

(1992) 02 MAD CK 0010

In the Madras High Court

Case No : Criminal M.P. No. 14575 of 1989

Alfred Borg and Co., India (P) Ltd., and 13 Others

APPELLANT

Vs

M/s Antox India (P) Ltd., 46/3, Hossargatta Road, Bangalore

RESPONDENT

Date of Decision : 10-02-1992

Acts Referred:

Drugs and Cosmetics Act, 1940 — Section 17(B)(a), 27(c)

Citation : (1992) 02 MAD CK 0010

Hon'ble Judges : Arunachalam, J

Bench : Single Bench

Advocate : Franco Louis, for the Appellant; A.C. Somayaji for Mr. M. Jayaraman, for the Respondent

Final Decision : Dismissed

Judgement

Arunachalam, J.—Petitioners, 14 in number, are the accused in C.C.No.2622 of 1989, pending on the file of the XVIII Metropolitan

Magistrate, Saidapet, Madras.

2. Petitioners are being prosecuted, for having manufactured a spurious Drug, punishable under S.27(c) read with 17 (B) (a) of the Drugs and

Cosmetics Act, 1940. The prosecution, is on a private complaint, and the respondent is the complainant.

3. The allegations in the complaint show, that the first petitioner is a private limited company, having its registered office at Madras; petitioners 2 to

6 are the directors of the first petitioner company; petitioner 7 is a public limited company having its registered office at Bombay and, petitioners 8

to 14 are the directors of petitioner 7. The complainant claims to be the manufacturer of a drug bearing the brand name Cal-De-Ce". The

ingredients of this drug are Calcium Gluconate, Vitamin C and Vitamin D. Cal-de-

ce is stated to fall under the definition of patent of proprietary medicine, under S.3(b)(ii) of the Drugs and cosmetics Act.

4. The averments in the complaint show, that the complainant had been manufacturing Cal-de-ce since 1986, by virtue of a licence issued with effect from 10.7.1986 and which was renewed and was valid at or about the time, this private complaint was instituted. From the inception

petitioner 7 was the sole selling agent or this product of the complainant. In 1986, before the licence was issued to the complainant, the Drug

Controller of Karnataka called upon the 7th petitioner to surrender their earlier licence and further give an undertaking, that they would not be

manufacturing the same drug either in their own name or in the name of anybody else. This was necessitated, since the 7th petitioner was

manufacturing the same drug, in their own name, prior to 1986. The 7th petitioner furnished a letter of undertaking to the Drugs Controller of

Karnataka as required, and thereafter, the manufacturing licence in favour of the complainant was issued.

5. The complaint further states, that in contravention of law, petitioners 1 to 7 have subsequently entered into an illegal arrangement by which

petitioner No. 1 has started manufacturing the identical drug, with the identical name Cal-de-ce and the 7th petitioner has been buying, stocking

and marketing the same. On enquiry, the complainant found, that with the help of the 7th petitioners, the first petitioner had secured a drug

manufacturing licence from the Drugs Controller of Tamil Nadu, suppressing the continued validity of the licence granted earlier in 1986, for

manufacturing the same drug, by the complainant, though by the Drugs Controller of Karnataka. The complainant further states. That under S.32 of

the Act, the complainant would be an aggrieved person. Apart from both the companies shown as A.1 and A.7 in the complaint, the other accused

are being prosecuted, since they happen to be the directors of either of the companies. The learned trial magistrate after recording the sworn

statement of the complainant took cognizance of the offence, and issued process to all the petitioners.

6. In this petition, preferred under S.482 of the Criminal Procedure Code, to call for the records and quash the pending prosecution as not

maintainable and an abuse of the process of court Mr. C. Franco Louis, learned

counsel appearing on behalf of the petitioners, contended, that Cal-de-ce will attract provisions of S.3(h)(ii) of the Act, However, this patent or proprietary medicine will not fall within the ambit of spurious drug, contemplated under S.17(B)(a) of the Act, According to the learned counsel, the trade name will not be the criterion but the ingredients of the drug would be the criterion to attract the definition of spurious drug. To substantiate his contention, he referred to S.16(1)(a) of the Act, which deals with standards of quality. In this context, Schedule 2 was also referred to. In other words, the contention of the learned counsel was that a drug can be sold without a trade name, but the real name of the drug will be only its ingredients. In the same strain, reference was made to R.124-B and Schedule V. Thereafter, the learned counsel brought to my notice S.18 (a)(iii), which prohibits the manufacture and sale of any patent or proprietary medicine, unless there is displayed in the prescribed manner, on the label or container thereof, the true formula or list of active ingredients contained in it, together with the quantities thereof. In this connection, he also pointed out, R.103(3), which reads that the true formula or list of the ingredients shall be printed or written in indelible ink on the outer label of every package containing a patent or proprietary medicine. The learned counsel then urged, that rule S.96(A) and (B) contemplate the difference between the trade name and the drug name, and what was therefore required was the generic name and not the trade name. By reference to Indian Pharmaceutical Guide, he contended that Analgin was manufactured by several companies though the name of the drug is Analgin. Several such drug names were pointed out. He further contended, that the Indian Pharmacopoeia under the head Patents and Trade Marks reads that the inclusion in the Indian Pharmacopoeia of any drug subject the actual or potential, patent or similar rights, or the inclusion of any name which is a trade mark in any part of the world does not and shall not be deemed to imply or convey permission, authority, or licence to exercise any right or privilege protected by such patent or trade mark, including licence to manufacture, without due permission, authority or licence from the person or person in whom such rights and privileges are vested, and this fact will have to be given due significance, while considering the impact of S.17 B(a) of the Act.

7. He then contended, that, to be a Person Aggrieved one has to be equated to a Recognised Consumer Association contemplated under S.32 of

the Act. In other words, the point urged was, that one manufacturer cannot institute a prosecution against another, since he would not be a

consumer on the basis of S.34, of the Act, the learned counsel, argued, that there was lack of allegations in the complaint, to prosecute petitioners

2 to 6 and petitioners 8 to 14. He finally, contended that multiplicity of proceedings should not be encouraged and even on that score, the pending

prosecution should not be allowed to survive. For this proposition, he stated that the respondents initially preferred a writ petition in this court, for

cancellation of the licence of the petitioners, on the ground, that Cal-de-ce manufactured by the petitioners was a spurious drug falling within the

ambit of S.17B (a) of the Act. In the writ petition, a verdict was rendered, directing the Drugs Controller to consider the matter afresh, regarding

cancellation of licence. However, on a Writ Appeal, preferred by the petitioners, a Division Bench of this court, while agreeing that a fresh disposal

had to be given by the Drugs Controller observed that, the ground, that such a consideration was for cancellation of licence, had to be deleted. The

learned counsel also stated about the pendency of C.S.No.1220 of 1988 and C.S.No.972 of 1989 on the Original Side of this court between the

parties, apart from a suit, filed by the petitioners in Baroda, wherein an ex-parte order of injunction, has been issued against the respondent on

1.4.1989 and confirmed on 21.6.1989. The learned counsel urged, that the object of the respondent, was to harass the petitioners.

8. On these contentions, I have heard Mr. A.L. Somayaji, learned counsel appearing on behalf of the respondent. He contended that an artificial

definition has been given under S.17-B (a) of the Act and in fact, a fiction was created. He urged that unless there is ambiguity, there will be no

need to look into the object and reasons which prompted the legislation. The language of S.17 B(a) of the Act, was so clear and explicit that no

form of ambiguity exists. Similarly, he contended, that the word "aggrieved" in S.32 of the Act would include the respondent, and therefore the

contention that the complainant should also be a consumer should not accede to, for then, the very object would be thwarted. He submitted that

once a person is stated to be a director in charge he must be deemed to be responsible for the conduct of the business of the company and hence

the other petitioners apart from petitioners 1 and 7 cannot also be excluded. He contended, that the main issue in the civil suit, was not, whether

the drug Cal-de-ce was spurious or not, and hence there cannot be a bar for prosecuting the petitioners, merely because civil suits were pending.

The remedy, sought in the writs, was also for cancellation of licence and hence even the pendency of W.P.1547/91 preferred by the respondent in

this court, challenging the order of Drugs Controller, that Cal-de-ce manufactured by the petitioners was not a spurious drug, after the order in the

Writ Appeal was handed over to him, cannot erase the pending prosecution.

9. I have carefully considered the rival contentions, urged by either counsel. The crux of the arguments centre on the question, if Cal-de-ce,

admittedly manufactured by the petitioners, would fall within the contemplation of S.17(B) (a) of the Act. Learned counsel for the petitioners, has

not disputed the Cal-de-ce medicine falls within the purview of S.3(h)(ii) of the Act. S.3 (h)(ii) reads as follows:

3(h) "patent or proprietary medicine" means, (ii) in relation to any other system of medicine, a drug which is a remedy or prescription presented in

a form ready for internal or external administration of human beings or animals and which is not included in the edition of the Indian Pharmacopoeia

for the time being or any other pharmacopoeia authorised in this behalf by the Central Government after consultation with the Drugs Technical

Advisory Board constituted under S.51;

On this basis, if we now turn to S.17 B(a) of the Act, Cal-de-ce, which is a drug, shall have to be deemed to be spurious, if it is manufactured

under a name which belongs to another drug. S.3(h)(ii) in relation to any other system of medicine, other than mentioned in S.3(h)(ii) of the Act,

takes in its fold a drug, which is a remedy or prescription present in a form ready for internal or external administration of human beings or animals

and which is not included in the edition of the Indian Pharmacopoeia for the time being or any other Pharmacopoeia authorised in this behalf by the

Central Government, after consultation with the Drugs Technical Advisory Board constituted under S.51. Cal-de-ce is presented in a form ready

for internal and external use of human beings and animals, and it is this drug, which the complainant claims, is being manufactured by the petitioners

under a name which belongs to the drug manufactured by him, Prima facie it

appears that the averments in the complaint taken at their face value, indicate the ingredients of an offence, punishable under S.17 B (a) alleged against the petitioners. It is of course true, that the learned counsel for the petitioners, attempts to make a distinction between the trade name and the ingredients of the drug. Such a distinction can be appreciated only after sufficient evidence is brought on record. At this stage, it is very difficult for me, to agree that the name of the drug would only be the ingredients of the drug or the drug can be sold, without a trade name. I have already noticed that Cal-de-ce contains three different ingredients each one of which could be a drug under the concerned definition in the Act. All that Rule 124-B read with Schedule V, 18 (a)(iii) read with the Rule 103(3) and again Rule 96 (A) and (B) contemplate are the basic need, to stick to the standards of drugs and do proper labelling, showing the ingredients. The prescription of these Rules, will have to be complied with by every manufacturer and the respondent as a manufacturer of Cal-de-ce, will have to strictly comply with those provisions. However, the petitioner cannot claim, that merely because they have complied with the rules aforestated, they cannot be prosecuted under S.17 (B)(a) of the Act, for then, the very purpose for which S.17 (B) (a) was (sic) into the statute book, would be thwarted. The reference to Indian Pharmaceutical Guide and the Pharmacopoeia of India, cannot advance the case of the petitioners at this stage, for consideration of this question can arise, only after sufficient evidence is brought on record and the petitioners succeed in establishing that Cal-de-ce will not fall within the purview of S.17 B (a) of the Act, as claimed by the respondent, and further the ingredients of Cal-de-ce will only be relevant and not the name Cal-de-ce which should be merely treated as trade name.

10. I am unable to agree that under S.32 of the Act, the, respondent will not be an aggrieved person and if the respondent company has to be treated as an aggrieved person, it must be equated to a Recognised Consumer Association. S.32 uses the word ""or"" between an Inspector and the person aggrieved and a Recognised Consumer Association. Paragraph 10 of the complaint mentions how the respondent is an aggrieved person and prima facie, the trial Magistrate was justified in taking cognizance of the offence alleged, on the basis that the respondent was an aggrieved

person.

11. However, as far as petitioner 2 to 6 and 8 to 14 are concerned, I will have to uphold the contention of Mr. Franco Louis S.34 of the Act, as

far as it is relevant for our purpose, reads as follows:

When 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.

Proviso to the Section is not relevant at this stage, for that would come into operation only after the initial onus contemplated under S.34(1) of the

Act is discharged by the prosecution, at least prima facie, by making necessary averments in the complaint, S.34(2) of Act does not come into

operation at this stage, at least till the prosecution prima facie complies with its obligation under S.34(1) of the Act. The only relevant paragraph in

the complaint, seeking to connect the directors of the companies is paragraph 11, which is extracted here under:

11. Accused 1 is a company managed by accused 2 to 6 who are Directors in-charge of the business of the company, Accused 8 to 14 are the

directors of Accused-7 company. They are responsible to the A-7 company for the conduct of business of the Company. As such under S.34 of

the Act, accused 2 to 6 and accused 8 to 14 are liable to be punished along with accused-1, and 7. Accused-1 is the manufacturer of the Drug.

A-7 is stocking, selling and marketing in Madras and other places, drugs deemed to be spurious under S.17 B of the Act.

What S.34 of the Act contemplates is that, if the offender were to be 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, shall also be deemed to be vicariously liable.

Vicarious liability can be fastened only after the prosecution prima facie succeeds in showing by the averments made in the complaint, that those

persons sought to be prosecuted along with the companies, were not only in charge but were also responsible for the conduct of the business of

the company. The word used is ""and"" and not ""or"". It would be very difficult to agree with Mr. Somayaji, that ""and"" will have to be read as or. In

catena of cases, the Apex Court has held, that initiating prosecution against sleeping partners or women, when the company is the main offender,

cannot be sustained unless there was basic material to show that such partners or directors were also in charge of and responsible for the conduct

of the business of the company. Merely, by alleging that directors are in charge of the company, as is found in paragraph 11 of the complaint,

petitioners 2 to 6 cannot be prosecuted. The complainant should further show that petitioners 2 to 6 were also responsible for the day-to-day

conduct of the business of the company. Similarly, as far as petitioners 8 to 14 are concerned, paragraph 11 reads that they were responsible for

the business of the company, but does not allege that they were in charge of the company. A quick look at the law laid down by the Apex Court

will be useful in this context. In *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others*, the pronouncement reads as hereunder:

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, it can be said that no case against the Directors has been made out ex facie on the allegations

made in the complaint and the proceedings against them were rightly quashed by the High Court.

In that case the averments in the complaint read as follows:

That the accused No. 3 is the Manager, of accused No. 2 and accuse Nos. 4 to 7 are the Directors of Accused No. 2 and as such they were in

charge of and responsible for the conduct of business of accused No. 2 at the time of sampling.

In *Municipal Corporation of Delhi Vs. Purshotam Dass Jhunjunwala and Others*, , the supreme court stated thus, after extrating the relevant para in

the complaint;

Complaint: That accused Ram Kishan Bajaj is the Chairman, accused R.P. Neyatia is the Managing Director and accused 7 to 12 are the

Directors of the Hindustan Sugar Mills Ltd., and were in charge of and responsible to it for the conduct of its business at the time of commission of

offence.

Unlike the other case, para 5 of the complaint of this case gives complete details of the role played by the respondents and the extent of their

liability. It is clearly mentioned that Ram Kishan Bajaj is the Chairman and R.P. Nayotia is the Managing Director and respondents 7 to 11 are the

directors of the Mill and were in charge of and responsible for the conduct of its business at the time of commission of the offence whereas in other

case the complaint has merely drawn a presumption, without any averment. In the instant case, a clear averment has been made regarding the

actual role played by the respondents and the extent of their liability. In this view of the matter it cannot be said that part 5 of the complaint is vague

and does not implicate respondents 1 to 11.

Thus it is apparent that mere extraction of the Section in the complaint would not suffice, and further vague allegations or assumptions, would not

lead any where. The complaint must prima facie disclose, that there was any act committed by the Directors, from which a reasonable inference

can be drawn of their vicarious liability. Looked at from any angle, on the averments available in the complaint, the pending prosecution cannot be

maintained, in so far as it concerns petitioners 2 to 6 and 8 to 14. It may be, that petitioners 1 and 7 may have to be represented, by some person

in-charge of the respective companies. On that score it would not be fair to sustain the prosecution against petitioners 2 to 6, and 8 to 14. It is quit

true that civil litigation is pending in this court and also in the concerned court at Baroda. It appears that the suits do not mainly concern, with the

decision if Cal-de-ce manufactured by the petitioners will be a spurious drug as contemplated under S.17 B(a) of the Act and the writ petitions

again deal with the need for cancellation of licence or otherwise. It is of course, true that there is bound to be some overlapping, on the same set of

facts, leading to a prosecution as well as challenge of a civil right. On that score, a prosecution cannot be quashed, as long as the court is not

impelled to hold that initiation of this prosecution was intended to be an exercise in harrassment. At this stage, I am unable to conclude that

initiation of this prosecution was totally aimed at harrassing the petitioners.

12. I agree with Mr. Somayaji that under S.17 B (a) of the Act, a fiction and an artificial definition is created. There is no ambiguity in the language

of the section. Learned counsel for the petitioners, wanted to rely upon certain

documents to substantiate his contentions, but I did not permit him to do so, since documentary evidence is yet to come on record. Those documents will have to be placed before the trial court and an opportunity, afforded to the respondent to challenge the same. At this premature stage, it will be difficult to accede to the request of the learned counsel to peruse documents, which have not accompanied the complaint, or brought on record as exhibits in the Calendar Case. Petitioners 1 and 7 will be at liberty to urge before the trial Magistrate, that Cal-de-ce will not attract the provisions of S.17 B (a) of the Act, since, as stated earlier, the said question will relate to the realm of appreciation of evidence, which is yet to be brought on record. During the course of trial, if evidence is forthcoming, regarding involvement of one or more of the directors or those who have not been arrayed as accused, it will always be open to the trial Magistrate, to exercise his power under S.319 of the Criminal Procedure Code, which extraordinary power, of course, can be utilised by sound exercise of judicial discretion, only if compelling reasons exist for taking cognizance.

13. In the result this petition is dismissed in so far as it concerns petitioners 1 and 7 and allowed in so far as it relates to the petitioners 2 to 6 and 8 to 14.