

(2009) 02 GUJ CK 0097

In the Gujarat High Court

Case No : Misc. Criminal Application No. 1473 of 1998

Loknath Bhattacharya, Managing Director, Shalimar Chemical Works Ltd. and Another

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 06-02-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 319, 482
Drugs and Cosmetics Act, 1940 — Section 34
Negotiable Instruments Act, 1881 (NI) — Section 141
Prevention of Food Adulteration Act, 1954 — Section 16(1), 17, 17(1), 17(2), 17(3)
Prevention of Food Adulteration Rules, 1955 — Rule 12, 32

Citation : (2009) CriLJ 3577 : (2010) 1 Crimes 340 : (2009) 1 GLH 540 :
(2009) 2 GLR 1290 : (2009) 5 RCR(Criminal) 350

Hon'ble Judges : Anant S. Dave, J

Bench : Single Bench

Advocate : Saurin Mehta, for Nanavati and Nanavati, for the Appellant; Manisha L. Shah, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Anant S. Dave, J.—This petition u/s 482 of the Code of Criminal Procedure, 1973 is filed for quashing and setting aside the proceedings initiated against the petitioners under Criminal Case No. 217 of 1995 registered with the Court of learned Judicial Magistrate, First Class at Rajpipla, Dist. Bharuch along with the summons issued by the learned Judicial Magistrate, First Class at Rajpipla, with regard to the offences alleged to have been committed by the petitioners for violation of Section 2(ix)(k) and Rule 32(e) and Sections 7(ii)(v) and 16(1)(a)(i) of the Prevention of Food Adulteration Act, 1954 and Rules, 1955 (for short "the Act" and "the Rules" respectively).

2. It is the case of the petitioners that the petitioners herein are directors viz. petitioner No. 1 is the Managing Director and the petitioner No. 2 is Director of Shalimar Chemical Works Ltd., which is a limited Company, registered under the

provisions of the Companies Act, 1956 and having its Registered Office at Calcutta.

3. On 24-1-1994 at 2-00 p.m. the complainant Food Inspector along with one witness went to the shop named Harisiddhi Krupa Provision Store situated at Rajpipla, District Bharuch and the witness purchased three tins of coconut oil by paying Rs. 60/- for sampling and on these tins contents of weight, name of manufacturer, maximum retail price, date of the manufacture etc. were mentioned and it is mentioned that the said coconut oil is manufactured by Shalimar Chemical Works Ltd. Thereafter, the sample was taken as per the prescribed procedure. All other procedure was followed under Rule 12 of the Rules. Sample was sent to public analyst at Vadodara on 25-1-1994 and upon receipt of analysis report it was mentioned that the accused herein have committed offence under the Act as the product was misbranded. Upon grant of sanction by the Commissioner of Food and Health Organization, Bharuch, necessary complaint against the accused was lodged on 10-4-1995, and thereafter, process was issued by the learned Magistrate on 11-7-1995.

4. Mr. Sudhir Nanavati, learned Senior Advocate with Mr. Saurin Mehta, learned Counsel for the petitioners has mainly raised following contentions to quash and set aside the proceedings of Criminal Case No. 217 of 1995 that the averments made in the complaint are vague, unclear and nothing is mentioned specifically qua the petitioners attracting even the basic ingredients of the alleged offences. Secondly, while issuing the process, learned Magistrate has even prima facie not examined the complaint and process is issued mechanically without application of mind. Thirdly, the petitioners, in the capacity of Managing Director and Director, are not directly or indirectly responsible for misbrand, and ultimately, placing heavy reliance on Section 17 of the Act, it is submitted that as per requirement of Sub-section (2) of Section 17 of the Act, when a Company has committed an offence under the Act, the person nominated under Sub-section (2) to be in charge of, and responsible to, the company for the conduct of its business of the Company shall be proceeded against unless it is shown that the offence was committed with the consent, connivance or negligence of any director, manager, secretary or other officer of the Company, in which case the said person can also be proceeded against and punished for committing the said offence.

5. It is submitted that so far as Shalimar Chemical Works Ltd. is concerned, by a resolution passed in the meeting of the Company dated 25-1-1993 nominated a person named Mr. Ashutosh Maity, Factory Superintendent of the Company and made him as in-charge of and responsible to the said company for the conduct of the business of the said Company or establishment/branch/unit thereof and was authorized to exercise all such powers and take all such steps as may be necessary or expedient to prevent commission by the said Company and any offence under the Act.

6. In view of the above valid nomination, reliance was placed on Sub-section (1) (a)(i)(ii) and Clause (b) of Section 17 of the Act and it was submitted that when

a person is nominated under Sub-section (2) to be in charge as above, no proceedings can be undertaken against either Managing Director or Director or any other person. It is further submitted that though valid nomination was made as stated above, proceedings have been initiated and issuance of process by the Magistrate, therefore is illegal and nothing but abuse of process of law by the Food Inspector of filing such frivolous complaint deserves to be set aside.

7. Learned Counsel the petitioner further placed reliance on Sub-section (4) of Section 17 and submitted that even for attracting Sub-section (4) of Section 17 specific averment is necessary and even indicating slightest involvement of the Director or Managing Director or Manager of the Company, but except averment that the respondents Nos. 4 and 5 are Managing Director and Director, not a single word is found in the complaint, and therefore, above Sub-section (4) of Section 17 though begins with non-obstante clause, cannot be pressed into service for two grounds : (i) that nomination is already made and secondly no specific averment was made in the complaint. In support of the above submissions, learned Counsel for the petitioners has placed reliance mainly on three decisions in the cases of : (i) R. Banerjee and others Vs. H.D. Dubey and others, (ii) Yogesh Babubhai Trivedi v. K.V. Dabhi, Food Inspector reported in 2006 (1) GLH 83 and (iii) Misc. Criminal Application No. 8885 of 2002 and allied matters (Rasikbhai Manilal Patel v. State of Gujarat), where Sub-sections (1), (2) & (4) of Section 17 of the Act are specifically interpreted.

8. Learned Counsel for the petitioners pressed into service Section 141 of the Negotiable Instruments Act, 1881 and Section 34 of the Drugs and Cosmetics Act, 1940 and submitted that in absence of specific averments in the complaint, vicarious liability under criminal law against the Director or Manager cannot be attracted.

9. Ms. Manisha Shah, learned A.P.P. has vehemently opposed grant of relief as prayed for mainly on the following three grounds that averments in the complaint disclose a basic ingredient of the offences inasmuch as misbranding was established after sample was drawn, which was sent to public analyst and a report was received to the extent of misbranding of the product. Thus, when the petitioners are Managing Director and Director in-charge of the Company cannot be absolved from the offences committed by them.

10. Learned A.P.P. further contended that the document produced on the record of nominating Shri Ashutosh Maity for the purpose of Sub-section (2) of Section 17 of the Act was not communicated to the authority in spite of repeated requests made by the authority. It is further submitted that even such nomination can be raised at the stage of defence by the petitioners.

11. Ms. Shah, learned A.P.P. further drawn attention to provisions of Sub-section (4) of Section 17 that the above sub-section begins with non-obstante clause and irrespective of anything contained in the Sub-sections (1), (2) and (3) of Section 17 of the Act where an offence is committed by a Company with the consent or

connivance of, or is attributed to, any neglect on the part of, any director, manager, secretary or any other officer of the Company (not being a person nominated under Sub-section (2)) such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

12. According to Ms. Shah, learned A.P.P., irrespective of nomination under Sub-section (2) of Section 17 of the Act, more particularly, when the petitioner No. 1 is the Managing Director in-charge of day-to-day affairs of the Company, no specific averments were necessary vis-a-vis role attributed to him of committing the above offence. Learned A.P.P. further submits that powers u/s 482 of the Code of Criminal Procedure, 1973 to be exercised sparingly and that the same being extra-ordinary in nature and proceedings before the competent Court are pending the petitioners herein can raise all the contentions as part of the defence and if they seek any exemption etc., of personal appearance before the Court no undue hardship will be caused to them. Thus, according to her, petition deserves to be rejected in limine.

13. Having heard learned Counsel for the parties and perusing the record of the case, I am inclined to accept the submissions of learned Counsel for the petitioners on the very short ground that the question with regard to interpretation of Sub-sections (1), (2) and (4) of Section 17 is fully answered by their Lordships in the cases of R. Banerjee (supra), Yogesh Babubhai Trivedi (supra) and unreported judgment in case of Rasikbhai Manilal Patel (supra).

14. It is profitable to reproduce Section 17 as a whole, which reads as under:

17. Offences by Companies - (1) Where an offence under this Act has been committed by a Company -

(a)(i) the person, if any, who has been nominated under Sub-section (2) to be in charge of, and responsible to, the Company for the conduct of the business of the Company (hereinafter in this Section referred to as the person responsible), or

(ii) Where no person has been so nominated, 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; and

(b) 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 provides that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of such offence.

(2) Any Company may, by order in writing, authorize any of its directors or

managers (such manager being employed mainly in a managerial or supervisory capacity) to exercise all such powers and take all such steps as may be necessary or expedient to prevent the commission by the Company of any offence under this Act and may give notice to the Local (Health) Authority, in such form and in such manner as may be prescribed, that it has nominated such director or manager as the person responsible, along with the written consent of such director or manager for being so nominated.

Explanation - Where a Company has different establishments or branches or different units in any establishment or branch, different persons may be nominated under this sub-section in relation to different establishments or branches or units and the person nominated in relation to any establishment, branch or unit shall be deemed to be the person responsible in respect of such establishment, branch or unit.

(3) The person nominated under Sub-section (2) shall, until -

(i) further notice cancelling such nomination is received from the Company by the Local (Health) Authority, or

(ii) he ceases to be a director or, as the case may be, manager of the Company, or

(iii) he makes a request in writing to the Local (Health) Authority, under intimation to the Company, to cancel the nomination (which request shall be complies with by the Local (Health) Authority),

whichever is the earliest, continue to be the person responsible:

Provided that where such person ceases to be a director or, as the case may be, manager of the Company, he shall intimate the fact of such cesser to the Local (Health) Authority:

Provided further that where such person makes a request under Clause (iii), the Local (Health) Authority shall not cancel such nomination with effect from a date earlier than the date on which the request is made.

(4) Notwithstanding anything contained in the foregoing sub-sections, where an offence under this Act has been committed by a Company and it is proved that the offence has been committed 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 (not being a person nominated under Sub-section (2)) such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation - For the purposes of this Section -

(a) "Company" means any body corporate and includes a firm or other association of individuals;

(b) "director" in relation to a firm, means a partner in the firm; and

(c) "manager", in relation to a Company engaged in hotel industry, includes the person in charge of the catering department of any hotel managed or run by it.)

15. That perusal of Section 17 is with regard to offence by Companies and Clause (a) of Sub-section (1) of Section 17 empowers the Company to nominate a person under Sub-section (2) of the Act and in absence thereto if no person is so nominated, Sub-clause (ii) makes it clear that offences said to have been committed by a person who was in charge of, and was responsible to, the Company for the conduct of the business of the Company. The proviso to the above Section begins with a phrase 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 and that he exercised all due diligence to prevent the commission of such an offence.

16. Thus, a plain reading of the above Sub-section (1) as a whole with proviso makes it clear that so far as nomination is made under Sub-section (2) of a person, other directors or any other person is not liable to be proceeded under the Act. At the same time, if nomination is not made, the director or any other officer of the Company is liable. The interpretation of the above proviso of Sub-section (1) read with Sub-section (4) mandates the prosecution to make specific averments about a person in-charge of, and responsible for the offence for conduct of the business of the Company unless such fact is pleaded, viz., the fact about connivance, consent, negligent etc. under Sub-section (4) will not come into operation.

17. The Apex Court in the case of R. Banerjee (supra) in Para 9 held as under:

9. On a careful perusal of the complaints lodged by the Food Inspector under the Act, it is evident that intimation regarding the nomination in favour of H. Dayani and Dr. Nirmal Sen had been communicated to the Food Inspector before the complaints came to be lodged. This is evident from the averments made in the respective complaints. The nomination was, however, not acted upon by the complainant on the ground that it was incomplete. It was, therefore, said that in the absence of a valid nomination from the concerned Company the directors of the Company were liable to be proceeded against the punished on proof of the charge levelled against them in the complaint. It will thus be seen that there is no allegation in the complaint which would bring the case within the mischief of Section 17(4) of the Act. There is no allegation in the complaint that the offence was committed with the consent/connivance/negligence of the directors, other than the nominated person, who were impleaded as co-accused. We are, therefore, satisfied that the allegations in the complaint do not make out a case under Sub-section (4) of Section 17 of the Act. That being so, the inclusion of the co-accused other than the Company and the nominated person as the persons liable to be proceeded against and punished cannot be justified. As held by this Court in *Municipal Corporation of Delhi v. Ram Kishan Rohtagi* where the

allegations set out in the complaint do not constitute any offence, no process can be issued against the co-accused other than the Company and the nominated person and the High Court would be justified in exercising its inherent jurisdiction u/s 482 of the Code of Criminal Procedure, 1973 to quash the order passed by the Magistrate taking cognizance of the offence against such co-accused.

18. In an unreported decision dated 9-5-2003 in Misc. Criminal Application No. 8885 of 2002 and allied matters, this Court (Coram : Hon''ble Mr. Justice D.H. Waghela) (Rasiklal Manilal Patel v. State of Gujarat) in Para 5.1, observed as under:

5.1 The substituted Section 17 of the Act is analyzed and interpreted by the Supreme Court in R. Banerjee and others Vs. H.D. Dubey and others, , wherein it is held that notwithstanding the nomination under Sub-section (2) of Section 17 and notwithstanding Clause (a)(i) of Sub-section (1) of Section 17, any director, manager, secretary or other officer of the Company, other than the nominated person, can be proceeded against and punished if it is shown that the offence was committed with his consent or connivance or negligence. However, it is also held that in view of the nomination made as required by Sub-section (2) of Section 17 of the Act, only the nominated person could be proceeded against and punished since there was no allegation in the complaints lodged by the Food Inspector to bring the case within Sub-section (4) of Section 17 of the Act. It is also held that it would then be necessary for the prosecuting agency to show from the averments made in the complaint that the case falls within Sub-section (4) of Section 17 of the Act. If the prosecuting agency fails to show that the offence was committed with the consent or connivance of any particular director, manager, secretary or other officer of the Company or on account of the negligence of any one or more of them, the case set up against the appellants cannot be allowed to proceed. In the facts of that case, there was no allegation in the complaint which would bring the case within the scope of Section 17(4) of the Act. There was no allegation in the complaint that the offence was committed with the consent/connivance/negligence of the directors other than the nominated persons who were impleaded as co-accused. However, it was ordered in that case, that if upon inquiry, it was found that nomination was not valid, the learned Magistrate would proceed against all the persons who were shown as the accused in the complaint i.e. all the directors including the nominated persons and the Company".

19. In case of Yogesh Babubhai Trivedi (supra), this Court (Coram : Hon''ble Mr. Justice K.A. Puj), in Para 34, held as under:

34. Over and above this, reasons given and observations made by this Court while quashing the complaints qua the manufacturer and its Directors vide its order dated 9-5-2003 in Misc. Cri. Application Nos. 8885 of 2002 and other cognate matters are equally applicable to the facts of present petitions and are sufficient to quash the complaints qua the present petitioners. There was no allegation in the complaints which would bring the case within the scope of

Section 17(4) of the Act. There was also no allegation in the complaints that the offence was committed with the consent/connivance/negligence of the petitioners. In absence of such allegations, the complaints filed against them could not be sustained, and are therefore, liable to be quashed at this stage. It is, however, made clear that the corporation being an accused person, the trial Court could proceed against any person u/s 319 of the Criminal Procedure Code.

20. It is clear that right from the case of State of Punjab Vs. Devinder Kumar and Others, about principle of vicarious liability in criminal offence vis-a-vis Company and its personnel including the directors and requirement of necessary and specific averments or contentions about commission of offence and in the above context if the complaint is perused, only averment against the present petitioners is that they are Managing Director and Director of the petitioner-Company and nothing beyond that. Therefore, the complaint lacks necessary ingredients and averments with regard to commission of alleged offence and issuance of process by the Magistrate is nothing, but arbitrary exercise of power and contrary to the procedure.

21. Apart from the above, in the facts of this case, under Sub-section (2) of Section 17 of the Act, the petitioner-Company had nominated one Mr. Ashutosh Maity, Factory Superintendent of the Company by passing resolution on 25-1-1993 and the same was duly communicated therefore, there was no justification for filing complaint against the petitioner-Company involving the Managing Director and other directors. Therefore, the complaint deserves to be quashed and set aside on this ground also.

22. So far as the contention of non-obstante clause viz. Sub-section (4) of Section 17 of the Act, as relied by the learned A.P.P., the bracketed portion excludes the persons nominated under Sub-section (2) of Section 17 of the Act, and therefore, the contention of learned A.P.P. that Sub-section (4) of Section 17 overrides other preceded sections, cannot be accepted. At the same time, Sub-section (4) of Section 17 of the Act begins with a phrase "notwithstanding ...it is proved", and therefore, when at the threshold requirement of Sub-section (2) of Section 17 is fulfilled coupled with the fact that there are no specific averments in the complaint qua the Managing Director and Director that they were in-charge of day-to-day conduct of the business and responsible for alleged commission of crime under the Act, I do not see any justification to permit the concerned Magistrate to proceed further with the proceedings impugned in this petition. A case is made out by the petitioners to exercise powers u/s 482 of the Code of Criminal Procedure, 1973 since the complaint and the process issued subsequently do not contain allegations prima facie if examined on the face value attracting ingredients of the offences and for the reasons stated herein above, the impugned complaint is required to be quashed and set aside.

23. In view of the above discussion, this petition succeeds and impugned proceedings initiated against the petitioners under Criminal Case No. 217 of 1995 registered with the Court of learned Judicial Magistrate First Class at Rajpipla,

Dist. Bharuch along with summons issued by the learned Judicial Magistrate, First Class at Rajpipla qua the petitioners are hereby quashed and set aside. Accordingly, this petition is allowed. Rule is made absolute to the aforesaid extent only.