



COMPETITION COMMISSION OF INDIA

Reference Case No.: 02/ 2015

Filed by: Ministry of Agriculture and Farmers Welfare
(Department of Agriculture, Cooperation and
Farmers Welfare), Government of India **Informant**

Against: M/s Mahyco Monsanto Biotech (India) Limited **Opposite Party**
(MMBL)

With

Case No.: 107/ 2015

Filed by: Nuziveedu Seeds Limited **Informant No. 1**
Prabhat Agri Biotech Limited **Informant No. 2**
Pravardhan Seeds Private Limited **Informant No. 3**

Against: M/s Mahyco Monsanto Biotech (India) Limited **Opposite Party No. 1**
(MMBL)
Monsanto Company **Opposite Party No. 2**
Maharashtra Hybrid Seeds Company Limited **Opposite Party No. 3**
Monsanto Holdings Private Limited (MHPL) **Opposite Party No. 4**

With

Case No.: 03/ 2016

Filed by: All India Kissan Sabha (AIKS) **Informant**

Against: Monsanto Company **Opposite Party No. 1**
Maharashtra Hybrid Seeds Company Limited **Opposite Party No. 2**
M/s Mahyco Monsanto Biotech (India) Limited **Opposite Party No. 3**
(MMBL)

With



Reference Case No.: 01/ 2016

Filed by: Department of Agriculture and Cooperation, Informant
State of Telangana

Against: M/s Mahyco Monsanto Biotech (India) Limited Opposite Party No. 1
(MMBL)
Monsanto Company Opposite Party No. 2
Maharashtra Hybrid Seeds Company Limited Opposite Party No. 3
Monsanto Holdings Private Limited (MHPL) Opposite Party No. 4

With

Case No.: 10/ 2016

Filed by: National Seeds Association of India (NSAI) Informant

Against: M/s Mahyco Monsanto Biotech (India) Limited Opposite Party No. 1
(MMBL)
Monsanto Holdings Private Limited (MHPL) Opposite Party No. 2
Monsanto Company Opposite Party No. 3
Maharashtra Hybrid Seeds Company Limited Opposite Party No. 4

CORAM

Mr. Devender Kumar Sikri

Chairperson

Mr. S. L. Bunker

Member

Mr. Sudhir Mital

Member

Mr. U. C. Nahta

Member

Dr. M. S. Sahoo

Member



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Justice G. P. Mittal

Member

**Appearances
during the hearing
on 29th June, 2016:**

Shri Sunil Mathews, Advocate alongwith Ms. Reeja Varghese, Advocate and Shri C.P. Singh, Senior Technical Assistant for Ministry of Agriculture and Farmers Welfare, Government of India

Shri Amitabh Kumar, Advocate for Nuziveedu Seeds Limited

Shri Vaibhav Choukse, Advocate for Prabhat Agri Biotech Limited

Shri Murali Krishnan, Authorised Representative for Pravardhan Seeds Private Limited

Shri P. Shiva Rao, Advocate alongwith Shri M. Tulasirah, A.O. for Department of Agriculture and Cooperatives, Government of Telangana

Shri Vaibhav Gaggar, Advocate alongwith Ms. Neha Mishra, Advocate, Shri Saksham Daingra, Advocate, Shri Nirawank Kollipara, G.C. Member and Shri Kalyan B. Goswani, E.D. for National Seeds Association of India

Shri Ramji Srinivasan, Senior Advocate alongwith Shri Rajshekhar Rao, Advocate, Shri Naval Satarawala Chopra, Advocate, Shri Aman Singh Sethi, Advocate, Ms. Nitika Dwivedi, Advocate and Shri Tushar, Advocate for Opposite Party No. 1 and Opposite Party No. 2

Shri Abdullah Hussain, Advocate alongwith Ms. Kanika Chowdhary Nayar, Advocate for Opposite Party No. 3

Shri Anandh Venkataraman, Advocate alongwith Ms. Smitha Murthy, Authorised Representative (Legal) and Shri Sharad Kumar, Authorised Representative (Legal) for Opposite Party No. 4



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ORDER

1. By this common order, the Commission proposes to dispose of the six applications listed hereunder moved by the different parties, in Reference Cases No. 02/ 2015 and 01/ 2016 and Cases No. 107/ 2015, 03/ 2016 and 10/ 2016 as common questions of law and fact are involved in all the applications:
 - i) Application dated 23.05.2016 filed by Mahyco Monsanto Biotech (India) Private Limited for review/ recall of order dated 10.02.2016 in Reference Case No. 02 of 2015 and Case No. 107 of 2015;
 - ii) Application dated 23.05.2016 filed by Monsanto Holding Private Limited for review/ recall of order dated 10.02.2016 in Case No. 107 of 2015;
 - iii) Application dated 23.05.2016 filed by Mahyco Monsanto Biotech (India) Private Limited for review/ recall of order dated 18.02.2016 in Reference Case No. 01 of 2016 and Cases No. 03 of 2016 and 10 of 2016;
 - iv) Application dated 23.05.2016 filed by Monsanto Holding Private Limited for review/ recall of order dated 18.02.2016 in Reference Case No. 01 of 2016 and Case No. 10 of 2016;
 - v) Application dated 10.06.2016 filed by Monsanto Company for review/ recall of order dated 10.02.2016 in Reference Case No. 01 of 2016 and Cases No. 107 of 2015, 03 of 2016 and 10 of 2016; and
 - vi) Application dated 10.06.2016 filed by Monsanto Company for review/ recall of order dated 18.02.2016 in Reference Case No. 01 of 2016 and Cases No. 107 of 2015, 03 of 2016 and 10 of 2016.

2. In fact, in Reference Case No. 02/ 2015 and Case No. 107/ 2015, an order under Section 26 (1) of the Competition Act, 2002 (the 'Act') dated 10.02.2016 was passed by the Commission directing the Director General (the 'DG') to cause an investigation into the matter. Directions were also issued to the DG to investigate the role of the officials/ persons concerned, who at the time of the alleged contravention, were in-charge of and responsible for the conduct of business of the faulting Opposite Party companies (OPs). For the



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sake of convenience, the relevant paragraph 46 of the said order is extracted hereunder:

“46. Considering in totality the information, reference oral submissions by the parties and all other material available on record, the Commission is of the view that there exists a prima facie case of contravention of the provisions of Section 3 (4) and Section 4 of the Act by the OP group and it is a fit case for investigation by the DG. Accordingly, under the provisions of Section 26 (1) of the Act, the Commission directs the DG to cause an investigation into the matter and to complete the investigation within a period of 60 days from the date of receipt of this order. In case, the DG finds that the OPs have acted in contravention of the provisions of Act, the DG shall also investigate the role of the officials/persons who at the time of such contravention were in-charge of and responsible for the conduct of their business.” (emphasis added)

3. By virtue of these applications, the Applicants (the Opposite Parties in the cases) seek to challenge the directions of the Commission to investigate the role of the officers/ persons in-charge of the company, which has been underlined above; in view of the subsequent judgement of the Hon'ble Competition Appellate Tribunal (the Tribunal) in *A.N. Mohana Kurup and Others vs. Competition Commission of India and Others*, primarily on the ground that it was not permissible for the Commission to issue any directions to the DG to look into the role of the persons in-charge of and responsible for the conduct of business of the OP companies at this stage before returning the finding of contravention against the OPs as envisaged under Section 27 read with Section 48 of the Act.
4. The Applicants have tried to emphasise the scheme of the Act in Para 16/ 17 of the applications, which read as under:



“Duties and powers of the Hon’ble Commission:

16. It is submitted that initiation of proceedings against persons who were in-charge of, or responsible to the company for the conduct of its business, on the basis of the information/reference filed before the Commission or the findings of the DG’s investigation will result in obliterating the various layers of protection afforded under the Competition Act and completely disregards the possibility that the company itself (i.e. the Applicant herein) may not be found to have contravened the provisions of the Competition Act. In order to arrive at a finding of contravention against the Applicant, the Competition Act provides various checks and balances as set out below:

- a) Once this Hon’ble Commission receives a reference/information under Section 19 (1) of the Competition Act, it can either, upon forming its prima facie opinion under Section 26 (1), direct the DG to cause an investigation in the alleged contravention, or choose to close the matter under Section 26 (2);*
- b) In the event if this Hon’ble Commission directs an investigation under Section 26 (1), the DG shall investigate and file its report under Section 26 (3) and this Hon’ble Commission may forward a copy to the parties under Section 26 (4);*
- c) If the report so filed by the DG recommends that a contravention has been committed by the Company, this Hon’ble Commission is not bound by such recommendation and can direct further investigation by the DG under Section 26 (8) of the Competition Act;*
- d) In the event the report submitted by the DG finds contravention of any of the provisions of the Competition Act, the Hon’ble Commission under Regulation 21 (7) can invite objections or suggestions from the parties concerned;*
- e) It is only after complying with the aforesaid provisions that this Hon’ble Commission passes a*



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final order under Section 27 of the Competition Act, recording a finding of contravention of Section 3 or Section 4 of the Competition Act. In the event the Hon'ble Commission finds a contravention, it can pass orders contemplated under Section 27 (a) to (g). Alternatively, this Hon'ble Commission may find that no contravention whatsoever has been committed, which would not require any consequent orders being passed; and

f) Once a finding of contravention, as mentioned above, is recorded by this Hon'ble Commission, against a company, this Hon'ble Commission may proceed against relevant officers of the company under Section 48 of the Competition Act. However, in the present case, proceedings have been commenced against individuals pending the conclusion of proceedings detailed above, which is ultra vires the powers vested in the Hon'ble Commission and the DG and will gravely prejudice the interest of the Applicant."

5. Shri Ramji Srinivasan, learned Senior Counsel for the Applicants urges that if the DG investigates the roles of the individuals in the absence of a finding of contravention against the company, the same would render the words "*shall be liable to be proceeded against*", as used in Section 48 of the Act redundant and otiose.
6. The learned Senior Counsel, referring to the judgment of the Hon'ble Tribunal in *A.N. Mohana Kurup (supra)* has urged that the Hon'ble Tribunal has held that the direction of the Commission to investigate the role of the persons who were in-charge of and responsible for the conduct of business of the company, at the very threshold while passing an order under Section 26 (1) of the Act, is *ex facie* contrary to the plain language of Section 48 of the Act and the provisions of Section 48 can only be invoked after contravention of the provisions of the Act by the company is established. The learned Senior



Counsel relies particularly on Paras 29 and 30 of the report in *A.N. Mohana Kurup (supra)* which read as under:

“29. Since the provision contained in Section 48 (1) raises a presumption of guilty [sic] against every person, who, at the time of contravention of the provisions of the Act by the company, was in-charge of, and was responsible for the conduct of its business and visits him with penalty, the same deserves to be construed strictly and in our view, the deeming provisions contained in the two sub-sections of Section 48 can be invoked only after it is found that the company has contravened the provisions of the Act or any rule, regulation, order made and direction issued thereunder. The use of the word ‘committed’ in the two sub-sections necessarily implies that before any person in-charge of and responsible to the company or director, manager etc. of the company can be proceeded against and punished by invoking the deeming provisions contained in Section 48 (1) and/ or (2), there must exist an affirmative finding by some competent authority that the company has contravened the provisions of the Act or any rule, regulation etc. Under the scheme of the Act, final determination on the issue of contravention of the provisions of the Act or any rule, regulation etc. can be made only by the Commission and not by the Director General or any other authority. Even the determination made by the Commission is subject to the right of the aggrieved person to challenge the same by filing an appeal under Section 53B (2) of the Act. To put it differently, in the absence of a determination by the Commission that the company has committed contravention of any of the provisions of the Act or any rule, regulation etc.

30. In the present case, investigation into the role of the persons in-charge of and responsible to Respondent No. 5 for the conduct of its affairs was initiated by the Commission at the threshold i.e. while passing order dated 29.09.2014 under Section 26 (1) of the Act and Jt. DG returned a finding in paragraph 8



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of his report that the appellants are equally complicit in the practices being carried on and the decisions being taken by Respondent No. 5, which were found to be contrary to the provisions of the Act. This exercise was ex facie contrary to the plain language of Section 48 of the Act.”

7. The learned Senior Counsel urges that it is now well settled that vicarious liability of a person in-charge of and responsible for the conduct of business of a company can be fastened only when the company is first prosecuted and found to have contravened the provisions of the relevant law. The learned Senior Counsel relies upon the judgment in *Aneeta Hada vs. M/s Godfather Travels and Tours Private Limited (2012) 5 SCC 661* to buttress his argument that proof of contravention of a particular statute by a company is a condition precedent to attract vicarious liability of the person in-charge of and responsible for the conduct of business of the company. He refers to Para 42 of the report wherein it was observed as under:

“42. ... Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words “as well as the company” appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicted.”

8. The learned Senior Counsel further contends that the Tribunal being a higher authority, its judgment would be binding on this Commission. In support of his contention, the learned Senior Counsel heavily relies on the three Judge



Bench decision of the Hon'ble Supreme Court in *Union of India and Others vs. Kamlakshi Finance Corporation Limited (1992) Supp (1) SCC 443* and the Division Bench decision in *RBF Rig Corporation, Mumbai vs. Commissioner of Customs (Imports), Mumbai (2011) 3 SCC 573*.

9. The applications are resisted by the respective Informants (non-Applicants) and also by the Ministry of Agriculture, Government of India and the State of Telangana. The learned counsel for non-Applicants have urged that Section 48 of the Act nowhere talks of reaching a finding of contravention against the company first and then taking up the issue of contravention, if any, committed by the officer in-charge of and responsible to the company for the conduct of its business. It has been contended by the learned counsel that the provisions of Section 48 of the Act are *pari materia* with the provisions of Section 10 of Essential Commodities Act, 1955; Section 141 of the Negotiable Instruments Act, 1881; Section 17 of the Prevention of Food Adulteration Act, 1954; Section 34 of the Drugs and Cosmetics Act, 1940; Section 149 of the Electricity Act, 2003; Section 27 of Securities and Exchange Board of India, 1992; Section 68 of Foreign Exchange Regulation Act, 1973 and various other statutes. These provisions alongwith the various judgments rendered by the Hon'ble Supreme Court including the judgment in the case of *Aneeta Hada (supra)* and the various High Courts simply envisage that, to make a person vicariously liable for the acts of the company, prosecution of the company is a condition precedent. It is contended that however, for violation of the various statutory provisions under the above referred Acts also containing similar provisions for vicarious liability of the officers of the Company, the prosecution of the company as well as of the officer sought to be made vicariously liable may be carried out simultaneously and the order of acquittal or conviction against them, whatsoever, as the case may be, may also passed at the same time.
10. Mr. Vaibhav Gaggar, the learned counsel for the non-Applicants relies on the order dated 26.02.2010 of the Hon'ble Delhi High Court in *Pran Mehra vs. Competition Commission of India and Others (Writ Petitions No. 6258/ 2014,*



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6259/ 2014 and 6669/ 2014) to urge that the contention raised by the Applicants in the instant applications that the prosecution against an officer of the company can only be initiated after a finding of contravention is returned against the company is incorrect and the same was negated by the Delhi High Court in the relied upon case by holding that there cannot be two separate proceedings in respect of the company and its key persons.

11. The learned counsel for the non-Applicants has also relied upon the report of the Hon'ble Supreme Court in *East India Commercial Company Limited, Calcutta and Another vs. Collector of Customs, Calcutta AIR 1962 SC 1893* and of the Bombay High Court in *Commissioner of Income Tax, Vidarbha vs. Godavari Devi Saraf (1978) 113 ITR 589* to urge that the order of a High Court is binding on the Tribunal and not *vice versa*. Thus, it is contended that in view of the order in *Pran Mehra (supra)*, the judgment passed by the Tribunal in *A.N. Mohana Kurup (supra)* becomes irrelevant. The learned counsel further submits that review of an order on the basis of a subsequent judgment is not permissible as a judgment passed by any court or authority cannot be applied retrospectively. The learned counsel relies heavily on the judgment of the Hon'ble High Court of Calcutta in *Debala Mukherjee and Another vs. Sujit Singh (1977) CHN 617* to support his contention.
12. The Commission has heard the learned counsel for the parties and examined the record and the relevant provisions of law.
13. To appreciate the contentions raised, it will be apposite to extract the provisions of Section 48 of the Act:

“Contravention by Companies

48. (1) Where a person committing contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder is a company, every person who, at the time the contravention was committed, was in-charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall



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be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention.

(2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, regulation, order made or direction issued thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that contravention and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section,—

- a) “company” means a body corporate and includes a firm or other association of individuals; and
- b) “director”, in relation to a firm, means a partner in the firm.”

14. A plain reading of the above quoted Section clearly shows that a company, upon whose Directors vicarious liability can be fastened includes a firm as well as any other association of individuals. Similarly, it is also clear that a Director in relation to such firm means a partner in the firm.
15. Various statutes under Indian law, as mentioned in Para 9 hereinbefore, and numerous other Acts have *pari materia* provisions in respect of offences by companies imposing vicarious liability for the acts of the company upon its Directors and other officers occupying key managerial positions. Similar provision is also there under Section 17 of the Prevention of Food Adulteration Act, 1954 with only a slight difference being there, that in case



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where a person has been expressly nominated under Section 17 (2), he alone can be proceeded against and punished for the violations of the Act committed by the Company and only where no such person has been so nominated, any other person, who at the time the offence was committed, was in-charge of and was responsible for the conduct of business of the company may be proceeded against and punished. Such provisions in all the statutes including the Competition Act states an exception that any such person proceeded against shall not be held vicariously liable for the acts of the company if he is able to prove that the alleged act which turns out to be an offence was committed without his knowledge and negligence and he had exercised all due diligence to prevent the commission thereof. Thus, vicarious liability is fastened on the officer in-charge of and responsible for the conduct of business of the company by fiction of law inspite of the fact that such person may or may not have been directly responsible for the commission of such offence by the company. The object behind making such person liable is that the company being a juristic person, having no independent mind of its own, must act through somebody, and, therefore, various statutes contain such provision so as to make the person behind the acts of the company vicariously liable to suffer punishment when an offence is said to have been committed by the company.

16. There was a divergence of opinion on the point whether a Director, or for that matter, any other person in-charge of and responsible for the conduct of business of a company can be prosecuted for an offence said to have been committed by the company without arraigning the company itself as an accused. The said issue first arose and was dealt with by a three Judge Bench decision of the Hon'ble Supreme Court in *State of Madras vs. C.V. Parekh and Another (1970) 3 SCC 491*. In this case, the question arose with regard to the provisions of Section 10 of the Essential Commodities Act, 1955 which are almost similar to the provisions of Section 48 of the Competition Act, 2002. Respondent No. 1 C.V. Parekh and Respondent No. 2 A.C. Parekh were claimed to be in *de facto* charge and management of affairs of Microtec



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Castings (Private) Ltd. There were allegations of sale of pig iron by the company at rates varying between Rs. 300/- to Rs. 350/- per tonne as against the prices fixed by Iron and Steel Controller of Rs. 250/- per tonne. The act of sale by the company amounted to violation of Sections 6 and 8 of the Essential Commodities Act, 1955. The Magistrate convicted the two Respondents while placing reliance on Section 10 of the Essential Commodities Act, 1955. On appeal, the two Respondents were acquitted by the Hon'ble Madras High Court. On further appeal, the Hon'ble Supreme Court laid down that the liability of the person in-charge of and responsible for the company is binding when a contravention is by the company. However, since the company was not prosecuted at all, it was held that the Respondents could not be fastened with the liability.

17. Subsequently in *Sheoratan Agarwal and Another vs. State of Madhya Pradesh (1984) 4 SCC 352*, the decision in *C.V. Parekh (supra)* was sought to be explained by a two judge bench of the Hon'ble Supreme Court. It was held that the company alone or the person in-charge of and responsible for the conduct of business of the company alone, may be prosecuted for the acts of the company as there is no statutory requirement that such person cannot be prosecuted unless the company is also arraigned as an accused alongside him.
18. This divergence of opinion in the above noted two cases was noted by the Hon'ble Supreme Court in its report in *Aneeta Hada vs. M/s Godfather Travels and Tours Private Limited (2008) 13 SCC 703*, and the two judge bench referred the matter to be decided by a larger judge bench. Ultimately in *Aneeta Hada vs. M/s Godfather Travels and Tours Private Limited (2012) 5 SCC 661 (Second Case)*, the controversy was set at rest wherein the Hon'ble Supreme Court held that in prosecutions against such persons, the company has to be prosecuted along, or in other words, prosecution of the company is a condition precedent if its officer in-charge or responsible for the conduct of its business is to be prosecuted. It was nowhere stated that in cases of commission of an offence by a company, the prosecution has to be in two stages *i.e.* first against the company and thereafter, in case the company is held guilty, against



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the officer in-charge of and responsible for conduct of business of the company.

19. In Para 58 of the judgment, the Hon'ble Supreme Court held as under:

“58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words “as well as the company” appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted.”

20. During the course of arguments, the Commission enquired from Shri Ramji Srinivasan, learned Senior Counsel for the Applicants, if he can point out any judgment of the Hon'ble Supreme Court or any Hon'ble High Court under any statute having provision *pari materia* to Section 48 of the Competition Act where prosecution of the person in-charge of and responsible for the conduct of business of the company was initiated after conviction of the company. He was unable to point out any such case.

21. On the other hand, the Commission has perused a number of judgments under various statutes where the company and its officer in-charge have been simultaneously prosecuted and convicted/ acquitted. In fact, the same was also clearly spelt out in Para 58 of *Aneeta Hada (Second Case)* extracted above.

22. In *Vasu Tech Limited and Others vs. Ratna Commercial Enterprises Limited (2009) 160 DLT 591*, the Directors, who were in-charge of and responsible for



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the conduct of the business of the company were prosecuted under Section 138 of Negotiable Instruments Act, 1881 read with Section 420 of the Indian Penal Code, 1860 by virtue of provisions under Section 141 of the Act along with the company. The directors moved the Hon'ble Delhi High Court under Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.) for quashing of the summoning orders issued against them. However, their prayer was declined and their petition dismissed. In other words, prosecution of the Directors, the persons in-charge of and responsible for the conduct of the business of the company simultaneously along with the company was upheld.

23. Further, in *Dilip S. Dhanukar vs. Air Force Group Insurance Society (2007) ILR 1 Delhi 234*, the petitioner Dilip Dhanukar was convicted under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881. In the revision petition before the Hon'ble High Court, the Petitioner raised the plea that he was not separately arraigned and summoned as an accused in the case alongwith the Company. However, the Company, of course, was prosecuted through its Chairman, the Petitioner, and there his name was specifically mentioned. Hence, rejecting the said plea, the conviction of the Petitioner simultaneously with the company was upheld.
24. Also, in *Satyapal Talwar vs. State (Government of NCT of Delhi) and Others Crl. M.C. 410/ 2011 and Crl. M.A. 1622/ 2011 decided on 29.03.2011*, the order of summoning of Shri Ashok Mittal as the person in-charge of and responsible for the conduct of the business of Acme Resources Limited was upheld by the Hon'ble Delhi High Court and the petition challenging the summoning order filed under Section 482 Cr.P.C. was dismissed.
25. Furthermore, in *Sushila Devi vs. Securities and Exchange Board of India (2008) 1 Comp. L.J. 155 Del.*, the petitioner being the officer in-charge of and responsible for the conduct of the business of the company was summoned as an accused for violation of Sections 24 (1) of the Securities and Exchange Board of India Act, 1992 along with the company. The order of summoning was challenged. The said order was upheld and the petition dismissed. Here



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again, the prosecution of the officer in-charge alongwith the company under Sections 24 (1) read with 27 of the Securities and Exchange Board of India Act, 1992 was upheld.

26. Also, in *Shailendra Swarup vs. The Director, Enforcement Directorate (2011) 162 Comp. Cas. 346 (Del.)*, adjudication proceedings under Section 51 of erstwhile Foreign Exchange Regulation Act, 1958 against M/s Modi Xerox Limited and under Section 50 of the said Act its officer in-charge/ responsible for undertaken simultaneously was upheld.
27. All the more, in *Pran Mehra vs. Competition Commission of India and Another (Writ Petitions No. 6258/ 2014, 6259/ 2014 and 6669/ 2014)*, in a case under the Act, a contention similar to the one was raised. It was urged that the process commenced against the Petitioner under Section 48 of the Competition Act, is premature and the Petitioner could have been proceeded with only after a finding of contravention was returned against the company VeriFone India Sales Private Limited. The Hon'ble Delhi High Court negated the said contention holding that there cannot be two separate proceedings, one in respect of the company VeriFone India Sales Private Limited and other against its key persons. Relying on *Aneeta Hada (Second Case)*, the Hon'ble Delhi High Court are held as under:

“6... I am in agreement with the submissions of Mr. Chandhiok that there cannot be two separate proceedings in respect of the company (i.e. VeriFone) and the key-persons as the scheme of the Act, to my mind, does not contemplate such a procedure. The procedure suggested by Mr. Ramji Srinivasan is both inefficacious and inexpedient. As in every such matter, including the proceedings under Section 138 of the Negotiable Instruments Act, 1881 (in short N.I. Act), a procedure of the kind suggested is not contemplated. The judgment of the Supreme Court in the case Aneeta Hada dealt with proceedings under Section 138 of the N.I. Act. The judgment does not deal with issue at hand, which is whether adjudication in two parts, as



contended by Mr. Ramji Srinivasan, is permissible. The judgment, in my opinion is distinguishable.

7. It is no doubt true that the petitioners can only be held liable if, the CCI, were to come to a conclusion that they were the key-persons, who were in-charge and responsible for the conduct of the business of the company. In the course of the proceedings qua a company, it would be open to the key-persons to contend that the contravention, if any, was not committed by them, and that, they had in any event employed due diligence to prevent the contravention. These arguments can easily be advanced by key-persons without prejudice to the main issue, as to whether or not the company had contravened, in the first place, the provisions of the Act, as alleged by the D.G.I., in a given case.”

28. In *SMS Pharmaceuticals Limited vs. Neeta Bhalla and Another* (2005) 8 SCC 89 as well, a three judge bench of the Hon’ble Supreme Court had the occasion to examine the *pari materia* provisions of Negotiable Instruments Act, 1881 (Section 141) with regard to vicarious liability of the officer in-charge of and responsible for the conduct of business of a company. The relevant paras of the said judgment are extracted hereunder:

“4. In the present case, we are concerned with criminal liability on account of dishonour of a cheque. It primarily falls on the drawer company and is extended to officers of the company. The normal rule in the cases involving criminal liability is against vicarious liability, that is, no one is to be held criminally liable for an act of another. This normal rule is, however, subject to exception on account of specific provision being made in the statutes extending liability to others. Section 141 of the Act is an instance of specific provision which in case an offence under Section 138 is committed by a company, extends criminal liability for dishonour of a cheque to officers of the company. Section 141 contains conditions which have to be satisfied before the liability can be extended



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to officers of a company. Since the provision creates criminal liability, the conditions have to be strictly complied with. The conditions are intended to ensure that a person who is sought to be made vicariously liable for an offence of which the principal accused is the company, had a role to play in relation to the incriminating act and further that such a person should know what is attributed to him to make him liable. In other words, persons who had nothing to do with the matter need not be roped in. A company being a juristic person, all its deeds and functions are the result of acts of others. Therefore, officers of a company who are responsible for acts done in the name of the company are sought to be made personally liable for acts which result in criminal action being taken against the company. It makes every person who, at the time the offence was committed, was in-charge of, and was responsible to the company for the conduct of business of the company, as well as the company, liable for the offence. The proviso to the sub-section contains an escape route for persons who are able to prove that the offence was committed without their knowledge or that they had exercised all due diligence to prevent commission of the offence.

8. The officers responsible for conducting the affairs of companies are generally referred to as directors, managers, secretaries, managing directors, etc. What is required to be considered is: Is it sufficient to simply state in a complaint that a particular person was a director of the company at the time the offence was committed and nothing more is required to be said.

...What emerges from this is that the role of a director in a company is a question of fact depending on the peculiar facts in each case. There is no universal rule that a director of a company is in-charge of its everyday affairs. We have discussed about the position of a director in a company in order to illustrate the point that there is no magic as such in a particular word, be it director, manager or secretary. It all depends upon the respective roles assigned to the



officers in a company. A company may have managers or secretaries for different departments, which means, it may have more than one manager or secretary. These officers may also be authorised to issue cheques under their signatures with respect to affairs of their respective departments. Will it be possible to prosecute a secretary of Department B regarding a cheque issued by the secretary of Department A which is dishonoured? The secretary of Department B may not be knowing anything about issuance of the cheque in question. Therefore, mere use of a particular designation of an officer without more, may not be enough by way of an averment in a complaint. When the requirement in Section 141, which extends the liability to officers of a company, is that such a person should be in-charge of and responsible to the company for conduct of business of the company, how can a person be subjected to liability of criminal prosecution without it being averred in the complaint that he satisfies those requirements. Not every person connected with a company is made liable under Section 141. Liability is cast on persons who may have something to do with the transaction complained of. A person who is in-charge of and responsible for conduct of business of a company would naturally know why the cheque in question was issued and why it got dishonoured.

9. The position of a managing director or a joint managing director in a company may be different. These persons, as the designation of their office suggests, are in-charge of a company and are responsible for the conduct of the business of the company. In order to escape liability such persons may have to bring their case within the proviso to Section 141 (1), that is, they will have to prove that when the offence was committed they had no knowledge of the offence or that they exercised all due diligence to prevent the commission of the offence.

10. While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under



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Section 138 is committed by a company. The key words which occur in the section are “every person”. These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words:

“Who, at the time the offence was committed, was in-charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence, etc.”

What is required is that the persons who are sought to be made criminally liable under Section 141 should be, at the time the offence was committed, in-charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in-charge of and responsible for the conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a company who was not in-charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in-charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a company may be liable if he satisfies the main requirement of being in-charge of and responsible for the conduct of business of a company at the relevant time ...”

29. The Hon’ble Supreme Court, while referring to various cases including *Municipal Corporation of Delhi vs. Ram Kishan Rohtagi and Others (1983) 1 SCC 1*, proceeded to answer the question raised in the appeal as to whether merely being a director of the company at the time the offence is sufficient to make a person liable under Section 141 of the Act or not. The issue was



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answered in negative and it was held that there has to be a specific averment in regard to such person and sufficient evidence must be placed on record to show that such person was actually in-charge of and responsible for the conduct of the business of the company at the relevant time. However, the prosecution of such officer alongwith the company was not even disputed before the Hon'ble Supreme Court in this case.

30. The learned counsel for the non-Applicants, as stated earlier, referred to *East India Commercial Co. Ltd., Calcutta and Another vs. Collector of Customs, Calcutta AIR 1962 SC 1893* to urge that the order of the High Court is binding on the Tribunal and the case is not *vice versa*. However, the Commission need not go into such question as there is not only the judgment of the Hon'ble Delhi High Court in *Pran Mehra (supra)* under the provisions of Section 48 of the Competition Act, but also several other judgments of the Hon'ble Supreme Court as well as various High Courts upon *pari materia* provisions contained in other statutes where it has been held that a person vicariously liable for acts of the company may be prosecuted simultaneously alongwith the company. Some of such judgments have been mentioned earlier which sufficiently establish that the person in-charge of and responsible for the conduct of the company may be simultaneously prosecuted along with the company. Of course, it goes without saying that when an inquiry is held under Section 26 of the Act, the finding of contravention has to be first recorded against the company and if the company is held liable, then the question of who was the officer in-charge of and responsible for the conduct of the business of the company at the relevant time and his liability will be gone into; however, in the same order. The Commission is therefore, unable to agree with the contention raised by Shri Ramji Srinivasan, learned Senior Counsel for the Applicants that the Commission has to first return a finding of contravention under Section 27 of the Act against the company and then only can the Commission again refer the matter to the DG to investigate as to who are the officers in-charge of and responsible for the conduct of business of the



company or with whose connivance or consent the contravention was committed.

31. In view of this, with due reverence to the Hon'ble Tribunal, its order in *M/s Alkem Laboratories Limited vs. Competition Commission of India and Another* (Appeal No. 09/2016) cannot be taken as a precedent.
32. The above practice, the precedence and the jurisprudence so far are based on sound reasoning. This is evident when we understand the proceedings of this nature. First, these are regulatory in nature and hence, need to be disposed of at the earliest so that the culprits are brought to book expeditiously and are prevented from causing further damage to market. Bringing a company to book and letting the persons behind the conduct of the company lose for some more time to continue to cause damage is not in the interest of competition in market. Second, the Act is a rule of reasoned law. It requires deep understanding of the facts and circumstances and what prompted a particular conduct. A particular conduct could be appreciated under one circumstance and deprecated under another, and two opposite conducts could invite the same outcome. For example, the competition authorities do not consider an unfair or discriminatory price by an enterprise illegal if it is adopted to meet competition. Such deep understanding is possible only if the persons, who were in-charge of the enterprise or who had a role in the conduct of a company at the relevant time, are allowed to explain that particular conduct at the appropriate stage so that the proceeding does not result in a false, negative for want of adequate reasoning outcome. It is important to note that in case of a false negative, one ends up deterring an efficient business, the cost of which is very high.
33. Third and most important is that one has to follow the principles of natural justice in disposal of such proceedings. In other words, no person can be condemned unheard. This is not rhetoric. This has to be followed in substance. This means that a person, who might be ultimately condemned, must have an effective opportunity to defend himself at the appropriate stage. In this



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connection, a reference may be made to the judgment of the Hon'ble Supreme Court in *Suresh Koshy George vs. The University of Kerala and Others*, AIR 1969 SC 198, wherein the Hon'ble Supreme Court referring to the case of *Russel vs. Duke of Norfolk and Others*, (1949) 1 All. E.R. 108, observed that, a person concerned should have a reasonable opportunity to defend himself before he is held guilty of contravening any provisions of law (Also see: *Swadeshi Cotton Mills vs. Union of India*, (1981) 1 SCC 664; *Union of India and Another vs. Tulsiram Patel and Others*, (1985) 3 SCC 398; *D.T.C. vs. D.T.C. Mazdoor Congress*, AIR 1991 SC 101; *Competition Commission of India vs. Steel Authority of India Limited*, (2010) 10 SCC 744).

34. If the proposition canvassed by the Applicants that a company is to be first held guilty of contravention of provisions of Sections 3 or 4, or both, of the Act, and only then investigation can be initiated against the persons who were in-charge of and responsible for the conduct of the business of the company at the relevant time, is accepted, it would render such person defenseless. This is most likely scenario, if the company is handicapped to defend itself. The company could be non-existent or could have become defunct. Or, the person who was in the know of things and had a role in a particular conduct of the company at the relevant time might have left the company. Or, the person who has in possession some material which demonstrates the non-contravention of the provisions of the Act by the company might be posted in some other department now and not involved in defending the company. If the company fails to defend itself properly for whatsoever reason, and as a consequence, it is found guilty, the person concerned would be left with no option but to suffer consequences under Section 48 of the Act. Shri Ramji Srinivasan, the learned Senior Counsel for the Applicants tried to plead that such person in-charge can defend himself by showing that the contravention was committed either without his knowledge or that he had exercised all due-diligence to prevent the commission of such contravention. In the considered opinion of the Commission, since the liability of the company makes such person in-charge vicariously liable, such person must have an opportunity to contest the



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proceedings at the very threshold and cannot be deprived of the opportunity to plead and demonstrate that the company itself is not liable at all. A company cannot be held guilty at the back of such person in-charge or anyone else who may be sought to be made vicariously liable under Section 48 (1) or (2) of the Act.

35. This also follows from the plain language of the provisions of the Act. A proceeding under the Act has genesis in the investigation ordered under Section 26 (1) of the Act. The said Section envisages that the Commission shall direct the DG to cause an investigation to be made into the “matter”. There is no suffix, no prefix, no *proviso*, no explanation, and no caveats of any form attached to the word “matter”. Hence, it obviously means that the DG needs to investigate into the matter at one go in all its dimensions comprehensively. The said Section does not envisage either for the Commission or for the DG to investigate into the matter in phases, unless it is necessitated by circumstances. Whether or not an order under Section 26 (1) of the Act explicitly directs the DG to look into the role of any person in-charge of and responsible for the conduct of business of the company under Section 48 of the Act, the DG is duty bound to look into the role of all persons behind the conduct of a company. Therefore, the provisions of Section 48 of the Act complement the provisions of Section 26 (1) of the Act. The said provisions, as stated earlier, are also *pari materia* with many statutes, some of which are around a century old. These provisions are time tested and the superior courts have always gone ahead with proceeding simultaneously in respect of the conduct of the company and its person in-charge.
36. There are some doubts as to whether the present applications for review of the orders dated 10.02.2016 and 18.02.2016 passed under Section 26 (1) of the Act on the grounds urged by the Applicants are maintainable as the scope of review is very limited. The Commission, however, prefers not to answer this question but rather decide the applications on merits as the contention raised herein is being raised in several cases by some or the other parties.



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37. In view of the foregoing discussion, the applications are found to be devoid of any merit and the same are accordingly dismissed. The Secretary is directed to inform the concerned parties accordingly.
38. It may be noted that the matters were referred for investigation to the DG *vide* orders dated 10.02.2016 and 18.02.2016. It is expected that the Applicants will cooperate with the DG in the conduct of the investigation so that the same is completed without undue delay.

**Sd/-
(Devender Kumar Sikri)
Chairperson**

**Sd/-
(S. L. Bunker)
Member**

**Sd/-
(Sudhir Mital)
Member**

**Sd/-
(U. C. Nahta)
Member**

**Sd/-
(Dr. M.S. Sahoo)
Member**

**Sd/-
(Justice G. P. Mittal)
Member**

New Delhi

Dated: 26/07/2016