

(2010) 07 AP CK 0045

In the Andhra Pradesh High Court

Case No : Criminal Petition No. 3961 of 2010

Sushil Mehta, Managing Director, RFCL Limited

APPELLANT

Vs

State of Andhra Pradesh

RESPONDENT

Date of Decision : 05-07-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Drugs and Cosmetics Act, 1940 — Section 16, 18, 18A, 18B, 22
Negotiable Instruments Act, 1881 (NI) — Section 138, 141
Penal Code, 1860 (IPC) — Section 500

Citation : (2010) 2 ALD(Cri) 284 : (2011) CriLJ 181

Hon'ble Judges : Samudrala Govindarajulu, J

Bench : Single Bench

Advocate : C.R. Sridharan, for the Appellant; Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Samudrala Govindarajulu, J.—The petitioners in this batch of four petitions are A-6 to A-9 in C.C. No. 98 of 2009 on the file of Judicial Magistrate of the First Class, Armoor relating to offence punishable u/s 32(1) of the Drugs and Cosmetics Act. 1940 (in short, the Act) for violation of Section 18(c), 18A and Section 22(1)(cca), of the Act. A-6 who is the petitioner in Criminal Petition No. 3961 of 2010 is Managing Director and the petitioners in other three petitions are Directors of M/s. RFCL Limited. The said company is shown as A-5 in the charge sheet.

2. It is alleged that Parth Parenteral (P) Limited (A-1) manufactured and sold Lemosal-P Powder for veterinary use without drug manufacturing license and that A-5 viz., M/s. RFCL Limited did not disclose the source of supply of records of purchase and sale of Lemosal-P Powder. On 22.11.2007, Drugs Inspector, Nizamabad found Lemosal-P Powder stock for sale in Sri Sapthagiri Veterinary and General Store, Armoor and it was observed that the label of the said product claimed the same as feed supplement, but as per composition label, it contains

levamisole Hydrochloride, B.P. 30%w/w. It is stated that British Pharmacopoeia prescribes standards of drugs and that the said product is for deworming and immnostimulation for birds and that the said product attracts definition of drug u/s 3(b) of the Act. The Drugs Inspector had drawn the above drug and sent the same to the Government Analyst, Drugs Control Administration, Hyderabad for analysis. It is stated that partners of Sri Sapthagiri Veterinary and General Store, Armoor disclosed that the said batch number product was sold by M/s. Bhavani Veterinary Medical Hall, Karimnagar vide a bill No. 3293 dated 30.10.2007. When letter was addressed by the Drugs Inspector, M/s. Bhavani Veterinary Medical Hall, Karimnagar disclosed that they have purchased the same from A-5 vide bill dated 22.09.2007. The Drugs Inspector addressed letter dated 26.12.2007 to A-5 requesting them to disclose the source of supply etc. of the said batch number. A-5 did not furnish reply to the said letter. But, the complainant received letter dated 29.02.2008 from A-5's Delhi office stating that their product cannot be covered within the scope of drug formulation. Test report received from Government analyst is to the effect that the said product contained 29.9% levamisole HCL B.P. and it is standard quality as per the Act. Finally, it is stated by the complainant in the complaint that A-5 to A-9 did not disclose source of supply of Lemosal-P Powder and it violated Section 18A punishable u/s 28 of the Act and that they did not produce records of purchase and sale of the said drug and thereby violating Section 22(1)(cca) which is punishable u/s 22(3) of the Act.

3. Relying on *Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others*, and *M.N. Ojha and Others Vs. Alok Kumar Srivastav and Another*, of the Supreme Court, it is contended by the petitioners' counsel that the Magistrate did not apply his mind while taking cognizance of the case against the petitioners/ A-6 to A-9. It is further contended that simply on the basis of A-6 being Managing Director and A-7 to A-9 being Directors of A-5 company, no personal liability is attached to any of them for the alleged criminal activity of A-5 company unless it is averred and material is placed to show that any of them was in-charge of day-to-day affairs of A-5 company and was responsible for business being conducted by A-5 company. The petitioners' counsel placed reliance on several reported decisions on this aspect. In *Shanmugha Sundera Raja v. State of Andhra Pradesh* 2010 (1) ALD (Cr.) 434 (AP) of this Court and *National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal and Another*, of the Supreme Court the question was liability of Partnership firm and Directors of a company in the light of Section 141 of the Negotiable Instruments Act which is a Special Provision relating to prosecution of offenders for offence punishable u/s 138 of the Negotiable Instruments Act.

4. The Supreme Court in *State of Haryana v. Brij Lal Mittal* (1998) 5 SCC 335 while dealing with a case of prosecution of the accused under the Drugs and Cosmetics Act, 1940 considered effect of Section 34 of the Act relating to offences by companies and observed as follows:

It is thus seen that the vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises if at the material time he was in charge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of the company it does not necessarily mean that he fulfils both the above requirements so as to make him liable. Conversely, without being a director a person can be in charge of and responsible to the company for the conduct of its business. From the complaint in question we, however, find that except a bald statement that the respondents were directors of the manufacturers, there is no other allegation to indicate, even prima facie, that they were in charge of the company and also responsible to the company for the conduct of its business.

The Supreme Court in *State of Karnataka Vs. Pratap Chand and Others*, quoted the following passage from an earlier pronouncement of the same Court in *Girdhari Lal Gupta Vs. D.H. Mehta and Another*, with approval:

What then does the expression a person in-charge and responsible for the conduct of the affairs of a company" means? It will be noticed that the word "company" includes a firm or other association, and the same test must apply to a director in-charge and a partner of a firm in-charge of a business. It seems to us that in the context a person "in-charge" must mean that the person should be in over all control of the day to day business of the company or firm. This inference follows from the wording of Section 23-C(2). It mentions director, who may be a party to the policy being followed by a company and yet not be in-charge of the business of the company. Further it mentions manager, who usually is in charge of the business but not in overall charge. Similarly the other officers may be in charge of only some part of business.

With the above legal aspects in mind, if the present complaint is examined, it is evident that except mentioning A-7 to A-9 as Directors of A-5 company, nothing else is mentioned about their participation in day-to-day affairs of the company or any of them being responsible for conduct of business of the company. In that view of the matter, the Additional Public Prosecutor fairly stated that in so far as A-7 to A-9 are concerned, it is left to discretion of the Court to continue the prosecution against them. Consequently, this Court finds that the prosecution cannot lie against A-7 to A-9.

5. In so far as A-6 is concerned, it is contended by the petitioners" counsel that there is also no specific averment in the complaint that he was in-charge of day-to-day affairs of A-5 company and was responsible for conduct of business of A-5 company. It is contended by the petitioners" counsel that even though A-6 is a Managing Director of A-5 company, he cannot be prosecuted on the above ground. In *Maksud Saiyed Vs. State of Gujarat and Others*, of the Supreme Court, the offence complained is one u/s 500 IPC for defamation. It was alleged therein that in the correspondence between the loanee and the bank there was some statement which was defamatory in nature. In those circumstances, Chairman and Managing Director and also nine other Directors of that bank were

being prosecuted for the offence. In those circumstances, the Supreme Court held:

The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability.

6. In Keki Hormusji Gharda and Others Vs. Mehervan Rustom Irani and Another, of the Supreme Court, originally charge sheet was filed against officers of the company and representatives of the contractor who were indulging in demolishing a building belonging to that company and which caused hindrance to neighbours and public at large. One month after filing of charge sheet by the police, another private complaint was filed by the neighbour impleading the original accused and also Managing Director and Directors of the company. Having regard to the said fact situation, the Supreme Court held:

The Penal Code, 1860 save and except in some matters does not contemplate any vicarious liability on the part of a person. Commission of an offence by raising a legal fiction or by creating a vicarious liability in terms of the provisions of a statute must be expressly stated. The Managing Director or the Directors of the Company, thus, cannot be said to have committed an offence only because they are holders of offices. The learned Additional Chief Metropolitan Magistrate, therefore, in our opinion, was not correct in issuing summons without taking into consideration this aspect of the matter. The Managing Director and the Directors of the Company should not have been summoned only because some allegations were made against the Company.

In my opinion, neither Maksud Saiyed Vs. State of Gujarat and Others, nor Keki Hormusji Gharda and Others Vs. Mehervan Rustom Irani and Another, can be made applicable to facts of the present case to relieve A-6 who is Managing Partner of A-5 company from being prosecuted, having regard to allegations in the complaint. In the above two reported decisions, the persons who issued legal notice containing defamatory statement and the persons who were in-charge of demolition work on behalf of the company and the contractor were identifiable and they were also being prosecuted. But, the case on hand is one where the allegations are inaction by way of not disclosing source of supply and non-production of records of purchase and sale of the drug. There is no dispute that A-6 is Managing Director of A-5 company. This is not a case where the company is being prosecuted for manufacture of a spurious drug or a substandard drug.

The allegations against A-5 being administrative lapses by way of not furnishing information which is required to be furnished by the statute, A-6's role as Managing Director directly attracts liability. In *Cyper Drugs and Pharmaceuticals Pvt. Ltd., New Delhi v. State* 2007 (1) ALD (CrI.) 862 (AP) of this Court, the Managing Director and Manufacturing Chemist of the company along with the company were prosecuted for offences punishable u/s 18(a)(i)/16 and 27(d) of the Act and u/s 18B/28 of the Act. It was contended by the Managing Director and Manufacturing Chemist that in the absence of any allegations in the complaint about them being in-charge of day-to-day affairs of the company, no prosecution can be maintained qua them in view of Section 34 of the Act. It was held by this Court that the said plea is not available to persons who are directly in control of the company and that such plea can validly be taken by other Directors who are not in-charge of affairs of the company.

7. It is contended by the petitioners' counsel that Lemesol-P marketed by A-5 company is not a "drug" within the meaning of Section 3(b) of the Act inasmuch as Clause (ii) of Section 3(b) of the Act excludes food substances. It is pointed out that it was printed on the container that it is only a poultry feed supplement. Simply because the manufacturer or a marketer prints on the label that it is a poultry feed supplement, it will not take away Lemesol-P from the definition of "drug". According to prosecution, as per composition label, it contains levamisole Hydrochloride, B.P. 30% w/w and that the said product is for deworming and immunostimulation for birds and therefore attracts definition of "drug" contained in Section 3(b) of the Act. B.P. means British Pharmacopoeia which prescribes standards for pharmaceutical products. Therefore, this Court cannot accept contention of the petitioners' counsel that Lemesol-P is not a drug and is only a poultry feed supplement.

8. It is contended by the petitioners' counsel that Section 18A of the Act is not applicable to A-5 company because A-5 is only agent for distribution of the product. Reliance was placed on *State of Orissa Vs. Janmejy Dinda*, on this aspect. It was held therein:

It is obvious that for application of the section, the person concerned shall not be a manufacturer of drug or his agent. In other words, the person to whom Section 18A applies is anyone other than a manufacturer or his agent for distribution thereof. The *raison d'être* of it is that, if he is the manufacturer or his agent he cannot disclose the name of the person from whom he acquired the drug because he himself is its manufacturer. To expect the other way is to expect the impossible. Hence there is no question of requiring him to disclose the identity of the person from whom he acquired the drug. Exclusion of manufacturer and his agent from the purview of Section 18A is, therefore, on understandable premise.

There is no material on record to show that A-5 company is agent of the manufacturer. What all printed on label of the product is that it is marketed by A-5. It is not known with what understanding or under what agreement with the manufacturer, A-5 has been marketing this product. It is a matter of evidence to

be produced by A-5 and A-6 before the trial court during trial and make out their defence on this point. Since it is a question of fact, this Court cannot go into and decide the said question in these petitions filed u/s 482 Cr.P.C.

9. It is next contended by the petitioners' counsel that the prosecution did not make out refusal to produce any record etc. by A-5 company in violation of Section 22(1)(cca) of the Act inasmuch as failure to produce" cannot be equated as "refusal to produce". This Court is of the opinion that non production of the required record etc. in spite of receipt of notice within the time provided or within reasonable time, would only amount to refusal to produce the same. There need not necessarily be an express refusal; and non production would surely amount to tacit refusal. For letter dated 26.12.2007 addressed by the complainant/Drugs Inspector to A-5 company, the company gave reply dated 29.02.2008 requesting the complainant to reconsider the whole matter about the product being not a medicine under the Act; and also requested the complainant to communicate his decision on this aspect. There is no whisper in the reply of A-5 with regard to query Nos. 1 to 5 posed by the complainant in his letter to A-5 company. This is nothing but refusal on the part of the A-5 company to furnish the required information.

10. It is further contended by the petitioners' counsel that Section 22(1)(cca) is subject to Section 23 of the Act. It is stated so even in opening words of Section 22 of the Act. The said contention in no way relieves the petitioners from prosecution launched by the complainant in the lower court.

11. Thus, viewed from any angle, A-6 who is Managing Director of A-5 company cannot absolve himself from being prosecuted for the above offence under the Act in the lower court.

12. Criminal Petition No. 3961 of 2010: In the result, the petition is dismissed.

13. Criminal Petition Nos. 3972 of 2010, 4030 of 2010 & 4919 of 2010: In the result, these three Criminal Petitions are allowed quashing proceedings in C.C. No. 98 of 2009 on the file of Judicial Magistrate of the First Class, Armoor in so far as the petitioners herein/A-7 to A-9 are concerned.