
(2016) 10 BOM CK 0011

In the Bombay High Court

Case No : Criminal Writ Petition No. 846 of 2016

Rajendra s/o Madhav Pate

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 10-10-2016

Acts Referred:

Drugs and Cosmetics Act, 1940 — Section 27(b)(ii)

Citation : (2017) 2 AIRBomRCri 245 : (2017) ALLMRCri 999 : (2017) 1 BomCR(Cri) 174

Hon'ble Judges : S.S. Shinde and Sangitrao S. Patil, JJ.

Bench : Division Bench

Advocate : Mr. R.R. Mantri, Advocate, for the Petitioner; Mr. A.R. Borulkar, A.P.P, for the Respondent

Final Decision : Allowed

Judgement

Sangitrao S. Patil, J. - Rule, returnable forthwith. With the consent of the learned counsel for the petitioner and the learned A.P.P., heard finally.

2. By this writ petition, the original accused has prayed for quashing of the criminal proceedings bearing Summary Criminal Case (S.C.C.) No. 671 of 2014, instituted by the Police Station Officer, Chalisgaon in the Court of the Judicial Magistrate First Class at Chalisgaon on the basis of the FIR bearing No. 62 of 2013, lodged in the Police Station by respondent No. 2 ? Drugs Inspector, for the offence punishable under section 27 (b) (ii) of the Drugs and Cosmetics Act, 1940 ("the Act", for short).

3. The case of respondent No. 2, in short, is that as per the order dated 20th June, 2013, passed by the Assistant Commissioner and Licensing Authority, Drugs and Medicine Administration, Government of Maharashtra, Jalgaon, the licence of the petitioner to run the business of selling the drugs was suspended from 1st October, 2013 to 15th October, 2013 (both days inclusive). He was made aware that legal action would be initiated against him for selling drugs

during the said period as it would amount to committing breach of Section 18 (c) of the Act. It is alleged that on 10th October, 2013, the Assistant Commissioner Shri H.Y. Metkar and the Drugs Inspectors Shri A.M. Manikrao (i.e. respondent No.2) and Shri A.S. Sarkade visited M/s Suyog Medical and General Stores, Station Road, Nehru Square, Chalisgaon, that was run by the petitioner and without disclosing their identity, orally asked for a cough syrup, whereon the petitioner sold out Alkof cough syrup to them without asking for prescription from the medical practitioner and without issuing any bill. However, when the price of the cough syrup i.e. Rupees 36/, was offered to the petitioner, he politely refused to receive the same. The above named three officers seized the cough syrup bottle and prepared the inspection report which was signed by the petitioner. Thereafter, on the next day, respondent No.2 lodged the FIR in Police Station, Chalisgaon against the petitioner for the offence punishable under section 27 (b) (ii) of the Act. After completion of the investigation, the Investigating Officer i.e. API Mushtaq Shaikh, submitted the charge-sheet against the petitioner in the Court of the Judicial Magistrate First Class at Chalisgaon for the above mentioned offence on the basis of which the S.C.C. No. 671 of 2014 came to be instituted.

4. The learned counsel for the petitioner assailed tenability of the charge sheet and the subsequent criminal proceedings bearing S.C.C. No. 671 of 2014, firstly on the ground that as per Section 32 of the Act, the cognizance of the above mentioned offence could not have been taken on the basis of the charge sheet filed by the police officer. He submits that it was only on the basis of the complaint filed by respondent No.2 that the cognizance could have been taken in view of section 32 of the Act. He points out to Section 36AC (a) of the Act which enumerates the offences punishable under certain sections of the Act which have been made cognisable. Therefore, according to him, the cognizance of the offence taken by the learned Judicial Magistrate First Class, Chalisgaon, on the basis of the charge sheet submitted by the police officer, itself is illegal and hence, the criminal proceedings are liable to be quashed and set aside.

5. He further submits that the licence of the petitioner to run the business of selling and purchasing the drugs was suspended by the Assistant Commissioner Shri H.Y. Metkar after holding necessary enquiry and giving an opportunity of hearing to the petitioner. Moreover, respondent No. 2 was serving as the Drugs Inspector for Chalisgaon Taluka since the year 2012. Both of them were known to the petitioner. Therefore, the case of respondent No. 2 that the Assistant Commissioner Shri H.Y. Metkar and himself visited the shop of the petitioner and without disclosing their identity, purchased the cough syrup ex facie cannot be accepted. He submits that respondent No. 2 being the Drugs Inspector, was empowered to inspect the shop of the petitioner and take samples of any drug. The petitioner was bound by law to hand over the bottle containing drug asked for by the Drugs Inspector for inspection and taking samples. His refusal to hand over the bottle of any drug to the Drugs Inspector would have entailed his criminal prosecution. He further submits that since the said officers were known

to the petitioner, on being asked by them, the petitioner handed over the bottle of cough syrup to them. He was not even knowing that the said officers were proposing to purchase the said bottle. He further submits that the refusal to receive the price of the cough syrup bottle on the part of the petitioner itself indicates that he was not intending to sell the said cough syrup bottle to them.

6. He then submits that there is absolutely no evidence to show that during the period of suspension of the licence of the petitioner, he sold out any drug to any person. According to him, no offence punishable under section 27 (b) (ii) of the Act can be said to have been committed by the petitioner. He submits that continuation of the criminal proceedings in the above circumstances would be nothing but abuse of process of law. He, therefore, prays that the said criminal proceedings may be quashed and set aside.

7. On the other hand, the learned A.P.P. submits that the Assistant Commissioner Shri H.Y. Metkar and respondent No. 2 along with one Shri A.S. Sarkade visited the shop of the petitioner. They did not disclose their identity to the petitioner and asked for a bottle of cough syrup without producing any prescription of any medical practitioner. The petitioner immediately handed over the cough syrup bottle to them. This, according to him, would be sufficient to establish the sale transaction of the drugs by the petitioner during the period of suspension of his licence. According to him, the petitioner has been rightly prosecuted for the above mentioned offence.

8. As per Section 18 (c) of the Act, no person shall himself or by any other person on his behalf manufacture for sale or for distribution, or sell, or stock or exhibit or offer for sale, or distribute any drug or cosmetic, except under, and in accordance with the conditions of, a licence issued for such purpose under Chapter IV of the Act. Undisputedly, the petitioner has obtained a licence for sale of drugs through his shop namely M/s Suyog Medical and General Stores. The petitioner has produced the copy of the order dated 20th June, 2013, passed by the Assistant Commissioner Shri H.Y. Metkar whereby the licence granted to the petitioner for sale and purchase of drugs through his shop was suspended for a period from 1st October, 2013 to 15th October, 2013 (both days inclusive). The copy of this order is shown to have been given to respondent No. 2 also.

9. The FIR lodged by respondent No. 2 itself makes it clear that before passing of the said order, a notice to show cause was given to the petitioner and after considering his reply, the said order came to be passed. It is further mentioned in the FIR that respondent No. 2 is working as a Drugs Inspector for Chalisgaon Taluka since the year 2012. In the circumstances, the contention of respondent No. 2 that when he himself, the Assistant Commissioner Shri H.Y. Metkar and one more officer visited the shop of the petitioner, the petitioner was not knowing them and that without disclosing their identity, they asked the petitioner to hand over the cough syrup bottle to them, prima facie, cannot be accepted. Moreover, the contents of the FIR do not disclose that respondent No. 2 expressed his desire to purchase the cough syrup bottle. It is mentioned that respondent No.2

and the other two officers orally asked the petitioner to handover the cough syrup bottle. When respondent No. 2 ? Drugs Inspector, who was empowered vide section 22 of the Act to inspect the shop of the petitioner, asked for any particular drug bottle for inspection, it was most natural on the part of the petitioner to obey his dictate by handing over the said bottle to him, failing which the petitioner would have been liable to be prosecuted for committing an offence made punishable under subsection (3) of section 22 of the Act. Respondent No. 2 himself states in the FIR that the petitioner politely refused to accept the price thereof. Had the petitioner really intended to sell the cough syrup bottle to unknown persons, as alleged, he would have immediately accepted the price thereof. If the said bottle was handed over by him to those officers on being asked by them, without receiving any price thereof, then it cannot be assumed that it was sold out by him to them. As such, the alleged sale of the cough syrup bottle by the petitioner, cannot be believed from the contents of the FIR itself.

10. There is absolutely nothing on record to show that the petitioner sold out the drugs to any other persons during the period of suspension of his licence. It was not difficult for respondent No. 2 to seize the bill-book containing the receipts or to send a spy witness to purchase the drugs with prescription and then after sale of the drugs by the petitioner, to take necessary action against him. Without doing that exercise, respondent No. 2 tried to show that the petitioner sold the drugs during the period of suspension of his licence.

11. Here, it would be necessary to refer to the material portion of the provisions of Section 36AC (1) (a) of the Act, enumerating the offences punishable under certain sections of the Act, which have been made cognisable, which read thus :

"Offences to be cognisable and non-bailable in certain cases -

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973

(a) every offence, relating to adulterated or spurious drug and punishable under clauses (a) and (c) of subsection (1) of section 13, clause (a) of subsection (2) of section 13, subsection (3) of section 22, clauses (a) and (c) of section 27, section 28, section 28A, section 28B and subsections (1) and (2) of section 30 and other offences relating to adulterated drugs or spurious drugs, shall be cognisable."

The offence punishable under section 27 (b) (ii) of the Act has not been included in clause (a) of subsection (1) of section 36AC of the Act. In view of the settled legal position that special enactment will prevail over general law, as has been reiterated in the case of *Suresh Nanda v. C.B.I.* (2008) 3 SCC 174 cited by the learned counsel for the petitioner, the provisions of section 36AC of the Act would prevail over the general provisions of the Code of Criminal Procedure, classifying the offences as cognisable or non-cognisable, and the offences those have been enumerated in section 36AC only would be treated as cognisable. As such, the offence under section 27 (b) (ii) of the Act being non-cognisable, the police machinery was not empowered to take cognizance thereof and conduct

investigation, without the order of the Magistrate vide section 155 (2) of the Code of Criminal Procedure. It is not the case of the respondents that the investigation into the present case was carried out after obtaining order from the Magistrate vide section 155 (2) of the Code. Thus, the investigation conducted by the police officer in this case is illegal.

12. Section 32 of the Act reads as follows :

"Cognizance of offences

(1) No prosecution under this Chapter shall be instituted except by

(a) an Inspector; or

(b) any Gazetted Officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government or a State Government by a general or special order made in this behalf by that Government; or

(c) the person aggrieved; or

(d) a recognised consumer association whether such person is a member of that association or not.

(2) Save as otherwise provided in this Act, no Court inferior to that of a Court of Session shall try an offence punishable under this Chapter.

(3) Nothing contained in this Chapter shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence against this Chapter."

From the above provisions, it is clear that the cognizance of the offences punishable under Chapter IV of the Act, which includes the offence under Section 27 (b) (ii), cannot be taken on the basis of the charge-sheet filed by the police under section 173 of the Code of Criminal Procedure.

13. Indisputably, the cognizance of the offence punishable under section 27 (b) (ii) of the Act alleged to have been committed by the petitioner has not been taken by the learned Judicial Magistrate, First Class on the basis of the complaint as defined under section 2 (d) of the Code of Criminal Procedure, 1973, filed by respondent No. 2 ? the Drugs Inspector. Consequently, the cognizance of the said offence taken on the basis of the charge-sheet filed by the police officer cannot be said to be legal. The learned Judicial Magistrate First Class had no jurisdiction to take cognizance of the said offence against the petitioner on the basis of the charge-sheet filed by the police officer ignoring the provisions of section 32 of the Act.

14. The learned counsel for the petitioner relies on the judgment in the case of G. Sagar Suri and another v. State of U.P. and others (2000) 2 S.C.C. 636, wherein it has been held that the High Court can exercise the jurisdiction of quashing criminal proceedings even when the application for discharge of the

accused is pending with the trial Judge. However, such power should be exercised cautiously to prevent abuse of process of court. He further cited the judgment in the case of Pepsi Foods Ltd. and another v. Special Judicial Magistrate and others 1998 (1) Mh.L.J. 599 (S.C.), wherein also it has been held that though the Magistrate can discharge the accused at any stage of the trial if he considers the charge to be groundless, but that does not mean that the accused cannot approach the High Court under section 482 of the Code or Article 227 of the Constitution to have the proceedings quashed against him when the complaint does not make out any case against him and still he must undergo the agony of a criminal trial.

15. In view of the above facts and circumstances of the present case and the rulings referred to above, we are of the considered view that the continuation of criminal proceedings against the petitioner would be a sheer abuse of process of the Court. In the result, we allow the writ petition with the following order :

- (i) The criminal writ petition is allowed.
- (ii) The criminal proceedings bearing Summary Criminal Case No. 671 of 2014, instituted in the Court of the Judicial Magistrate First Class, Chalisgaon, against the petitioner for the offence punishable under section 27 (b) of the Drugs and Cosmetics Act, 1940, are quashed and set aside.
- (iii) The petitioner is set at liberty. His bail bonds are cancelled.
- (iv) Rule is made absolute in the above terms.