

(2013) 08 MAD CK 0057

Madras High Court

Case No: Criminal Original Petition No. 13644 of 2012 and M.P. No"s. 1 and 2 of 2012

Tidal Laboratories Pvt. Ltd. and
Others

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision: Aug. 14, 2013

Acts Referred:

- Drugs and Cosmetics Act, 1940 - Section 18(c), 18A, 27, 27(a)(i)(ii), 27(b)(ii)

Citation: (2013) 2 LW(Cri) 447 : (2013) 3 MLJ(Cri) 654

Hon'ble Judges: R. Subbiah, J

Bench: Single Bench

Advocate: M. Venkatachalapathy, for Mr. M. Aravind Subramaniam, for the Appellant; C. Emalias, Assistant Public Prosecutor, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

R. Subbiah, J.

The present criminal original petition has been filed to quash C.C. No. 141 of 2012 on the file of the Court of IV

Metropolitan Magistrate, Saidapet, Chennai and quash the same as illegal, arbitrary, mala fide and abuse of law. Respondent herein has filed a

complaint against the petitioners u/s 18(c) of Drugs and Cosmetics Act, 1940, punishable u/s 27(b)(ii) of the said Act and Section 18-A of Drugs

and Cosmetics Act, 1940, punishable u/s 28 of the said Act. In the complaint, it has been alleged that the 1st petitioner is the company, petitioners

2 to 4 are the Directors of the Company and 5th petitioner is the Administrative Manager of the Company. As per the instructions of the Assistant

Director of Drugs Control, Zone-III on 29.03.2010, Tmt. G. Ammukutty, Drugs Inspector, Ashok Nagar Range and R. Chitra, Drugs Inspector, Vadapalani Range, with the complainant inspected the premises of M/s. Tidal Laboratories Pvt. Ltd., Tital House, 14, Elliots Beach Road, North End, T.V. Nagar, II Main Road, Besant Nagar, Chennai-90.

2. During inspection, Thiru S. Arumugam, Person in-charge of the said firm was present and in his presence, the firm was inspected and it was noticed that the drugs were kept for sale and distribution without having a valid drug licence and hence, the first petitioner company has contravened the provisions of Section 18(c) of Drugs and Cosmetics Act. The available stocks of drugs were seized from the premises, as mentioned in the Annexure under Form 16 bearing No. 13912 dated 29.03.2010 under a cover of Mahazar and prepared Mahazar list in the presence of two independent witnesses, viz., Sheik Fareed and J. Jayakumar. The copies of Form 16, Mahazar and Mahazar list were acknowledged by the Person in-charge, viz., Arumugam. The said Arumugam has given a voluntary written statement on the same day. On 30.03.2010, the seized properties of drugs were produced before the IV Metropolitan Magistrate, Saidapet, Chennai in M.P. No. 873 of 2010 and obtained the order of safe custody from the said Court. On 05.04.2010, the 5th accused has given a voluntary statement. Therefore, by having stocked the drugs for sale without holding requisite drug licences, A1 to A5 have contravened section 18(c) of the Act. Hence, a show cause notice dated 06.04.2010 was issued by hand delivery alleging that they have contravened the provisions of section 18(c) of Drugs and Cosmetics Act, 1940 for having stocked the drugs for sale/distribution without holding requisite drug licence and called for the petitioners to submit the particulars of the Directors and to disclose the names and addresses of the persons from whom they acquired the drugs, which were seized as per section 18-A of Drugs and Cosmetics Act. The petitioners submitted a reply on 12.04.2010 and the same found to be not satisfactory because the petitioners have not disclosed the names and addresses of the suppliers from whom they acquired the drugs. Hence, Tmt. Ammukutty, Drugs

Inspector, Ashok Nagar Range, by a letter dated 31.05.2010, has handed over the entire file to the complainant for further investigation and submit a final report. Hence, on 26.04.2011, the complainant submitted a detailed report to the Director of Drugs Control, Chennai, seeking sanction to prosecute A1 to A5 for the above contravention.

3. On 24.06.2011, the complainant received sanction order issued from the Office of the Director of Drugs Control, Chennai dated 14.06.2011

and thereafter, necessary action was taken to prosecute the accused persons for the said contraventions. Therefore, a complaint was filed against

the petitioners before the IV Metropolitan Magistrate Court, Saidapet, Chennai in C.C. No. 141 of 2012 on 27.01.2012 for having stocked the

drugs for sale without having requisite drug licence, which is punishable u/s 27(b)(ii) of the said Act and also for having not disclosed the names

and addresses of the persons from whom they acquired the drugs were seized, which is punishable u/s 28 of the said Act. The present petition has

been filed by all the accused persons to quash the said complaint.

4. It is the submission of the learned Senior Counsel for the petitioner that the premises, where the stocks of drugs were seized, is the Training

Centre of the petitioners company. The petitioner company had rented a premises at No. 14, Elliots Beach Road North End, T.V. Nagar 2nd

Main Road, Besant Nagar, Chennai from 01.04.2007 till January 2010 for the purpose of giving training to the medical representatives. Hence,

some samples, some empty sales pack of medicines and specimen strips of medicines are normally kept for facilitating training and to demonstrate

and visually show specimen of petitioner company's products to new sales officers. The worth of the strips of medicines and some empty sales

pack of medicines kept in the premises only to the value of Rs. 3,000/-. In fact, the Drugs Inspector checked the boxes and records and they did

not find anything incriminating but collected some empty cartons of medicines, few sample boxes of medicines marked ""physician sample not for

sale"" and few medicines strips having reached their end of shelf life with the passage of time and few specimen of medicines all kept in the training

hall and manufactured by petitioner's own manufacturing unit at Himachal Pradesh. In fact, on the date of inspection, namely, 29.03.2010 itself, the

night watchman of the said premises had clearly stated in his evidence that the petitioner used to keep the medicines to display during meeting

purpose. Therefore, the earlier statements available in the case i.e. the statements of workers would show that the drugs samples worth about Rs.

3,000/- were kept in the premises only for administration purpose to give training to the medical representatives.

5. Further, the learned senior counsel for the petitioners, by relying upon the judgment of this Court reported in (1992) 1 MLJ (Crl.) 126 in the

case of V. Loganathan vs. Drug Inspector, Chengalpattu Range, Kancheepuram submitted that a learned single Judge of this Court referred the

judgment rendered by the Hon"ble Supreme Court reported in 1979 MLJ. Crl. 448 in the case of Mohd. Shabbir vs. State of Maharashtra held

that mere possession of simpliciter of the drugs does not appear to be punishable under any of the provisions of the Act. Only if the drugs are

stored for the purpose of selling, distributing, then section 18(c) would be attracted. In the instant case, the drugs were kept only for the purpose of

demonstration to give training to the medical representatives. Therefore, the offence u/s 18(c) will not be attracted in this case.

6. That apart, the learned senior counsel for the petitioner submitted that there is no allegation to the effect in the complaint that these petitioners

are in charge of the company and also for the conduct of the business. Since petitioners 2 to 4 are the Directors of the company, they do not

vicariously liable for the offence committed. In this regard, the learned senior counsel relied on the decisions reported in State of Haryana Vs. Brij

Lal Mittal and Others, in the case of Concept Pharmaceuticals Pvt. Ltd., vs. State of Tamil Nadu. The learned senior counsel for the petitioner

further submitted that the complaint filed u/s 18-A of the Act is also not maintainable because under the said section, petitioners have to disclose

the address and other particulars of the person from whom they acquired the drugs or cosmetics. In the instant case, the petitioners have furnished

all the particulars by their reply dated 12.04.2010 to the show cause notice issued by the complainant on 06.04.1970. In these circumstances, the

offence u/s 18-A also will not be attracted. Therefore, the complaint is liable to be quashed.

7. On the contrary, it is the submission of the learned Additional Public Prosecutor that as per section 18(c) of the Act, if the manufacture of the drugs stored the drugs for sale or for distribution, or sell, or stock or exhibit or offer for sale, or distribute any drug or cosmetic, except under and in accordance with the conditions of, a license issued for such purpose under this Chapter IV of the said Act, he is liable to be prosecuted.

Therefore, it is incorrect to state that only if it is stored for sale, section 18(c) would be attracted. Even if the drug is exhibited, that is suffice to attract the penal provisions u/s 27 of the Act. Thus, the learned Additional Public Prosecutor opposed to quash the proceedings.

8. This Court has considered the submissions made by both sides.

9. According to the petitioner, the Mahazar discloses, ""During search, it was found that they have stocked certain salable drugs, expired drugs and physician sample not to be sold, without valid drug licence"". There is no allegation in the Mahazar that stocks were exhibited for sale or the

petitioner company was found selling and distributing the drugs at the time of surprise inspection. Further, according to the petitioner, these drugs

were stored for the purpose of demonstration purposes to give training to the medical representatives. In this regard, they also relied upon the

earlier statement given by the night watchman and submitted that the statement of Arumugam would show that the samples were kept in the

premises only for the purpose of giving training. Further, according to the petitioners, they have vacated the premises in January, 2010.

10. Though these submissions made by the learned senior counsel for the petitioners are based on the factual aspects, which have to be normally

established at the time of adducing evidence, in the instant case, I find that, except the seizure of the samples found in Form 16, no other document

such as, sale register, invoices, etc. were seized by the Drugs Inspector to show that these drugs were kept only for the purpose of sale. Now, it is

the main submission of the learned senior counsel for the petitioner that mere possession simpliciter of the samples would not attract section 18(c)

of the Act. In support of his contention, he also relied upon the judgment reported in 1979 MLJ CrL 448 (supra) wherein the Hon"ble Supreme

Court dealt with the interpretation of penal provision of section 27 of the Act as under:

On an interpretation of section 27, it seems to us that the arguments of Mr. Singh is well founded and must prevail. The words used in section 27,

namely, ""manufacture for sale"", sells, have a comma after each clause but there is no comma after the clause ""stocks or exhibits for sale"". Thus the

section postulate three separate categories of cases and no other. (1) manufacture for sale; (2) actual sale; (3) stocking or exhibiting for sale or

distribution of any drugs. The absence of any comma after the word ""stocks"" clearly indicates that the clause ""stocks or exhibits for sale"" is one

indivisible whole and it contemplates not merely stocking the drugs but stocking the drugs for the purpose of sale and unless all the ingredients of

this category are satisfied, section 27 of the Act would not be attracted. In the present case there is no evidence to show that the appellant had

either got these tablets for sale or was selling them or had stocked them for sale. Mr. Khanna appearing for the State, however, contended that the

word ""stock"" used in section is wide enough to include the possession of a person with the tablets and where such a person is in the possession of

tablets of a very huge quantity, a presumption should be drawn that they were meant for sale or for distribution. In our opinion, the contention is

wholly untenable and must be rejected. The interpretation sought to be placed by Shri Khanna does not flow from a true and proper interpretation

of section 27. We, therefore, hold that before a person can be liable for prosecution or conviction u/s 27(a)(i)(ii) read with section 18(c) of the

Act, it must be proved by the prosecution affirmatively that he was manufacturing the drugs for sale or was selling the same or had stocked them or

exhibited the articles for sale. The possession simpliciter of the articles does not appear to be punishable under any of the provisions of the Act. If,

therefore, the essential ingredients of section 27 are not satisfied the plea of guilty cannot lead the Court to convict the appellant.

Therefore, the dictum laid down in the above judgment would show that unless all the ingredients of the category of section 27 of the Act are

satisfied, the penal provision u/s 27 for the offence u/s 18(c) will not be attracted, wherein in the instant case, there is no evidence to show that the

petitioners kept the drugs marked "physician sample not for sale" only for the purpose of sale, because no document such as sale register, invoices, etc. were seized. Therefore, I am of the opinion that mere possession simpliciter of drugs would not amount to "offence" under any provisions of the Act.

11. With regard to the next fold of submission of the learned senior counsel for the petitioners that in the absence of any specific averment as to how the petitioners are responsible or in charge of the affairs of the company, the respondent cannot be compelled the petitioners to face criminal trial. In the instant case, a reading of the complaint would show that absolutely there is no averment to the effect as to how the petitioners are responsible for the conduct of the business of the company or in charge of the day-to-day affairs of the company. In this regard, it would be appropriate to refer the judgment of the Hon"ble Apex Court reported in State of NCT of Delhi through Prosecuting Officer, Insecticides, Government of NCT, Delhi Vs. Rajiv Khurana, wherein it has been held as follows:

20. The legal position which emerges from a series of judgments is clear and consistent that it is imperative to specifically aver in the complaint that the accused was in charge of and was responsible for the conduct of the business of the company. Unless clear averments are specifically incorporated in the complaint, the respondent cannot be compelled to face the rigmarole of a criminal trial.

13. In Concept Pharmaceuticals Pvt. Ltd. Vs. State of Tamil Nadu, a single Judge of this Court has held that a person, who at the time when the offence u/s 34 of the Act was committed, was in charge of and responsible for the conduct of the business of the company, will be vicariously liable. The relevant paragraph in the said judgment reads as follows:

The last argument of the learned Counsel has a sufficient force. u/s 34 of the Drugs and Cosmetics Act, were an offence under the Act had been committed by a company, the persons who will be vicariously liable, would be those, who at the time when the offence was committed were in charge of and responsible for the conduct of the business of the company as well as the company itself. Before choosing to prosecute any person

vicariously, prima facie the complaint must contain allegations, that such persons were in charge of and responsible for the conduct of the business

of the company, at the relevant time. The absence of this basic averment would be sufficient to halt the prosecution, against those persons, who do

not fall within this category contemplated by law. Only after the initial burden of ""in-charge of"" and ""responsible"" is discharged by the prosecution,

the proviso to Section 34(1) would come into operation, shifting the onus on the persons concerned, to prove that the offence was committed

without the knowledge in spite of exercise of all due diligence to prevent commission of such an offence. The law on this question is well settled. A

perusal of the complaint clearly shows, that petitioners 2 and 3 were the directors of the first petitioner and were residents of Bombay. Nowhere, it

has been stated in the complaint, that petitioners 2 and 3 were in charge of and responsible for the conduct of the business of the first petitioner.

The second petitioner is a lady and the wife of the third petitioner. On the sole ground that no allegations have been made against petitioners 2 and

3, which would attract the ingredients of Section 34(1) of the Act, the pending prosecution in so far as it relates to them, will have to be quashed

and shall accordingly stand quashed. As far as petitioners 1, 4 and 5 are concerned, the prosecution will have to be sustained. The first petitioner is

the company itself, while the fourth petitioner is not only the Chairman, but also the person in charge of the conduct of the business of the first

petitioner at Bombay, where the manufacturing unit is situated. As far as the fifth petitioner is concerned, he is the person in charge of the day-to-

day conduct of the business at Madras. Of course, it will be open for these petitioners to contend, before the trial Magistrate, that the offence

alleged had not been established and further the proviso to Section 34(1) of the Act will attract their case. At this stage, I do not find any scope to

interfere, as far as petitioners 1, 4 and 5 are concerned.

13. A reading of the said judgments would show that u/s 34 of the Act, where an offence under the Act had been committed by a company, the

persons who were responsible for the conduct of the business of the company as well as the company itself shall be deemed to be guilty. In this

case, there is no averment to the effect that these persons are responsible and in charge for the conduct of the business of the company and hence,

merely they are the Directors, it does not mean that automatically they are liable to be prosecuted. There should be a clear averment as to how the

Directors are responsible and in charge for the conduct of the business of the company when they are all residing at Mumbai where the alleged

offence said to have been committed at Chennai. In this regard, one more judgment of a Full Bench of Hon"ble Supreme Court reported in S.M.S.

Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, , wherein it has been held as follows:

....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 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 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 The

conclusion is inevitable that the liability arises on account of conduct, act or omission on the part of a person and not merely on account of holding

an office or a position in a company. Therefore, in order to bring a case within Section 141 of the Act the complaint must disclose the necessary

facts which make a person liable.

Therefore, I am of the opinion that in the absence of specific allegation as to how they are responsible for the conduct of the business of the

company, the complaint itself is not legally sustainable.

Yet another submission is that u/s 18A, the petitioners have failed to disclose the address and other particulars of the persons from whom they

acquired the drugs and cosmetics; but on a perusal of the reply sent by the petitioners to the show cause notice I find that the petitioners have

already furnished the particulars. In any event, this complaint has to fail for the reason that there is no allegation to the effect that the Directors are

responsible and in charge of the day-to-day affairs of the company. On the whole, I am of the opinion that the complaint itself is not legally sustainable and hence, the same is liable to be quashed.

For the reasons stated above, the criminal original petition is allowed and the proceedings against the petitioners in C.C. No. 141 of 2012 pending on the file of IV Metropolitan Magistrate Court, Saidapet, Chennai, are quashed. Consequently, connected M.Ps. are closed.