(2002) 02 BOM CK 0051

In the Bombay High Court

Case No : Criminal Application No. 1530 of 1998

Kishanchand Lilaram Bajaj — APPELLANT

Vs

State of Maharashtra — RESPONDENT

Date of Decision : 21-02-2002

Acts Referred:

Drugs and Cosmetics Act, 1940 — Section 18, 27
Drugs and Cosmetics Rules, 1945 — Rule 65

Citation : (2002) 3 MhLj 76

Hon'ble Judges : D.D. Sinha, J

Bench : Single Bench

Advocate : S.V. Manohar, for the Appellant; S.G. Loney, Additional Public Procecutor, for the Respondent

Final Decision : Dismissed

Judgement

D.D. Sinha, J.—Heard Shri Manohar, learned Counsel for the applicant and Shri Loney, learned A.P.P. for the non-applicant.

2. The Criminal Application u/s 482 of the Code of Criminal Procedure is directed against the judgment and order dated 10th August 1998 passed by the III Additional Sessions Judge, Nagpur, whereby Criminal Revision Application No. 2187 of 1993 preferred by the non-applicant/State was allowed and the order of discharge dated 19-8-1993 passed by the Additional Chief Judicial Magistrate was set aside.

3. Shri Manohar, learned counsel for the applicant contended that Smt. Awadhibai Bajaj was granted licence under the provisions of Drugs and Cosmetics Act on 27-2-1983 for a period of five years. At the time of grant of licence, the name of the applicant was shown as qualified person. A complaint was filed against the applicant on 9-4-1991 in the Court of Judicial Magistrate First Class, Nagpur for alleged contravention of Rule 65(4)(2) and Rule 65(3) read with Section 18(C) and 18(A)(vi) of the Drugs and Cosmetics Act, 1940. The allegations in the complaint reveal that the applicant was not able to produce

purchase records and the drugs sold were in excess of the purchase records produced.

4. The learned Counsel for the applicant contended that the application for discharge was moved by the applicant before the Judicial Magistrate First Class, Nagpur and the Additional Judicial Magistrate First Class, Nagpur vide his order dated 19-8-1993 discharged the applicant of the alleged offences charged against him. The non-applicant/State, being aggrieved by the said order, filed a Criminal Revision Application before the Sessions Judge, Nagpur and the II Additional Sessions Judge, Nagpur vide its judgment dated 10-8-1998 allowed the revision and set aside the order passed by the Additional Chief Judicial Magistrate dated 19-8-1993. Hence, the present application u/s 482 of the Code of Criminal Procedure is, moved by the applicant for quashing of the revisional order passed by the Additional Sessions Judge.

5. Shri Manohar contended that the applicant is not the licensee of the shop in question. The licence was in the name of proprietor Smt. Awadhibai Lilaram Bajaj. The present applicant/accused was holding a power of attorney and was shown as qualified person in the licence application. The alleged offence has taken place in the year 1987. It is contended that on the basis of these facts, the prosecution was launched under the provisions of Drugs and Cosmetics Act, 1940 and the rules made thereunder and it is alleged by the prosecution that there is a breach committed with regard to the maintenance of public record and the registers and as such there is a contravention of the provisions of Rule 65(4)(2) and Rule 65(3) read with Section 18(C) and 18(A)(vi) of the Drugs and Cosmetics Act, 1940.

6. Shri Manohar contended that perusal of Rule 64(4) of which a contravention is alleged and for which present prosecution is launched, clearly recites that the records of purchases of the drugs intended for sale or sold by retail shall be maintained by licensee and such record shall show the following particulars,

(a) The date of purchase.

(b) The name and address of person from whom purchased and the number of the relevant licence held by him.

(c) The name of the drug, the quantity and the batch Number, and

(d) The name of the manufacturer of the drugs.

(ii) Purchase bills including cash or credit memos shall be serially numbered by the licensee and maintained by him in chronological order.

7. It is further contended that bare perusal under Sub-rule (4) of Rule 65, it is the duty of licensee to maintain the records. It is submitted that by no stretch of imagination the present applicant should be held responsible for not maintaining the record which is duty of the licensee.

8. Shri Manohar vehemently argued that provisions of Section 18 of the Act

would demonstrate that no person shall himself or any other person on his behalf shall maintain for sale or for distribution or sale or stock or exhibit or offer for sate or distribution any drug or cosmetic in contravention of any of the provisions of this chapter or any rule thereunder. It is submitted that the said provision will have to be construed strictly so as to mean that any person who carries on the contravention with regard to manufacture for sale or sale or stock or exhibit either himself or through any other person shall be responsible for violation of the provisions of the Act. The said provision makes the person alone liable and it does not make the other person liable for his misdeeds. It is further canvassed by the learned Counsel that it could be seen that the said provision of Section 18(A)(vi) has to be read harmoniously with Rule 65 and as seen from the perusal of Rule 64(4) it is obligatory on the part of licensee to maintain the registers and records.

9. Shri Manphar has submitted that, from the perusal of Sub-section (d) of Section 18, it is the duty of the licensee to maintain all registers and if the provisions of Section 18(A)(vi), 18(B) and Rule 65(4) are read harmoniously the same would mean that it is only licensee who is responsible for non maintenance of records and, therefore, fastening the liability on the applicant who is merely qualified person working in the licensed shop for the offences is uncalled for and same is also not the intent of the legislature.

10. Shri Manohar states that the provisions of Sub-section (C) of Section 18 of the Act also does not apply to the case of the present applicant since the provision itself is clear, that the sale or distribution of stock or exhibition for sale has to be done in accordance with the conditions of licence. The said provision would apply only to the licensee and none else. It is, therefore, submitted that any breach of conditions of licence laid down under Rule 65 would apply only to the licensee and none else. It is submitted that when the license is granted to the licensee under the Rules of Drugs and Cosmetics Act, it is the duty of the licensee alone to carry on business in accordance with the conditions of the licence and nobody else can be held responsible for violation of any of the conditions of licence. The applicant admittedly is not the licensee and was working as a qualified person and as such he cannot be held responsible for the said contravention of the condition of the licence. Shri Manohar earlier contended that the penal provision under Drugs and Cosmetics Act, 1940 is Section 27 and the contravention alleged by the prosecution, falls under category "(d) of Section 27". It is submitted that the opening words of Section 27 make it amply clear "whosoever or any other person on his behalf manufactures or sale or for distribution or sale or stocks or exhibits or offers for sale or distributes" make it clear that the provision relates to a person who commits a breach and does not apply to the employees or servants. It is, therefore, submitted that the provisions of Section 27 of the Act would apply only in case of licensee and not in case of the applicant.

11. The last limb of arguments of Shri Manohar is that the Sub-section (d) of

Section 27, regarding which the violation has been alleged, maximum punishment provided is two years. It is submitted that the contravention alleged in the complaint relates to the year 1987 whereas the complaint was filed on 9-4-1991 after a period of four years. It is submitted that Section 468 of the Code of Criminal Procedure lays down a limitation of a period of three years if the offence is punishable with imprisonment for a term exceeding one year, but not exceeding three years. In the present case, the maximum punishment describes being for a period of two years, a limitation of three years would apply and as such the present complaint filed against the applicant is barred by limitation.

12. Shri Manohar, learned Counsel for the applicant, therefore, contended that the applicant cannot be held responsible for the fault committed by the licensee and as such deserves to be discharged. The impugned order passed by the III Additional Sessions Judge, Nagpur being contrary to the provisions of the Act and Rules, cannot be sustained and needs to be quashed and set aside and the order passed by the Additional Chief Judicial Magistrate dated 19-8-1993 needs to be confirmed.

13. Shri Loney, learned A.P.P. on the other hand, contended that Rule 65 of the Drugs and Cosmetics Rules, 1945 deals with conditions of the licence and the present applicant has admitted that he was the qualified person as per the licence granted to M/s Bajaj Medical Stores. Applicant Shri Kishanchand Lilaram Bajaj was a constituted power of attorney holder and was authorised to act for all practical purposes on behalf of the proprietor of the firm. Awadhibai Bajaj is the mother of the applicant and the applicant was entrusted with the job of day to day working of the medical stores and was looking after the business and was dealing with the business transaction on behalf of the proprietor under the power of attorney executed by the proprietor in favour of the applicant and, therefore, the applicant is directly involved in the commission of an offence and it is incorrect to say that the provisions of Rule 65 does not apply in case of the applicant.

14. The learned A.P.P. further contended that the applicant was a qualified person and was also a constituted attorney of the proprietor under the valid power of attorney makes him, fully responsible and liable for the offence for which he is charged. It is submitted that it is not disputed that Rule 65 deals with maintenance of record of purchases of drugs by licensee. However, this does not absorb the applicant from the liability under the Act and Rules since he was entrusted the job of conducting the day to day business of the shop under the valid power of attorney. It is contended that all these aspects are clearly spelt out from the deed of special power of attorney which was submitted while applying for licence to the office of F.D.A., Nagpur. The deed was executed on 12-12-1983 by the owner of the shop late Smt. Awadhibai Lilaram Bajaj in favour of the applicant who was also a qualified person. As the owner of the shop was unable to manage the affairs of the shop personally, she appointed the applicant her attorney by executing valid power of attorney to act on her behalf in regard

to the affairs of the business. The applicant, therefore, was responsible and was liable to observe all the lawful provisions of Drugs and Cosmetics Act and the Rules made thereunder. All these factors are clear from the recitals in the deed of power of Attorney.

15. The learned A.P.P. further contended that the recitals in the deed of power of attorney show that the original licensee late Smt. Awadhibai Lilaram Bajaj has delegated all the powers, liabilities and responsibilities to carry on the business to the applicant. It is submitted that though the licence was granted to late Smt. Awadhibai Bajaj in view of the deed of power of attorney, it is the applicant who was looking after day to day affairs of the medical shop and, therefore, was liable for all the consequences for which he has been prosecuted.

16. Shri Loney, the learned A.P.P. further contended that the applicant/accused was not acting as servant of the licensee (proprietor) but was responsible for running of the medical shop as he was entrusted with all the powers in this regard by the proprietor under the deed of power of attorney and, therefore, the applicant is correctly held responsible for contravention of provisions of the Act and Rules.

17. Shri Loney, the learned A.P.P. further contended that Section 7(v) of the Prevention of Food Adulteration Act, 1954 is pari materia with Section 18(A)(vi) of the Drugs and Cosmetics Act, 1940. The Division Bench of Mysore High Court was considering the identical situation in case of State of Mysore v. Udipi Co-operative Mills Society Limited and Anr. reported in AIR 1960 Mysore 80, case falling u/s 7 of the Prevention of Food Adulteration Act and has held that the liability of a person contravening any of the provisions contained in Section 7 is an absolute liability and is not dependent on the existence of any particular knowledge or- intention. The learned A.P.P. further contended that similarly the Apex Court in case of Sarjoo Prasad Vs. The State of Uttar Pradesh, , a case arising out of offence under Prevention of Food Adulteration Act, expressed the view that if the owner of the shop in which adulterated article is sold is without proof of any mens rea, liable to be punished for sale of adulterated food. Learned A.P.P., therefore, contended that in the instant case, the provisions of Section 18(A)(vi) of the Drugs and Cosmetics Act, 1940 are attracted since in the instant, the applicant sold the concerned drug in excess of quantity than the actual purchases and, therefore, violated the provisions of Rule 65(4)(2) and Rule 65(3) read with Section 18(C) and 18(A)(vi) of the Drugs and Cosmetics Act.

18. I have given my anxious thought to the various contentions canvassed by the respective counsel and also perused impugned judgment passed by the III Additional Sessions Judge as well as the judgments referred by the parties.

19. It is an admitted fact that the licence was in the name of Awadhibai Lilaram Bajaj and the present accused/applicant Kishanchand was working as a qualified person in the shop and was holding a power of attorney on behalf of Awadhibai and was looking after the entire business of the medical stores in question. In

order to understand the issue in question, it will be appropriate to consider the scheme of the relevant sections of the Act as well as Rules. Section 18 provides the prohibition for manufacture and for sale of certain drugs and cosmetics. In the present case, we are concerned with Sub-clause (A) of Clause (vi) of Section 18 which contemplates that no person shall himself or by any other person on his behalf manufacture for sale (or for distribution), or sell, or stock or exhibit (or offer) for sale, or distribute, any drug or cosmetic in contravention of any of the provisions of this chapter or Rules made thereunder. Language used in the provision is totally unambiguous and is capable of conveying the legislative intent. The words "himself or by any person on his behalf have been included in the provision with a view to put it beyond controversy that the owner of any goods/drugs sold or distributed is liable for the offence in question whether he sells or distributes the same, himself, or by any person on his behalf. Similar analogy is applicable in respect of provisions of Section 27 of the Act which provides penalty for manufacture, sale etc. of drugs in contravention of provisions of this chapter or any Rule made thereunder is made punishable with imprisonment for a term which shall not less than one year but may extend to two years and with fine. The plain reading of Section 27 makes it clear that any person himself or by any other person on his behalf sells any drug other than drug referred to in Clause (a) or Clause (b) or Clause (c) in contravention of any other provision of this chapter and Rule is made punishable under this section. The liability of a person contravening any of the provisions referred to hereinabove is an absolute liability and is not dependent on existence of any particular knowledge or intention. The section is amply clear which contemplates that every person who indulges in sale of drug in contravention of the provisions of the Act and Rules is liable for the punishment whether he is aware or not in regard to the procedure required to be followed by the original proprietor or licensee.

20. In the instant case, it is no doubt true that Section 18(b) deals with maintenance of record and furnishing of information and further contemplates that the holder of the licence under Clause (c) of Section 18 shall keep and maintain records, registers and other documents as may be prescribed and shall furnish to any officer or authority exercising any power or discharging any function under this Act. Such information as is required by such officer or authority for carrying out the purposes of this Act. Similarly, Rule 65 of the Drugs and Cosmetics Rules, 1945 provides condition of licence and sub Rules of Rule 65 impose liability on the licensee to maintain the records, registers and the prescribed forms.

21. The Rules made under the Act need to be understood within the framework of the scheme of the substantive provisions of the Act and cannot be construed in isolation in order to draw meaning different than the scheme of the provisions of the Act. As I have already expressed hereinabove that the provisions of Sections 18 and 27 in no uncertain terms impose liability on a person (whoever he may be) sells a drug either himself or by any person on his behalf and

contravene any of the provisions of the Act or Rules contemplated u/s 27(d) is liable to be punished accordingly if the offence against him is proved by the prosecution for such contravention. In view of this legal position, the contention of Shri Manohar in this regard is misconceived and cannot be accepted.

22. In the instant case, the applicant would be a person who has sold the drugs on behalf of the licensee in contravention of the Rules and, therefore, in view of the provisions of Section 18(A)(vi) read with Section 27 of the Act is liable to be prosecuted. It is not available to the applicant to raise the defence that under Rule 65 as well as Sub-clauses of the said Rule impose the duty on the licensee alone to maintain records and registers in the prescribed forms and for any contravention thereof it is the licensee alone who is responsible for such breach of Rule and is alone liable for prosecution. It must be borne in mind that the legislature thought it fit to prohibit every person whether he is a licensee himself or other person who is acting on behalf of such licensee (in whichever capacity) to sell any drug or cosmetic in contravention of any of the provisions of the Act and Rules made thereunder. Neither Section 18 nor Section 25 carves out any exception in this regard in favour of person who is acting on behalf of the licensee from the criminal liability. In absence thereof, it is not possible to exclude a person who is acting on behalf of the licensee and the act of such person contravenes the provisions of the Act and Rules, to be excluded from the Criminal liability under the provisions of the Act. The contention of the learned counsel for the applicant if accepted in this regard, would frustrate the scheme of Sections 18 and 27 and, therefore, the same is rejected.

23. The purport of Sections 18 and 27 is every person whether licensee, agent or may be a qualified person, is prohibited from selling any drug in contravention of provisions of Act and Rules without any exception to this Rule and, therefore, all those who sell drug in contravention of the provisions of the Act and Rules are responsible for such contravention and can be proceeded against. Any other interpretation of Sections 18, and 27, in my view would be totally inconsistent with the legislative intent as well as object and purpose for which these provisions are enacted by the legislature. For the reasons stated hereinabove, the contention canvassed by Shri Manohar, learned Counsel for the applicant in this regard is misconceived and devoid of substance.

24. As far as the aspect of limitation is concerned, Section 473 confers power on the Court taking cognizance after expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained and that it is necessary to do so in the interest of justice. The power has been conferred on the Court taking cognizance to extend the said period of limitation where a proper and satisfactory explanation of the delay is available and where the Court taking cognizance finds that it would be in the interest of justice. Similarly, it appears that this point was also not canvassed before the Court below. However, in the facts of the case, it would be open for the trial Court to consider this aspect, if not already considered.

25. For the reasons stated hereinabove, the application is misconceived, devoid of substance and hence dismissed.

