petitioners who had the option to get the report of the Central Food Laboratory have not chosen to get such report. Under Sec. 13 of the Act we have provisions which confer on the indictee a right to raise a technical appeal against the findings/report of the Public Analyst. The report of the Public Analyst is not final. The law zealously protects the right of the indictee to challenge the opinion of the Public Analyst in the report submitted by him by preferring a technical

appeal under sec. 13(2) of the Act to the Central Food Laboratory.

11. The learned Public Prosecutor submits that the contentions raised under grounds (3), (4) and (5) cannot be heard to be advanced now as the indictees have not chosen to take resort to the valuable right which is available to them under Sec. 13(2) of the Act. An indictee who has chosen not to invoke such a valuable right conferred on him invoking which he could have brought the prosecution to premature termination at the threshold itself cannot now be permitted to seek the invocation of the extraordinary inherent jurisdiction vested in this Court under Sec.482 Cr.P.C. to achieve that result. It may be true that even when a technical appeal is not filed by him under Sec. 13(2) of the Act, in the course of the trial, the iniciee may insist that the Public Analyst must be made available for cross-examination and even without preferring such a technical appeal the conclusion of the Public Analyst may be questioned in the course of trial as totally unacceptable. The learned Public Prosecutor submits that, at any rate, this Court must be circumspect and should not choose to invoke the extraordinary inherent jurisdiction under Sec.482 Cr.P.C. in favour of an indictee who has not chosen to invoke such valuable right of technical appeal which is available to him. I shall later advert again in detail to this contention of the learned Public Prosecutor which does appear to me to be very impressive. I need only note now that no satisfactory explanation is offered as to why the petitioners, if they wanted to bring the prosecution to premature termination at the threshold on those grounds, did not choose to invoke their option to prefer a technical appeal. I am conscious of the fact that even without a technical appeal under Sec. 13(2) of the Act the indictee may have the opinion at the stage of trial to endeavour to show that the Public Analyst's report cannot be accepted on its intrinsic worth.

12. Having referred to the above broad contention which is pressed into service by the learned Public Prosecutor to resist the challenge on grounds (3), (4) and (5), I shall now proceed to consider the challenge raised on these specific grounds.

13. Under ground (3), the learned counsel for the petitioners contends that the scientific and technological knowledge which is presently available to humanity is insufficient for any expert to render an authentic opinion on the question whether a carbonated beverage a complex matrix substance, contains pesticide residue and the percentage thereof. An authentic opinion on this aspect - as to whether pesticide residue is present to any specified extent, cannot be rendered by any one, contends the learned counsel for the petitioners. The learned counsel further contends that the Public Analysts in these cases have mentioned that the DGHS method was followed by them to give the opinion which they have given in the reports. The learned counsel for the petitioners contends that there is no such method at all and it is impossible for any Public Analyst to follow the DGHS method to identify the level of pesticide residue in a complex matrix carbonated beverage. Both sides have relied on texts and authorities. Reliance is placed on

certain stands taken by the Union Government in proceedings before courts and it is contended that in the total absence of any such method, the reports of the Public Analysts cannot legally be taken cognizance of for any purpose. Hence the prosecutions launched and cognizance taken on the basis of such reports cannot be accepted, it is contended.

14. I have considered this aspect in detail. I have been taken through the relevant scientific material which is available. I need only mention that at this stage and with the available inputs it appears to be impossible for me to come to any specific conclusion on the question whether such a validated method is there or not. I have no hesitation to agree that such question can be decided only when the Public Analyst who asserted that he had conducted the examination and had come to a conclusion about the percentage of pesticides is tested by a cross examination. Only thereafter can it be decided whether the Public Analyst is justified in coming to this conclusion on the basis of methods known to science and technology now. Detailed arguments have been advanced. But I find myself unequal to answer that question authentically at this stage and with the available inputs. I have no hesitation to agree that the Public Analyst can be called in and his opinion can be tested by cross-examination before a decision is taken on the question whether the method which the Public Analyst claims to have followed is acceptable or not. Suffice it to say that an authentic opinion on that question at this stage does not appear to be possible. I shall not venture to do the same. In this context, I take note of the general argument advanced by the learned Public Prosecutor that this contention that no validated methods at all are available is being raised by the petitioner who have not chosen to take resort to the provisions for technical appeal which is available to them under Sec. 13(2) of the Act. The stand taken by the Executive Government in certain proceedings before courts are, according to me, insufficient for this Court now to squander and throw over board the material that is available in the form of Public Analysts' reports which have not been superseded by the reports of the CFL under Sec. 13(2) of the Act. The report of the Public Analyst is entitled to respect, authenticity and acceptability until it is superseded under Sec. 13(2) or until it is shown to be unacceptable on the basis of material produced in the course of trial.

15. The learned counsel for the petitioners contends that the petitioners are fully aware and convinced that there is no point in sending the sample to the Central Food Laboratory as there is no known method in science by which the Central Food Laboratory can conduct the examination and give the result. I must assume that if that were the situation, the Central Food Laboratory would have mentioned that in the report to be submitted by them when the technical appeal comes up before them for consideration. It will be idle for me now to assume that the Central Food Laboratory would not have been able to conduct the test or that they would have conducted the test without the requisite knowledge and know how and would have submitted their report after such examination. I am not satisfied with the explanation offered by the petitioners for not taking resort to the provisions for technical appeal which is available under Sec. 13(2) of the

Act. Certainly I cannot now assume that the Central Food Laboratory would not have been able to test and give an opinion as to whether the Public Analyst's report can be accepted or not. If no validated methods exist in human knowledge and it is impossible now to ascertain the pesticide residue level in carbonated beverages, I would expect the CFL while entertaining the technical appeal under Sec. 13(2) to state that. I will not lightly assume at this stage that the CFL would not have said so in its report. I am, in these circumstances, not satisfied at all that the explanation for not sending the article to the Central Food Laboratory can be accepted. I may hasten to report that this is not to say that the petitioners cannot challenge the report of the Public Analyst in the course of trial notwithstanding their omission/failure to send the article to the Central Food Laboratory under Sec. 13(2) of the Act. That question shall be considered later at the appropriate stage.

16. The learned counsel for the petitioners under ground (4) contends that there is no specific statement of the Public Analysts in the reports submitted by them that the sample analysed by them were injurious to health. The learned counsel for the petitioners has taken me through the reports submitted by the public Analysts in all these matters to contend that the Public Analysts had not made a specific statement that the article is injurious to health for that reason. The Public Analysts had only said that the article is adulterated under Sec.2(ia)(h) and there is no specific statement that the article was found to be injurious to health. The learned counsel contents that a specific statement that the article is injurious to health is not made in the reports submitted by the Public Analysts.

17. The learned counsel for the petitioners submits that the absence of such a specific statement assumes graver significance, when it is seen that the Public Analyst has in all the reports opined that the very presence of insecticide residue is objectionable. The learned counsel for the petitioners succinctly contends that not only what is not stated in the reports; but also what is stated in the reports assume significance and hence his contention must be accepted even at this stage that these reports are not sufficient to conclude that the carbonated beverages analysed by the Public Analysts are adulterated. I cannot say that I am too happy with the manner in which the opinion is expressed by the Public Analysts. But all the same, in all these prosecutions the Public Analyst has stated specifically that the article is adulterated under Sec. 2(ia)(h) of the Act. I agree with the learned counsel for the petitioners that the specific statement that the article is injurious to health is not mentioned in some reports; but it is mentioned that the article is adulterated under Sec.2(ia)(h) of the Act in all these cases. In some of the reports, we find such statement that the article is injurious to health is also mentioned. In some, that has not been specifically mentioned.

18. When a Public Analyst states in his report that the article adulterated under Sec.2(ia)(h) of the Act, it will be idle for the court to look for specific statement again that the article was found to be injurious to health. Sec. 2(ia)(h) of the Act reads as follows:

2. Definitions. In this Act unless the context otherwise requires,-----

xxxxxxxxxxxxx xxxxxxxxxxxx

(ia) "adulterated" an article of food shall be deemed to be adulterated---

xxxxxxxxxxxxx xxxxxxxxxxxx

(h) if the article contains any poisonous or other ingredient which renders it injurious to health.

19. When a Public Analyst states that an article of food is adulterated under Sec. 2(ia)(h) of the Act, at least, at the threshold this Court will have to presume that amounts to a statement that the article is adulterated in accordance with Sec.2(ia)(h) and that is that "the article contains any poisonous or other ingredient which renders it injurious to health". Even in the absence of a specific re-statement/statement that the article is injurious to health and hence adulterated, a statement in the report of the Public Analyst that it is adulterated under Sec.2(ia)(h) must be assumed to bring with it the statement that it is injurious to health. This, I must remind myself, is not an occasion when this Court attempts to weigh the materials in golden scales and this is not the occasion to concede the benefit of doubt to any one. In these circumstances, even in the absence of a specific statement that the carbonated beverages examined by the Public Analyst is injurious to health in some of the reports of the Public Analyst., I am satisfied that the statement that it is adulterated under Sec.2 (ia)(h) of the Act is sufficient at this stage to justify the prima facie satisfaction that the article is injurious to health and support the cognizance taken by the learned Magistrate. It is contended that the Public Analysts were under a mistaken impression that no pesticide residue at all should be present in any article of food and that their opinion that the article is adulterated is based solely on that mistaken impression. I find no merit in this contention. The specific statement in all the reports admittedly is that the article is adulterated under Sec.2(ia)(h) and not merely that it violates Rule 65 of the Rules. In these circumstances, the mere fact that violation of Rule 65 is also alleged/indicated in some reports does not and cannot militate against the opinion that the article is adulterated under Sec.2(ia)(h) of the Act.

20. The learned counsel for the petitioners under ground No.(5) contends that the presence of insecticide residue is not prohibited in any article. The mere fact, that such insecticide residue is present to any extent cannot justify an allegation that the article is adulterated. The learned counsel for the petitioners submits that even in carbonated water under Entry A.33 of Appendix B of the Rules the presence of pesticide residue is not totally barred or prohibited and the mere presence of pesticide residue in carbonated beverages cannot hence justify a conclusion that the article has become injurious to health. I am inclined to agree with the learned counsel for the petitioners that the mere presence of insecticide residue cannot ipso facto justify a conclusion that the article has become injurious to health. The learned counsel for the petitioners draws inspiration from

Rule 65 of the Rules and contends that Rule 65 does not make the presence of insecticide residue in any article of food objectionable; nor is an instant inference permissible that such presence would ipso facto render the article injurious to health. I have been taken through the details of Rule 65 of the Rules.

65. Restriction on the use of insecticides.-- (1) Subject to the provisions of sub-rule (2), no insecticide shall be used directly on articles of food:

(2) The amount of insecticide mentioned in column (2) on the foods mentioned in column (3) shall not exceed the tolerance limit prescribed in column 4 of the Table given below:-

Explanation:- For the purpose of this rule:

(a) the expressions "insecticide" shall have the meaning assigned to it in the Insecticides Act, 1968 (46 of 1968);

(b) unless otherwise stated-

(i) xxxxxxxxxxxxxxxx

(ii) all foods refer to raw agricultural products moving in commerce.

(3) xxxxxxxxxxxxxxxx

(emphasis supplied - unnecessary portions omitted)

21. Rule 65(1) does not place an embargo on the presence of insecticide residue in any article of food. Rule 65(1) only mandates that "no insecticide shall be used directly on articles of food". The prohibition or the embargo is only against use directly of the insecticide on any article of food. Rule 65(1) as rightly contended by the learned counsel for the petitioners may not justify an inference that whenever insecticide residue is found to be present in an article of food, the inference must follow that such insecticide residue must have been "used directly" on such article of food. Rule 65(2) also reveals that in many articles of food the presence of insecticide residue is permitted or reckoned to be not objectionable, provided such presence is within the tolerance limits prescribed. The learned counsel for the petitioners builds up an argument of this and contends that this shows that the presence of insecticide residue to any extent cannot lightly lead to the inference that the article is injurious to health and hence adulterated. The learned counsel for the petitioners has taken me through the details of the table given in Rule 65 (2) of the Rules to contend that in many articles tolerance limit of insecticide residue prescribed is much higher than what has been detected by the Public Analyst in the samples as per the reports submitted by them. The argument of the learned counsel is that merely because insecticide residue was found present at the levels reported in the reports by the Public Analyst, a ready and instant conclusion that the article injurious to health cannot be drawn or accepted.

22. I cannot agree that in all other articles (not mentioned in the Table to Rule

65(2) of the Rules) insecticide residue can be present upto the maximum limit of tolerance permitted for any one of the articles listed in the Table under Rule 65(2) of the Rules and the article cannot be held to be adulterated under Sec. 2(ia)(h) for that reason. That differential tolerance limits are prescribed for various articles of food in the table under Rule 65 of the Rules must itself convey to the court that the tolerance limit permitted must have relevance to many other factors in relation to the specific article. That tolerance limit of pesticide residue for a specified article is fixed at a much higher rate in the Table cannot justify the contention that the presence of pesticide residue upto that level in other non-specified articles would not be objectionable or that such other articles would not become injurious to health for that reason. It may not be inapposite to straightaway not that under the Explanation to Rule 65 all food refer to raw agricultural products moving in commerce. Carbonated beverages in the instant cases go directly into the system of the consumer and merely because a higher tolerance limit is prescribed for pesticide in raw agricultural products moving in commerce (which may undergo washing, cleaning and processing before actual consumption), I will not be justified in coming to the conclusion that the presence of insecticide residue at lower levels in the carbonated beverages concerned cannot render such carbonated beverages injurious to health. I will not be justified in discarding and eschewing Public Analyst's report for that reason at this stage.

23. The question then is at what level the presence of the insecticide residue in carbonated leverages would become injurious to health. Different standards are seen prescribed in different countries of the world for carbonated water as pointed out by the learned counsel for the petitioners. I do notice that the pesticide residues actually found by the Public Analysts in the samples of carbonated beverages in these cases are far in excess of the maximum specified for carbonated water under Entry 33 of Appendix-B. I need only mention that the Public Analysts in these cases have opined that insecticide residue was found to be present in the articles of food - i.e. carbonated beverages at the levels shown in the reports and that makes them injurious to health and hence adulterated u/s 2(ia)(h). Though it is not stated in so many words in the reports, the irresistible conclusion to which a reasonably prudent mind must sail on the basis of the report of the Public Analyst is that the presence of insecticide residue at that level will make the samples of carbonated beverages injurious to health. The question has now got to be considered on the basis of the reports of the Public Analysts. The petitioners' option to show that opinion is incorrect shall remain. But at the moment and with the available inputs this Court will have to go by the reports of the Public Analysts which indicate that the presence of insecticide residue at the levels detected in the carbonated beverages do make them injurious to health. I do note again in this context that the option to challenge that opinion under Sc. 13(2) of the Act has not been utilised by the petitioners. I am not satisfied that the proceedings deserve to be quashed on the basis of this contention raised under ground No. (5).

24. The argument is advanced on ground No. (6) that the Directors are not liable to be prosecuted for the reasons that the requisite averments to attract culpability under Sec. 17 of the Act are not raised in the complaint. The learned counsel for the petitioners points out that none of these Directors are nominated Directors under Sec. 17(1)(a) of the Act. It is further contended that there is no requisite crucial averment in any of these complaints that any one of those Directors are "in charge of and responsible to the company for the conduct of the business of the company". From this with the help of the decision in *S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another*, it is contended that the prosecution against such non nominee Directors who are not alleged to be in charge of and responsible to the company for the conduct of the business is unjustified.

25. The petitioners rely on the dictum in *S.M.S. Pharmaceuticals Ltd.*, (supra) and contend that a Director in a Company cannot ipso facto be deemed to be in charge of and responsible to the company for the conduct of its affairs. In the light of Sec. 17(1)(a)(ii) of the Act, the complainant must specifically allege that the indicatee/Director was in charge of and was responsible to the company. In the absence of such specific averments, the indictment against such Directors/indictees deserve to be quashed, contends counsel. In particular, reliance is placed on the conclusions of the Supreme Court in *S.M.S. Pharmaceuticals Ltd.*, appearing in para-10(a) and (b) which I extract below:

10. In view of the above discussion, our answers to the questions posed in the Reference are as under:

(a) It is necessary to specifically aver in a complaint under Sec. 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of S. 141 and has to be made in a complaint. Without this averment being made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) The answer to question posed in sub-para (b) has to be negative. Merely being a director of a company is not sufficient to make the person liable u/s 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for conduct of its business. The requirement of S. 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

26. The learned Public Prosecutor, on the contrary, contends that the observations in *S.M.S. Pharmaceuticals Ltd.*, extracted above cannot be understood in any mechanical or rigid manner. Those observations were made in the mechanical or rigid manner. Those observations were made in the context of the offence under Sec. 138 of the Negotiable Instruments Act and in the light of

Sec. 141 of the N.I. Act. The learned Public Prosecutor contends that Sec. 17 of the Act and Sec. 141 of the N.I. Act are worded very differently and convey different schemes. Ordinarily a Director of the company by the mere fact that he is such Director must be held to be an agent of the company acting for and on behalf of the company and must be reckoned to be in charge of the company. Under Sec. 141 of the N.I. Act, unlike Sec. 17 of the Act there is no provision for nomination of a functionary. The nature of the offence under Sec. 16 and 17 of the Act are totally different. Non-payment of amounts to a specified payee or holder in due course within the stipulated time in spite of notice issued after dishonour of the cheque on specified grounds is the gravamen of the offence under Sec. 138/141 of the N.I. Act. The dispute there primarily is between two individuals - the drawer and the payee/holder in due course. That dispute is essentially a private dispute between two individuals and the interests of the State steps in only because of its anxiety to usher in and introduce a new and healthy commercial morality among the polity.

27. But different is the offence under Sec. 16/17 of the Act. The concern under Sec. 16/17 of the Act is the health of the community and the need to prevent availability of adulterated food for consumption by members of the polity. The purpose of the two statutes are different. Relevant provisions of the Statutes are differently worded (See Sec.138/141 of the N.I. Act and Sec.16/17 of the Act).

28. In this context it will be relevant to advert to the decision in *N. Rangachari Vs. Bharat Sanchar Nigam Ltd.*, . In that decision a two Judge Bench of the Supreme Court had occasion to consider the decision in *S.M.S. Pharmaceuticals Ltd.* Their Lordships have definitely doubted whether any further allegation/averment is necessary to bring in that element - of the Directors acting for and on behalf of the company and of the Directors being in charge of the company. I need only extract two passages from *Rangachari* to highlight this aspect. In para-13 the following observations and conclusions appear:

.....It appears to us that an allegation in the complaint that the named accused are directors of the company itself would usher in the element of their acting for and on behalf of the company and of their being in charge of the company,

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But as has already been noticed, the decision in *S.M.S. Pharmaceuticals Ltd.*, (Supra) binding on us, has postulated that a director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of its business in the context of S. 141 of the Act. Bound as we are by that decision, no further discussion on this aspect appears to be warranted.

(emphasis supplied)

29. The above observations seem to suggest that the dictum cannot be blindly

and mechanically followed in all contexts. Sec. 17(1)(a)(ii) of the Act speaks of a situation where no nomination is made under Sec. 17(1)(a)(i) of the Act. The Directors can normally be assumed to be acting for and on behalf of the company and the Directors if they want to avoid the liability under Sec. 17 of the Act, must, it appears to me prima facie, nominate a person under Sec. 17(1)(a)(i) of the Act who will then be responsible for offences, if any, committed by the company. Sec. 17(1)(a)(ii) of the Act deals with every person who at the time the offence was committed was in charge of and responsible to the company for the conduct of the business of the company and the said provision is not limited in its application to Directors of the company. From Sec. 17(1)(a)(ii) of the Act, it may be artificial to sail to the conclusion that a Director can be assumed to be not in charge of and responsible to the company for the conduct of the business of the company and hence not liable under Sec. 16 read with Sec. 17 of the Act. I intend to express no final opinion of the question. But I am satisfied, at any rate, that the dictum in *S.M.S. Pharmaceuticals Ltd.*, (supra) which is N.I. Act centric and Sec. 141 centric cannot be made applicable mechanically and rigidly to a prosecution under Sec. 16 read with Sec. 17 of the Act where the statutory destinations are different and distinct. The statutory scheme and semantics employed under Secs. 16 and 17 of the Act are definitely different from that in Secs. 138 and 141 of the N.I. Act. In these circumstances, I am of the view that the arguments raised on the 6th ground cannot also be accepted at this stage. It will only be proper to decide that question later trial after giving the parties opportunity to adduce all materials and advance all their contentions.

30. On the basis of the above discussions, I come to the conclusion that the prayer to quash the prosecutions against the petitioners invoking the jurisdiction under Sec. 482 Cr.P.C. cannot be accepted on any one of the 6 grounds referred above.

31. On the basis of the discussions, I come to the conclusion that there are no sufficient circumstances justifying the invocation of the extraordinary inherent jurisdiction to bring to premature termination the prosecutions against the petitioners. I may, however, hasten to observe that I have not intended to finally resolve any disputed question of fact and it shall be open to the petitioners to raise all relevant and appropriate contentions before the learned Magistrate when the matter comes up for trial. No conservations in this order shall fetter the rights of the petitioners to raise all relevant and appropriate contentions before the trial court.

32. The learned counsel for the petitioners submits that the ritualistic insistence on the personal appearance of the Directors on all dates of posting may not be made and appropriate directions may be issued. I find no reason to assume that any court would ritualistically insist on the personal presence of the indictees if such personal presence is not required for the progress of the case. Appropriate application under Sec. 205 Cr.P.C. can be filed by the indictees after they enter appearance and are enlarged on bail. The learned Magistrate must consider such

applications on merits and pass appropriate orders in the light of the decision in Alice George Vs. Deputy Superintendent of Police, .

33. Neither side has specifically made a request to that effect before me; but I am certainly of the opinion that to save judicial time and for a comprehensive resolution of all the question raised, it will be advantageous for the parties and the system to ensure that trial in all these cases are held before a competent senior Presiding Officer. Appropriate applications can be made so that it is not necessary to agitate that same question before different Magistrates at different centres. Even an application for a joint trial can be made by the petitioners under the proviso to Sec.218 Cr.P.C. and it is for the court concerned to consider whether such request can be accepted. If so advised, the parties may file the necessary applications for transfer/joint trial. Such requests shall be considered on merits by the courts concerned. In the result, these Crl.M.Cs. are dismissed with the above observations.