(2016) 06 BOM CK 0036

In the Bombay High Court

Case No : Criminal Writ Petition No. 1051 of 2001

M/s. The Madras Pharmaceuticals — APPELLANT

Vs

The State of Maharashtra — RESPONDENT

Date of Decision : 09-06-2016

Acts Referred:

Citation : (2016) ALLMRCri 3443 : (2016) 4 BomCR(Cri) 471 : (2016) CriLJ 3415

Hon'ble Judges : Smt. Sadhana S. Jadhav, J.

Bench : Single Bench

Advocate : Mr. Hrishikesh Chavan h/f. Mr. Subodh Desai, Advocates, for the Appellant; Ms. A.A. Mane, APP, for the Respondent

Final Decision : Allowed

Judgement

Smt. Sadhana S. Jadhav, J.—Heard the learned counsel for the petitioner and the learned APP.

2. The petitioners herein are seeking the relief of quashing of the order of issuance of process against the petitioners in RCC No.4/S/2001 by the Metropolitan Magistrate, 6th Court, Mazgaon, Mumbai under the provisions of the Drugs & Cosmetics Act, 1940.

3. At the threshold, it is apparent on the face of the record that the petitioners herein are placing implicit reliance upon the notice issued to them by the Drug Inspector,Brihan Mumbai, dated 20.6.2001, by which the petitioners were informed that a prosecution has been filed against them for sub-standard quality of a drug Tab. E-PRIL-2.5 However, it is mentioned in the body of the petition that the petitioners had not received any summons from the concerned Court till the date of filing of the petition. However, on enquiry, it was learnt that the process was issued against them and the matter was scheduled on 3.8.2001 as per the notice dated 20.6.2001 issued by the Drug Inspector and hence the petitioners have approached this Court seeking the relief of quashing of the order of issuance of process against them.

4. That the Drug Inspector, Brihan Mumbai of the Food & Drugs Administration, State of Maharashtra filed a complaint in the Court of Metropolitan Magistrate, 6th Court, Mazgaon, Mumbai on 8.2.2001 alleging therein that on 29.12.1999, the complainant had visited the premises of M/s. C.P. Enterprises, Girirath Shop No.6, 3rd Carter Road, Brivali (East) and had taken the drug samples of the above mentioned drug for the purpose of testing and analysis as contemplated under Section 22 of the said Act. It was revealed from the label of the said drug that the said drug has been manufactured by Mano Pharmaceuticals. The complainant had seen the samples on th spot and has sent them to the Government Analyst, Mumbai for test and analysis after following the procedure under Section 23 of the said Act. The report was received on 29.7.2000 and it was reported that the said drug does not comply with the standard quality and is a substandard product. Thereafter on 2.8.2000, the complainant had revisited the premises of M/s. C.P.Enterprise, and had inspected the firm. Upon enquiry with the firm, it was revealed that the firm had received tablets of drug in question from M/s. Diamond Pharma Agency. The bills of the said drug were seized. Thereafter, the complainant had followed due procedure of law. By a letter dated 24.8.1999, a copy of the Analytical Report was sent by the complainant to M/s. Mano Pharmaceuticals, Chennai, for information as their name was disclosed as manufacturer of the said drug on the label affixed to the carton of the said drug. The Joint Commissioner had directed the Drug Inspector to initiate prosecution and accordingly a complaint was filed. In the course of enquiry by the complainant, it was learnt that Mano Pharmaceuticals had produced the said drug under the loan licence to manufacture and that they were manufacturing the said product from M/s. Madras Pharmaceuticals i.e. petitioner No.1. The drug was sold to M/s. Yel Pharma Chennai by Mano Pharmaceuticals.

5. It is further stated in the complaint specifically that on 22.1.2001, the complainant had visited the premises of the petitioner company. It was revealed that in the course of enquiry that the said firm was having a valid drug manufacturing licence which was granted to them by the Director of Drugs Control Tamil Nadu, Chennai. That they have various loan licence manufacturers and that Mano Pharmaceuticals is one of them. It was also revealed that the sheet showing the manufacturing list bears the signature of Mr. M.Y. Ahmed, who at the relevant time, was the Production Manager of the petitioner company. It is also revealed that the said product was analysed in their own laboratory and was certified to be that of the standard quality. Both the reports bear the signature of Dr. K.S. Ganesh who happens to be the approved competent technical staff in charge of maintenance quality. In view of this, the complainant had prayed to the Hon''ble Court that the accused No. 1 to 10 deserve to be prosecuted under the Drugs & Cosmetics Act for manufacturing for sale of Drug E-PRIL of a sub-standard quality prior to 29.7.2001.

6. It is pertinent to note that the present petitioners are the partners of petitioner No.1. That the original accused Nos.1, 2, 8 and 9 are not before this Court.

7. The learned counsel for the petitioners submits that the complaint does not attribute any specific averments/allegations against the present petitioners. According to the learned counsel for the petitioners, upon perusal of the r complaint, it is clear that the present petitioner is not a manufacturer of the said disputed drug. That the original accused Nos. 8 and 9 were employed by the present petitioner No.1 as their technical staff and the said drug was analysed at the laboratory of the petitioner No.1 and a certificate was specifically issued by original accused Nos. 8 and 9 who are not before the Court.

8. Section 34 of Drugs & Cosmetics Act, 1940 contemplates as follows :-

"34. Offenes 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 conduit 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 ini this subsection 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.

(2) Notwithstanding anything contained in subsection (1),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, 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 a body corporate, and includes a firm or other association of individuals; and

(b) "director" in relation to a firm means a partner in the firm."

According to the learned counsel for the petitioners, it cannot be said that the Managing Director of the petitioner No.1 or the partners of the company were a party to the certificate which was issued by the original accused Nos. 8 and 9 and, therefore, it cannot be said 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 and therefore, the order of issuance of process against the present petitioners would be an abuse of process of law.

9. In the case of Umesh Sharma and another v. S.G. Bhakta and others 2002 Cri. L.J. 4843, it is observed as follows :-

"On reference to section 34 as a whole, there is a presumption of being guilty against the person, who is in charge of and responsible to the company and such a person is liable to be punished unless he proves that offence was committed without his knowledge or in spite of exercise of due diligence to prevent the commission of offence. By virtue of sub-section (2) which is given overriding effect over sub-section (1) by non obstante clause in its opening part, the prosecution is obliged to prove that the offence has been committed with the consent or connivance of or is attributable to any neglect on the part of the Director, manager, Secretary or other officer of the company, before drawing a presumption of guilty against such individual. Taking into consideration the overriding effect given to sub-section (2) it will be responsibility of the prosecution to first indicate and prove that objectionable drug was manufactured with the consent or in connivance of the Managing Director or production of the said drug as attributable to any neglect on the part of the Managing Director, only thereafter he would be presumed to be the person in charge of and is responsible to the company for conduct of business and will be obliged to establish absence of knowledge or exercise of the diligence in order to seek exoneration. In the absence of specific averments that he was in-charge of and responsible to the conduct of the company, so far as it related to manufacture of the drug, he would not be liable for prosecution along with company. Thus, where there were no averments in the complaint attracting ingredients required by Section 34(i) and, therefore, mere description of accused as Managing Director and Director will not be sufficient to sustain the process issued against him."

10. Upon perusal of the complaint itself, it is clear that the drug was seized from the shop of M/s. C.P. Enterprises Girirath. The label on the said drug clearly revealed that the manufacturer of the sub-standard disputed drug was from Mano Pharmaceuticals and therefore the complainant had rightly issued the notice to Mano Pharmaceuticals and no notice was issued to the present petitioners. It is also a matter of record that the analysis report which was received by the complainant was also sent to Mano Pharmaceuticals as the complainant was also of the opinion that it is the manufacturer who would be held liable for the same. The contention of the petitioner that the petitioners had no knowledge about the seizure of the disputed drug and sending of the said drug for the purpose of analysis cannot be considered for the simple reason that the complainant had visited the office of the petitioner No.1 and had conducted the enquiry. It is true that the company has specifically stated that when the matter was being enquired with the firm of the petitioner No.1, he had conducted the enquiry through original accused Nos. 8 and 9 and therefore the contention that other directors and the partners had no knowledge about the said seizure and enquiry can be taken into consideration. The petitioner-company was not given a fair opportunity to send the said drug for re-analysis as the date of export of the said drug was March 2001 and the complainant had enquired with the original accused Nos. 8 and 9 in January 2001. The learned counsel further

submits that in absence of the specific averments or allegations attributing the responsibility of the said sub-standard drug to the petitioners, the prosecution initiated against them would be an abuse of process of law and hence prays that the order of issuance of process be quashed.

11. The learned APP submits that the drug was manufactured by Mano Pharmaceuticals under the loan licence of the present petitioner No.1 and therefore, they are liable to be prosecuted. The allegation in the complaint is not that a spurious drug was manufactured on the basis of the licence issued by the present petitioner No.1 but that the drug was of a substandard quality. It is in these circumstances that this Court is of the opinion that continuance of the prosecution against the present petitioners would be an abuse of process of law and hence this Court is inclined to quash the order of issuance of process initiated against the present petitioners.

12. Hence, the petition deserves to be allowed. Rule is made absolute in the above terms. Petition stands disposed of.

