

(2014) 02 KL CK 0163

High Court Of Kerala

Case No: Crl. M.C. No. 2897 of 2012

Rahul Sehgal

APPELLANT

Vs

State of Kerala and Another

RESPONDENT

Date of Decision: Feb. 14, 2014

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 155(2), 156(1), 482
- Drugs and Cosmetics Act, 1940 - Section 18(a)(i), 23, 23(4), 27(d), 32
- Negotiable Instruments Act, 1881 (NI) - Section 141
- Prevention of Food Adulteration Act, 1954 - Section 17(1)

Citation: (2014) CriLJ 2399 : (2014) 2 ILR 777 : (2014) 2 KHC 11 : (2014) 2 KLJ 632 : (2014) 2 KLT 906 : (2014) 3 RCR(Criminal) 766

Hon'ble Judges: P.D. Rajan, J

Bench: Single Bench

Advocate: S. Rajeev and K.K. Dheerendrakrishnan, Advocate for the Appellant; Bindu Gopinath, Public Prosecutor, Advocate for the Respondent

Judgement

@JUDGMENTTAG-ORDER

P.D. Rajan, J.

This petition is filed u/s 482 Cr.P.C. to quash the complaint in C.C. No. 2408/2003 of the Additional Chief Judicial Magistrate Court, Ernakulam, which was filed u/s 32 of the Drugs and Cosmetic Act, 1940 (hereinafter referred to as the "Act") against the petitioner and his company for violation of Section 18(a)(i) of the Act which is punishable u/s 27(d) of the Act. The petitioner is the 2nd accused in the above case. The second respondent, who is the Drugs Inspector from the Office of the Drugs Controller, Ernakulam filed the above complaint in the Additional Chief Judicial Magistrate's Court, Ernakulam alleging that the 2nd respondent obtained sample of Cloxacillin Sodium Capsules IP 250 mg, a drug manufactured by the petitioner's firm as per Section 23 of the Act from the Government Hospital Stores, Tripunithura,

Ernakulam on 25/07/2002, which was forwarded to Government Analyst, Drugs Testing Laboratory, Thiruvananthapuram u/s 23(4) of the Act and the drug was declared as not of Standard Quality prescribed by Government Analyst, Drugs Testing Laboratory, Thiruvananthapuram. Annexure-A1 is the complaint. The grounds alleged for quashing the complaint are violation of mandatory provisions of the Act and absence of necessary pleadings. The inherent powers of the High Court contemplated u/s 482 Cr.P.C. has to be exercised in case of significant and serious injustice mentioned in the Section. This power cannot be invoked naturally in a matter where it is covered by a specific provision of the Code. Therefore it means that if the matter in question is not covered by any provision of the code, it comes into operation, for the objects mentioned in the section. In the State of Haryana v. Bhajanlal 1992 SCC (Crl.) 426 the Supreme Court pointed out that:

(1) Where the allegations in the FIR/complaint, even if they are taken at their face value do not prima facie constitute any offence against the accused. (2) Where the allegations in the FIR of other materials do not constitute a cognizable offence justifying an investigation by the police u/s 156(1) of the code except under an order of a Magistrate within the purview of Section 155(2). (3) Where the uncontested allegations in the FIR/complaint and the evidence collected thereon do not disclose the commission of any offence. (4) Where the allegations in the FIR/complaint do not constitute any cognizable offence but constitute only non-cognizable offence to which no investigation is permitted by the police without the order of Magistrate u/s 155(2). (5) Where the allegations are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused. (6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Statute concerned (under which the proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the code or in the Statute concerned, providing efficacious redress for the grievance of the aggrieved party. (7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accuse with a view to spite him due to private and personal vengeance.

From the above clarification it is crystal clear that inherent jurisdiction can be invoked to make such orders necessary to "give effect to any order" under this Code or to prevent "abuse of the process" of any Court or to secure "the ends of justice". Therefore the Section indicates to preserve the existing right and not intended to create any non-existing right.

2. The learned counsel appearing for the petitioner contended that the petitioner is not in charge of the day-to-day affairs of the Company and the trial will end in acquittal. Annexure-A1 was filed without ascertaining the true facts and sequence of the events happened subsequent to 23/12/2002. He admitted that there was complaint with regard to the manufacture of Cloxacillin Capsule from different part

of the country and at that time, a detailed enquiry was conducted by the Director of Food and Drugs Administration, Panaji and he issued direction to stop the manufacturing of the above drug in his firm with effect from 23/12/2002.

3. The learned Public Prosecutor resisted the above argument and contended that the 2nd respondent is the authorised signatory to prosecute the 1st accused as per the Drugs and Cosmetics Act and all details are properly furnished in the complaint.

4. If the averments are true, the filing of a complaint against a person not in charge of and responsible for conducting the business of the Company is mere abuse of process of Court. In Annexure-A1, the company is the 1st accused and the Chairman is the 2nd accused. According to the complaint, the 1st accused is manufacturing Cloxacillin Sodium Capsule without maintaining standard of quality of Drug, which is violation of the Drugs and Cosmetics Act. Annexure-II is the letter addressed to the Drug Controller from the Director of Food and Drugs Administration, Goa. In Annexure-II it is reported that with reference to the letter from the Drugs Controller, a show-cause notice was served to the firm directing to recall the product from the market as well as the manufacture of the product. Accordingly, the firm stopped the manufacturing of Cloxacillin Sodium Capsule with effect from 23/12/2002 onwards. Moreover the Senior Inspectors of the Directorate verified the licence, manufacturing quality records and other available samples. After that, Annexure-III letter was issued from the office of the Drugs Controller, Thiruvananthapuram to the Drugs Inspector, Kozhikode to withdraw the complaint against few manufacturers. After this direction Drugs Inspector inspected the Govt. Hospital stores and gave notice to the manufacturer. Now the prime question is whether the petitioner is in charge of the company, as per Section 34 of the Drugs and Cosmetics Act.

5. It is true that in case of offence by Company the culpability of the person has to be decided with reference to Section 34 of the Act, same reads as follows:

34. Offences by companies.-- (1) Where an offence under this Act has been committed by a company, every person 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 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 provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

6. From the plain reading of the Section it is clear that when an offence has been committed by a company, every person 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. In that context one question arises, will it necessary to distinctively narrate in the complaint that the person accused was in charge of and responsible for the conduct of the business of the Company. In my opinion, in case of offence by company to bring its responsible person in charge of the company, it shall be necessary to allege that they were in-charge of and responsible for the conduct of the Company. I cannot read more than what has mentioned in Section 34 of the Act.

7. While dealing with the Drugs and Cosmetics Act, 1940, I wish to refer one decision of the Apex Court in State of Haryana Vs. Brij Lal Mittal and Others, to bring home this point, in which in paragraph 8 reads thus:

8. Nonetheless, we find that the impugned judgment of the High Court has got to be upheld for an altogether different reason. Admittedly, the three respondents were being prosecuted as directors of the manufacturers with the aid of Section 34(1) of the Act which reads as under:

34. xxxx xxxx xxxx (omitted)

It is thus seen that the vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises if at the material time he was in charge of and was also responsible to the company for the time he was in charge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of the company it does not necessarily mean that he fulfils both the above requirements so as to make him liable. Conversely, without being a director a person can be in charge of and responsible to the company for the conduct of its business. From the complaint in question, we however, find that except a bald statement that the respondents were directors of the manufacturers, there is no other allegation to indicate, even *prima facie*, that they were in charge of the company and also responsible to the company for the conduct of its business.

In the same decision noticed above, Apex Court referred the decision in Municipal Corpn. of Delhi v. Ram Kishan Rontai 1983 SCC (Crl.) 115 has considered Section 17(1) of the Prevention of Food Adulteration Act, 1954, which is similar with Section 34(1) of the Drugs and Cosmetics Act, 1940, which reads as follows:

15. So far as the Manager is concerned, we are satisfied that from the very nature of his duties it can be safely inferred that he would undoubtedly be vicariously liable for the offence, vicarious liability being an incident of an offence under the Act. So far as the Directors are concerned, there is not even a whisper nor a shred of evidence nor anything to show, apart from the presumption drawn by the complainant, that there is any act committed by the Directors from which a reasonable inference can be drawn that they could also be vicariously liable. In these circumstances, therefore, we find ourselves in complete agreement with the argument of the High Court that no case against the Directors (Accused 4 to &) has been made out *ex facie* on the allegations made in the complaint and the proceedings against them were rightly quashed.

8. The principles laid down in the above were considered by the Apex Court while discussing Section 141 of Negotiable Instruments Act, this question has been eloquently answered by three Judge bench of the apex Court in S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, in which it is held that:

19. 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 u/s 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 Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirement of Section 141 cannot be said to be satisfied.

Connected question came up for consideration by the Apex Court in National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal and Another, held as follows:

39. From the discussion, the following principles emerge:

(i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.

(ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in-charge of and were responsible for the conduct of the business of the company.

(iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make the accused therein vicariously liable for offence committed by the company along with averments in the petition containing that the accused were in-charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

(v) If the accused is a Managing Director or a Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.

(vi) If the accused is a Director or an officer of a company who signed the cheque on behalf of the company then also it is not necessary to make specific averment in the complaint.

(vii) 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.

9. There is no averment in Annexure-1 that the petitioner was in charge of day-to-day business of the Company and was the person responsible for the conduct of the business of the Company. The petitioner is the Chairman of the Company and simply because a person becomes Chairman or a Director of the Company does not mean that he is fully responsible for the day-to-day affairs of the Company. Vicarious liability can be inferred against a company or its Directors only after satisfying the condition u/s 34 of the Drugs and Cosmetic Act. Person made liable should be in charge of the company at the relevant time, which cannot be presumed from the complaint. Otherwise it may result in implication of innocent Chairman and Directors who have no connection with the offence and thereby cause miscarriage of justice.

10. For the purpose of quashing a complaint *prima facie* case is the litmus test. The inherent jurisdiction under this code can be exercised to prevent "abuse of the process" of any Court. The Apex Court in Zandu Pharmaceutical Works Ltd. and Others Vs. Md. Sharaful Haque and Others, held as follows:

It would be an abuse of process of Court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers, Court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of Court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the Court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto.

Therefore, this is a fit case to invoke the inherent jurisdiction under the Code to quash the criminal proceedings against the petitioner. It is clarified that, while quashing the proceedings, there is no bar for the 2nd respondent to prosecute the person in charge of and was responsible to the company for the conduct of the business of the company, according to law.

Hence, I quash all proceedings in C.C. No. 2408/2003 against the petitioner, who is the second accused, pending before Additional Chief Judicial Magistrate Court, Ernakulam invoking inherent jurisdiction u/s 482 of the Code of Criminal Procedure.

This Crl.M.C. is allowed as above.