

(2017) 01 JH CK 0207
In the Jharkhand High Court
Case No : 1130 of 2004

Nand Kishore Roy

APPELLANT

Vs

State of Jharkhand & Ors

RESPONDENT

Date of Decision : 19-01-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 482](#), [Section 202](#) - Saving of inherent powers of High Court - Postponement of issue of process
[Negotiable Instruments Act, 1881](#)

Citation : (2017) 01 JH CK 0207

Hon'ble Judges : Rongon Mukhopadhyay

Bench : SINGLE BENCH

Advocate : Biren Poddar, Darshana Poddar Mishra, Vikas Pandey, Deepak Sinha, Shekhar Kumar Sinha, S.K. Dwivedi

Judgement

1. Heard Mr. Biren Poddar, learned senior counsel appearing on behalf of the petitioner and Mr. S.K. Dwivedi, learned counsel appearing on behalf of the opposite party no.2.

2. In this application the petitioner has prayed for quashing of the entire criminal proceeding in connection with Complaint Case No.182 of 2004 including the order dated 29.06.2004 passed by the Judicial Magistrate, Bokaro at Chas by which cognizance has been taken for the offence punishable under section 27 (b) of the Drugs and Cosmetics Act, 1940.

3. A complaint case was instituted by the opposite party no.2 in which it was alleged that the complainant had purchased Hepp Fort Syrup of Iron and Folic Acid on prescription of doctor for administering it to his wife from retail medicine dealers M/s Medicine House. It is alleged that when the bottle was being opened for administering it to his wife, an iron nail was fixed in upper lid of the bottle which led the complainant to proceed to the retail medicine shop for pointing in out to the dealer. An averment has been made in the complaint petition that a

legal notice was sent to the petitioner but since no action was taken, the complaint petition was instituted alleging that the manufacturer was involved in the manufacture of an adulterated medicine with an intention to deceive the purchaser. Based on the aforesaid allegation, Complaint Case No. 182 of 2004 was instituted. Upon conducting an inquiry under Section 202 of the Cr.P.C by examining the complainant as well as the witness cognizance was taken by the learned Judicial Magistrate, Bokaro at Chas on 29.06.2004 for the offence punishable under section 27 (b) of the Drugs and Cosmetics Act.

4. It has been submitted by learned senior counsel for the petitioner that without making the retailer or the whole seller as an accused in the present case, the petitioner has straightaway implicated the Chairman of M/s Lupin Ltd. as the sole accused. Learned senior counsel has also submitted that in absence of the company having been made an accused, no vicarious liability can be fixed on the Chairman cum Managing Director in terms of Section 34 of the Drugs and Cosmetics Act. It has been submitted that in fact, the legal notice was given by the complainant to the company demanding an amount of Rs.5 lacs. Learned senior counsel further submits that the bottle in which the nail was found was never sent to the Government Analyst for examination and, therefore, it cannot be said that the said bottle contains spurious or adulterated drugs. It has been concluded that in absence of any material to implicate the petitioner being the Chairman cum Managing Director of the company, the entire criminal proceeding deserves to be quashed and set aside.

5. In support of his contention with respect to non-fastening of the vicarious liability upon the petitioner without making the company an accused, learned senior counsel has relied upon the judgment passed in the case of Aneeta Hada Vs. God Father Travels And Tours Private Limited, reported in (2012) 5 SCC 661 as well as the judgment passed in the case of Sharad Kumar Sanghi Vs. Sangita Rane, reported in (2015) 12 SCC 781.

6. Mr. S.K. Dwivedi, learned counsel appearing on behalf of the opposite party no.2 on the other hand has submitted that since the iron nail was found fixed on the upper lid of the bottle which was marketed by the Chairman cum Managing Director he has been made an accused. It has been stated that so far as the question which has been raised by the learned senior counsel for the petitioner is concerned, the same can be decided in course of trial, in view of the limited jurisdiction under Section 482 of the Cr.P.C with respect to the evidence or reliability on the documents to come to a conclusion. In support of his contention, learned counsel for the opposite party no.2 has relied upon the judgment passed in the case of N. Soundaram Vs. P.K. Pounraj & Another, reported in 2014 (10) SC 616 as well as the judgment passed in the case of Iridium India Telecom Limited Vs. Motorola Incorporated & Others, reported in 2011 (1) SCC page 74.

7. The main plank of the argument of learned senior counsel for the petitioner is with respect to the fact that the petitioner could not have been made vicariously

liable for being criminally prosecuted, in a case instituted under the Drugs and Cosmetics Act, in view of the fact that company has not been made an accused. Section 34 of the Drugs and cosmetics Act 1940 which deals with the offences by companies reads as follows: (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 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".

8. In the case of *Aneeta Hada Vs. God Father Travels And Tours Private Limited* (supra) while considering the conditions for attracting the vicarious liability in a case instituted under Section 138 of the Negotiable Instruments Act, Section 141 of the Negotiable Instruments Act was under consideration. Section 141 of the Negotiable Instruments Act is virtually *pari-materia* with section 34 of the Drugs and Cosmetics Act. On giving the definition a strict construction, it was held in the said case as follows: 58. "Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of other. Thus, the words "as well as the company" appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted.

59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in *C.V.Parekh* which is a three-Judge Bench decision. Thus, the view

expressed in Sheoratan Agarwal does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada is overruled with the qualifier as stated in para 51. The decision in Modi Distillery has to be treated to be restricted to its own facts as has been explained by us hereinabove."

9. This view has specifically figured in the case of Sangita Rane (supra). What would thus fall from the above is that for maintaining the prosecution under section 34 of the Drugs and Cosmetics Act, it is imperative for the complainant to have made the company an accused. In absence of the company having been made an accused would not render the petitioner vicariously liable to face prosecution in such a case. Apart from the above, it appears that none of the intervening persons between the manufacturer and the purchaser of the medicines have been made an accused. The legal notice which has brought on record by the petitioner also suggests some demand made on the part of opposite party no.2 of an amount of Rs.5 lacs as compensation and subsequently filing the complaint petition only against the head of M/s Lupin Limited. This fact also highlights the mala fide intention of the opposite party no.2.

10. Learned counsel for the opposite party no.2 has referred to the principles for exercising the powers under section 482 of the Cr.P.C as been stated in the case of N. Soundaram Vs. P.K. Pounraj & Another and Iridium India Telecom Limited Vs. Motorola Incorporated (supra). It is not in doubt that powers under section 482 of the Cr.P.C. has to be exercised sparingly and cautiously. However, when the allegation itself on the face of it does not invite any criminal prosecution or for that matter, the settled principles of law and the provision of the statute have not been followed this court is bound to interfere in the criminal proceeding as non-interference by this Court in a proceeding under section 482 of the Cr.P.C, in such circumstances, would lead to a miscarriage of justice and abuse of the process of Court.

11. As a cumulative result of the discussion made hereinabove, I find sufficient force in the argument of learned senior counsel for the petitioner and thus come to the conclusion that continuation of the criminal proceeding as against the petitioner will be an abuse of the process of Court. Accordingly, while allowing this application, the entire criminal proceeding against the petitioner in connection with Complaint Case No. 182 of 2004 including the order dated 29.06.2004 passed by the learned Judicial Magistrate, Bokaro at Chas by which cognizance has been taken for the offences punishable under section 27 (b) of the Drugs and cosmetics Act, is hereby quashed and set aside.