(2010) 04 SHI CK 0072

In the High Court Of Himachal Pradesh

Murari Lal Arora APPELLANT

Vs

State of H.P. RESPONDENT

Date of Decision : 20-04-2010

Acts Referred:

COMPANIES ACT, 1956 — Section 34
Criminal Procedure Code, 1973 (CrPC) — Section 482
Drugs and Cosmetics Act, 1940 — Section 34
Negotiable Instruments Act, 1881 (NI) — Section 138, 141

Citation : (2011) 6 RCR(Criminal) 2285 : (2010) 2 ShimLC 161

Hon'ble Judges : Surinder Singh, J

Bench : Single Bench

Judgement

Surinder Singh, J.—The present petition has been filed u/s 482 of the Code of Criminal Procedure, against the summoning order of the petitioner in case no:93-I of 2007, under the Drugs And Cosmetics Act, 1940; in short "The Act", being the Director of M/s Arora Pharmaceutical (Pvt.) Ltd., a drug manufacturing Company.

2. In the month of March, 2006, a complaint was received from the Chief Medical Officer, Hamirpur and Medical Officer Inchrage PHC Mahal regarding non-satisfaction of the supply of sodium bi-carbonate Eardrop B No.E-176 and also that this drug was not safe to prescribe to the patients because it was lacking in contents of quality and salt including the preservative as displayed thereon.

3. The drug Inspector inspected the PHC Centre Mahal Tehsil Bhoranj District Hamirpur on 5.4.2006. Dr. Arun Kumar Sharma was the then Medical Officer Incharge. The Drug Inspector picked up samples of the said drug which was admittedly manufactured by M/s Arora Pharmaceutical (Pvt.) Ltd. and supplied on 14th February, 2006 vide Invoice No.C-6090/05-06 to Chief Medical Officer (C.M.O.) Hamirpur, who in turn had sent to CHC Bhoranj and PHC Mahal, for its use to the patients. One of the samples was sent for analysis to C.T.L. Kandaghat, as per procedure prescribed under the law. The said Laboratory

submitted its report in triplicate on Form No. XIII declaring that "the sample of the said drug was not of standard quality."

4. The relevant papers were submitted by the complainant/Drug Inspector to the Drugs Controlling Authority for seeking permission to launch prosecution, against the Company and after obtaining requisite permission, filed the complaint against the petitioner in his capacity as a Director of the Company and also impleaded the said Company as an accused.

5. The learned trial Court after examining the complaint and the documents appended thereto, summoned the petitioner, who is a Director of the Company, as an accused, which is under challenge.

6. Sh. Anand Sharma, learned Counsel for the petitioner submitted that the petitioner could not have been summoned as an accused in his capacity as a Director of the Company, without any averment made in the complaint that he was incharge of and responsible to the business of the Company at the relevant time, in view of Section 34 of the Companies Act.

7. In the instant case manufacturer of the Drug is M/s Arora Pharmaceutical Pvt. Ltd. A corporate body duly registered under the Companies Act.

8. It shall be relevant to quote the provisions of Section 34 of the Drugs and Cosmetics Act, 1940, which deals with the offences by the Companies under the said Act, it reads as under:

34. Offences 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 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:

Provided 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 or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in Sub-section (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.

This section is a penal section and creates a vicarious liability, like Section 141 of the Negotiable Instrument Act 1881. It can also be usefully quoted as under:

"141. Offences by companies.

[Offences by companies].

(1) If the person committing an offence u/s 138 is 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 proceeded against and punished accordingly.

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]

(2) Notwithstanding anything contained in Sub-section (1), where any 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 attribute to, any neglect on the part of, any director, Manager, secretary, or other office 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 purpose of this section.

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

(b) "Director", in relating to a firm, means a partner in the firm."

9. Now, looking at the above provisions of the negotiable Instrument Act and also Section 34 of the Drugs and Cosmetics Act, both sections are para materia

10. The constitution Bench of the apex Court in S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, has answered the similar question u/s 141 of the Negotiable of Instruments Act on a reference as follows:

i) It is necessary to specifically aver in a complaint u/s 141 that at the time offence was committed, the person accused was incharge of and responsible for the conduct of the business of the company. This averment is an essential requirement of Section 141 and has to be made in the complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

ii) Merely being a director of a company is not sufficient to make the person liable u/s 141 of the Act. A director in a company cannot be deemed to be incharge and responsible to the company for the conduct of its business. The requirement of Section 141 is that the person sought to be made should be incharge and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

iii) Whereas the managing director or joint managing director would be admittedly incharge of the company and responsible to the company for the conduct of its business. When that is so, holders of such position in a company become liable u/s 141 of the Act. By virtue of the office they hold as managing director or joint managing director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered u/s 141. So far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under Sub-section (2) of Section 141.

11. Further in National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal and Another, same principal of law was reiterated.

12. Thus, from the above discussion, it can safely be concluded that every person connected with company shall not fall within the ambit of Section 34 of the Act, which has a marked similarity with the similar provision of Negotiable Instrument Act.

13. The conclusion is obvious that only those persons who are incharge of and responsible for the conduct of the business of company, at the time of commission of an offence, will be liable for criminal action.

14. The Director of the company, in the instant case the petitioner herein has not been alleged to be the incharge of and responsible for the conduct of the business of the company at the relevant time and there is also no averment made in the complaint to this effect, therefore, summoning him as an accused in this capacity or for and on behalf of the company is wrong and illegal, therefore, the order for summoning him as an accused without any averment in the complaint is liable to be quashed and set-aside.

15. Although the Company is always liable as a body corporate and is subject to fine only but the liability of the Managing Director or the Manager or Secretary or other officer of the Company, such Director, Manager, responsible for the conduct of the business of the Company is in addition to the liability of the Company.

16. In fact, Section 34 of the Act is a deeming provision which provides that where an offence under the Act is committed by the Company/firm the persons in charge of and responsible for the conduct of its business is to be held guilty and be liable to should be proceeded against with a view to fix culpability where the offence is committed by a Company.

17. Accordingly, for the reasons aforesaid, it can logically be concluded that the summoning of the petitioner as an accused is wrong and illegal, hence it is quashed and set-aside, however, the complaint shall survive against the Company through its Managing Director or Joint Director, who would admittedly be incharge of the company and responsible to the company for the conduct of its business by virtue of their office. However, this order shall not derogate the powers of the trial court to hold an inquiry if so warranted to find out as to who others were the persons incharge of or responsible to the business of the company at the relevant time for impleading them as an accused.

18. The petition stands disposed of. Send down the record.