
(1989) 05 MP CK 0005

In the Madhya Pradesh High Court

Case No : Miscellaneous Cri. Case No. 2000 of 1987

Prem Pharmaceuticals and Others

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 04-05-1989

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Drugs and Cosmetics Act, 1940 — Section 18, 27, 34

Citation : (1991) 36 MPLJ 473 : (1991) MPLJ 473

Hon'ble Judges : K.L. Shrivastava, J

Bench : Single Bench

Advocate : G.M. Chaphekar and V.S. Kokje, for the Appellant; Swami, for the Respondent

Final Decision : Allowed

Judgement

K.L. Shrivastava, J.

This is an application u/s 482 of the Criminal Procedure Code, 1973 (for short "the Code") for quashing the proceedings in Criminal Case No. 1068/86 of the Court of Shri P. C. Upadhyaya, Judicial Magistrate First Class, Indore.

Circumstances giving rise to the application are these : The applicant No. 1 M/s. Prem Pharmaceuticals, Nenawar Road, Indore is a partnership firm and the applicants 2 to 11 are its partners. They carry on the business of manufacture of intravenous fluid Sodium Chloride injection in their factory at Indore.

The applicants stand prosecuted in respect of an offence u/s 18(a)(i) read with Section 27 of the Drugs and Cosmetics Act, 1940 (for short "the Act") on the ground that sample of intravenous fluid Sodium Chloride injection manufactured and sold by them was taken on 8-10-1983 from M/s. Gangaram and Sons, Hisar, Haryana, by the Drugs Inspector having jurisdiction under the Act, and on analysis by Government Analyst, Haryana, it was reported to be substandard because it was found to contain particles of foreign matter.

The contention of the learned counsel for the petitioners is that a perusal of the provisions embodied in Sections 16, 19 and 34 of the Act shows that on the material on record no offence is constituted and the proceedings in the aforesaid criminal case deserve to be quashed u/s 482 of the Code.

The point for consideration is whether the application deserves to be allowed.

Chapter IV of the Act which pertains to "Manufacture, Sale and Distribution" of Drugs and Cosmetics, contains Sections 16 to 33A. Section 16(I)(a) is in these terms : -

"16. Standards of quality. - (1) for the purposes of this Chapter, the expression "standard quality" means -

(a) in relation to a drug, that the drug complies with the standard set out in the second schedule."

The drug in question is covered under Item No. 5(a) - "other drugs" which is as under : -

Other drugs -

(a) Drugs included in the Standards of identity, purity Indian Pharmacopoeia. and strength specified in the edition of the Indian Pharmacopoeia for the time being and such other standards as may be prescribed.

Regarding the drug in question the Indian Pharmacopoeia lays down as under : -

Standards : Sodium Chloride injection is a sterile isosmotic solution of Sodium Chloride in water for injection. It contains not less than 0.86% and not more than 0.95% W/v of NaCl. It contains no antimicrobial agents.

Storage : Store in single close containers of glass or plastic. On keeping, small solid particles may separate from a glass container. A solution containing such particles must not be used.

Labelling : The label on the container of the injection intended for intravenous infusion states (1) that the injection contains 150 millimoles of sodium and chloride ions per litre, (2) that the injection should not be used if it contains visible solid particles.

Section 18(1)(a) of the Act provides as under : -

"18. Prohibition of manufacture and sale of certain drugs and cosmetics. - From such date as may be fixed by the State Government by notification in the Official Gazette in this behalf, no person shall himself or by any other person on his behalf -

(a) manufacture for sale or for distribution or sell or stock or exhibit or offer for sale or distribute -

(i) any drug which is not of a standard quality or is misbranded, adulterated or

spurious.'"

The contention of the learned counsel for the petitioners is that presence of particulate matter in the drug in question, in spite of best precautions and manufacturing practice, is a foreseen circumstance and it is for this reason that the pharmacopoeia prescribes that the label must contain the caution that injection should not be used if it contains visible solid particles. He urges that it is not the prosecution's case that the ingredients of the injection were not as prescribed and according to the reports of the Government Analyst the only reason assigned for the drug being sub-standard is that foreign particles were seen in the injection. It is further urged that the Government Analyst ought to have described what foreign matter he had detected and as he has failed to do so it has to be taken to be particulate matter of the medicine itself. He goes on to urge that in the absence of analysis of the particles the mere use of the word "foreign" does not imply that the particles in the medicine were of extraneous substance and not of the requisite contents thereof coming into existence during the period of storage.

With reference to the provision in Section 19(2)(b) of the Act the learned counsel for the petitioners next contended that even on the assumption that the particles in the medicine were of extraneous substance, the drug could not be said to be sub-standard within the meaning of Section 18 of the Act in the absence of allegation by the prosecution of awareness on the part of the petitioners of the intermixture.

It has lastly been contended by the learned counsel for the petitioners that a perusal of Section 34 of the Act which relates to "offences by companies" shows that it is only on the basis of requisite allegations and proof of the same that partners of a firm can be held criminally liable and that on the material on record, no vicarious liability for the offence can be fastened on the petitioners 2 to 11 and, therefore, their prosecution is wholly unwarranted.

In support of the submission that where no offence is disclosed the proceeding may be quashed u/s 482 of the Code, reliance was placed on the decision in Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, , which relates to a similar provision in Section 17 of the Prevention of Food Adulteration Act, 1964 (for short "the Food Act").

The provision in Section 19(2)(b) of the Act on which the contention referred to in paragraph 10 above is constructed may usefully be reproduced. It reads thus :

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"19(2). For the purposes of Section 18 a drug shall not be deemed to be misbranded or adulterated or spurious or to be below standard quality nor shall a cosmetic be deemed to be misbranded or to be below standard quality only by reason of the fact that -

(b) In the process of manufacture, preparation or conveyance some extraneous

substance has unavoidably become intermixed with it : provided that this clause shall not apply in relation to any sale or distribution of the drug or cosmetic occurring after the vendor or distributor became aware of such intermixture."

On a careful consideration of the arguments and the relevant provisions of the Act, I am of the view that the contention that in the absence of analysis of the particles found in the medicine it cannot be held that they were of extraneous substance and not panicle matter of the contents of the medicine coming into existence during storage subsequent to its manufacture must be accepted. Further in view of the provision in Section 19(2)(b) of the Act, even on the assumption that the particles were of extraneous matter the drug cannot, in the absence of allegation of awareness of the intermixture, be said to be sub-standard merely on the ground of their presence therein. Absence of such allegation knocks bottom out of the prosecution case.

This brings us to the last contention as to the liability of the petitioners 2 to 11. The explanation appended to the Section 34 of the Act provides that for the purposes of this section "company" includes a firm and "Director" in relation to a firm means a partner in the firm. We are not concerned with the proviso to Sub-section (1) of the section and without it the said sub-section and Sub-section (2) read as under : -

"34(1). Where an offence under this Act has been committed by a company, every person who at the time of 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;

(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."

In Ram Kishan Rohtagi's case (supra) it has been held that vicarious liability is an incidence of an offence under the Act and as pointed out in Municipal Corporation of Delhi v. Des Raj 1985 Cri. L.J. 618, it is only on the fulfilment of specified conditions that a partner may be liable. In the instant case, it has nowhere been stated that any of the partners (petitioners 2 to 11) at the relevant time was in charge of and responsible to the company (petitioner No. 1) for the conduct of its business and thus in the absence of allegations which constitute pre-condition for fastening vicarious liability on the partners, they cannot be held liable for the offence in question.

Section 482 of the Code which shows that the High Court's inherent powers stand preserved reads thus : -

"482. Saving of inherent powers of High Court. - Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

The provision is intended to meet the three situations therein catalogued and is distinct from appellate or revisional jurisdiction. The question essentially is one of discretion and not of jurisdiction. As is clear from the decision in *L.V. Jadhav Vs. Shankarrao Abasaheb Pawar and Others*, , that the discretionary provision in Section 482 is not intended to bypass the prescribed procedure and is to be sparingly exercised where there is reason to believe that the process of law is being misused to harass a citizen. "Process" is a general word, meaning in effect anything done by the Court. An abuse of the process may be committed by a party by starting proceeding which is wanting in bona fide and is frivolous, vexatious or oppressive.

As pointed out in the decision in *J.P. Sharma Vs. Vinod Kumar Jain and Others*, , in determining whether proceedings should be ordered to be dropped in exercise of the powers u/s 482 of the Code, the question is not whether there is any truth in the allegations made but the test is whether the allegations as they stand without any addition or subtraction can be said to make out an offence. The decision in *L.V. Jadhav Vs. Shankarrao Abasaheb Pawar and Others*, , is also pertinent. The decision in *SAIL, Bhilai's case* 1984 MPLJ 408 : 1984 mpLJ 552, and the Full Bench decision in *Sher Singh's case* 1989 MPLJ 116 may also be usefully persued.

It may be pointed out that the ends of justice are certainly higher than the ends of mere law which is only meant to subserve justice. It is certainly in the interest of justice that a person who on the allegation made by the prosecution does not appear to have committed an offence is not required to face criminal prosecution for the same.

In this very connection the decision in *Mangat Ram v. Babu Ram* AIR 1969 J& K . 132, may usefully be perused. In paragraph 4 of the decision it has been pointed out that order under inherent powers should only be passed where there is a glaring defect on the face of the proceedings which makes the prosecution untenable and where there is no reasonable chance of the accused being convicted. Further in paragraph 5, with reference to the decision in *R.P. Kapur Vs. The State of Punjab*, , three categories of cases have been pointed out where criminal proceedings may be quashed. One of them is where the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding. The other category is where the allegations do not constitute the offence alleged. The last category is where there is no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. It may be

remembered" that cases falling in the last category do not involve appreciation of evidence as to its reliability which is properly the function of the trial Courts.

In the ultimate analysis I find that the criminal proceedings in question must be ordered to be dropped in exercise of inherent powers as provided u/s 482 of the Code.

In the result, the application is allowed. The proceedings in the criminal case referred to above are dropped.