

*** "REPORTABLE"**
HIGH COURT OF DELHI AT NEW DELHI

+ Crl.M.C. 3066/2007 & Crl. M.A.
No. 11005/07

Date of decision: February 06, 2009

RAVINDER GARG Petitioner
! Through : Mr. Rohit Madan, Adv.

Versus

\$ THE GOVT. OF NCT OF DELHI Respondent
^ Through : Mr. Lovkesh Sawhney, APP

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CORAM:
HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not? Yes
- (3) Whether the judgment should be reported in the Digest ? Yes

J U D G M E N T

ARUNA SURESH, J.

1. Present petition has been filed by petitioner, Ravinder Garg seeking quashing of the summoning order dated 10.5.2006 passed by the learned Metropolitan Magistrate in case '*Government of*

NCT of Delhi v. Sh. Naveen Kumar' under Section 7/16 of the Prevention of Food Adulteration Act (hereinafter referred to as PFA Act).

2. On 27.7.2005 Food Inspector, Department of Prevention of Food Adulteration purchased sample of ghee of brand "Mahaan" for analysis from one Sh. Naveen Kumar of M/s. Apna Bazar, Gurgaon Road, Roshan Pura who was engaged in the business of selling ghee of said brand. The sample consisted of 3x1 litre sealed tetra packs bearing the label "Mahaan", bearing the identical label declaration. This sample was taken under the supervision/ direction of the then SDM/LHA in its original sealed condition. The sample was divided into three equal parts by the Food Inspector on the spot and sample counterpart was separately packed, fastened and sealed. The Food Inspector conducted due formalities like giving notice to Naveen Kumar and preparing panchnama. One part of the sample was sent to Public Analyst, Delhi who, after duly conducting the analysis submitted its report on 18.8.2005. According to the report,

ghee was found to be conforming to the standards but was misbranded as it gave misleading information regarding 'Best Before Date' on the label.

3. Naveen Kumar had allegedly purchased ghee from M/s Manish Traders, Gaushala Road, Najafgarh, Delhi. M/s Manish Traders had purchased the said ghee from M/s Mahaan Proteins Ltd. having its corporate office at Janpath, New Delhi. The said company M/s. Mahaan Proteins Ltd. had not nominated any person under the PFA Act for its Delhi corporate office and as such all the four directors were made accused persons by the complainant department as incharge of and responsible for day to day business of the company in Delhi. Since all the accused persons were found having violated the provisions of Section 2(ix)(g) & (k) of PFA Act and Rule 32(f) and Rule 37 of PFA Rules punishable under Section 16(1)(a) read with Section 7 of PFA Act, the complaint was filed in the Court of the concerned MM. Vide his order dated 10.5.2006, trial court took cognizance of the

offences as he found sufficient evidence on the record to proceed against the accused persons including the petitioner for having committed offences under Section 7/16 of the PFA Act. Accordingly he summoned the accused persons. Aggrieved by the said order of the learned MM, present petition has been filed.

4. Mr. Rohit Madan, learned counsel for the petitioner, has submitted that petitioner was appointed as an alternate Director in place of Dr. Santosh Kumar Garg, Director of M/s. Mahaan Proteins Limited in accordance with Section 313 of the Companies Act on 16.4.2004. His appointment as alternate director was duly approved by the Board of Directors of the company in its meeting held on 12.5.2004. It is further submitted by the learned counsel for the petitioner that the company had provided information to the Food Inspector regarding Directors of the Company, name of the nominee under the PFA Act and Sales Tax Registration, however, the company incorrectly gave information mentioning only four directors

including the petitioner as being Executive Director of the company whereas, there were 11 directors on the Board of the company at the relevant time and the company had provided information as to the nomination of Sh. Harsh Kumar Jain, Chemist of Mahaan Proteins Limited, as being incharge of and responsible for the conduct of the business in terms of PFA Act, Form VIII. Therefore, according to the learned counsel for the petitioner, no offence has been committed by the petitioner under Sections 7/16 of the PFA Act as petitioner was neither incharge of nor was responsible for the day-to-day affairs of the company at manufacturing unit of the company at Kosikalan, Distt. Mathura, U.P.

5. Learned counsel for the petitioner has also challenged maintainability of the complaint against the petitioner on the grounds that as per Section 17(4) of the PFA Act a complaint could be filed where the offence has been committed by the company, any Director, Manager and Officer of the company and the offence has been committed with

the consent, connivance or is attributable to such Director, Manager or Officer of the company. As an alternate director of the company during the absence of the director, the petitioner could only hold office till such time as was permissible to the original director to hold office and therefore, proceedings against the petitioner could not have been initiated by virtue of Section 17(2) of PFA Act and the summoning order being bad in law deserves to be quashed.

6. Learned counsel for the petitioner has submitted that company had nominated Harsh Kumar Jain for its manufacturing unit at Village Barhana Kosikalan Distt. Mathura, U.P. and therefore, as such was the person in charge of and responsible for the conduct of day-to-day business at the manufacturing unit as well as of the corporate office at Janpath, Delhi.
7. Learned counsel for the petitioner has relied upon the following judgments:

- 1. R. Banerjee v. H.D. Dubey - 1992 Crl. L.J. 1523.***
- 2. Municipal Corporation of Delhi v. Ram***

Kishan Rastogi – 1983 Crl. L.J. 159.

8. Mr. Lovkesh Sawhney, learned counsel for the respondent department while refuting these submissions has submitted that Mr. Harsh Kumar Jain was nominated only for the manufacturing unit at Mathura, U.P. and not for the corporate office of the company at Delhi and therefore, the said nomination made by the company was not for the corporate office at Delhi, hence the complaint was rightly filed against all the directors of the company.

9. Learned counsel for the complainant/respondent has further submitted that averments contained in the petition as well as submissions made by learned counsel for the petitioner are question of fact, which are to be proved in evidence by the petitioner and also that, the company had not appointed any director as its nominee under PFA Act and Rules for its corporate office at Janpath, Delhi as a person incharge of and responsible for the day-to-day business of the company. It is prayed that under the circumstances the petition

deserves dismissal.

10. Since Section 17 of the PFA Act is relevant for the purposes of effective disposal of this case as it speaks of offences by companies. For the sake of convenience it is reproduced as below:

“17. Offences by companies.—
(1) Where an offence under this Act has been committed by a company—

- (a) (i) the person, if any, who has been nominated under sub-section (2) to be in charge of, and responsible to, the company for the conduct of the business of the company (hereinafter in this section referred to as the person responsible), or
(ii) where no person has been so nominated, 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; and

- (b) 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 and that he exercised all due diligence to

prevent the commission of such offence.

(2) Any company may, by order in writing, authorise any of its directors or managers (such manager being employed mainly in a managerial or supervisory capacity) to exercise all such powers and take all such steps as may be necessary or expedient to prevent the commission by the company of any offence under this Act and may give notice to the Local (Health) Authority, in such form and in such manner as may be prescribed, that it has nominated such director or manager as the person responsible, alongwith the written consent of such director or manager for being so nominated.

Explanation.—Where a company has different establishments or branches or different units in any establishment or branch, different persons may be nominated under this sub-section in relation to different establishments or branches or units and the person nominated in relation to any establishment, branch or unit shall be deemed to be the person responsible in respect of such establishment, branch or unit.

(3) The person nominated under sub-section (2) shall, until—

(i) further notice cancelling such nomination is received from the company by the Local

(Health) Authority; or
(ii) he ceases to be a director or, as the case may be, manager of the company; or
(iii) he makes a request in writing to the Local (Health) Authority, under intimation to the company, to cancel the nomination [which request shall be complied with by the Local (Health) Authority], whichever is the earliest, continue to be the person responsible:

Provided that where such person ceases to be a director or, as the case may be, manager of the company, he shall intimate the fact of such cesser to the Local (Health) Authority:

Provided further that where such person makes a request under clause (iii), the Local (Health) Authority shall not cancel such nomination with effect from a date earlier than the date on which the request is made.

(4) Notwithstanding anything contained in the foregoing sub-sections, 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 [not being a person nominated under sub-section (2)] 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 any body corporate and includes a firm or other association of individuals;
- (b) “director”, in relation to a firm, means a partner in the firm; and
- (c) “manager”, in relation to a company engaged in hotel industry, includes the person in charge of the catering department of any hotel managed or run by it.”

11. From bare reading of Section 17 of PFA Act, it is clear that where an offence is alleged to have been committed by the company and where the company has nominated any person to be incharge of and responsible for the conduct of the business of the company, that person would be liable to be proceeded against and punished for the commission of the offence. Where, however, no such person has been nominated, every person who at the time of the commission of the offence was in charge of and responsible to the company for the conduct of its business would be proceeded against and punished for the said crime. Though in such cases, proviso to Section 17 provides protection to

an accused if he could prove that the offence was committed without his knowledge and notwithstanding the exercise of due diligence to prevent it.

12. Section 17 of the PFA Act has been interpreted in ***R. Banerjee and others v. H.D. Dubey and others - 1992 Crl. L.J. 1523*** by the Supreme Court in the following manner:

“4. It is clear from the plain reading of Section 17 that where an offence under the Act is alleged to have been committed by a company, where the company has nominated any person to be in charge of, and responsible to, the company for the conduct of its business that person will be liable to be proceeded against and punished for the commission of the offence. Where, however, no person has been so nominated, every person who at the time of the commission of the offence was in charge of, and responsible to, the company for the conduct of its business shall be proceeded against and punished for the said crime. Even in such cases the proviso offers a defence, in that, the accused can prove his innocence by showing that the offence was committed without

his knowledge and notwithstanding the exercise of the due diligence to prevent it. The scheme of sub-section (1) of Section 17 is, therefore, clear that the cases where a person has been nominated under sub-sec. (2) of Section 17, he alone can be proceeded against and punished for the crime in question. It is only where no such person has been nominated that every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of its business can be proceeded against and punished. The proviso, however, lays down an exception that any such person proceeded against shall not be liable to be punished if he proves that the offence was committed without his knowledge and that he had exercised all due diligence to prevent the commission thereof. Sub-section (2) of Section 17 empowers the company to authorize any of its Directors or Managers to exercise all such powers and take all such steps as may be necessary or expedient to prevent the commission by the company of any offence under the Act. It further empowers the company to give notice to the Local (Health) Authority in the prescribed form that it has nominated a Director or Manager as the person responsible to the company for

the conduct of its business. This has to be done with the written consent of the nominated Director or Manager. Where a company has different establishments or branches or units, different persons may be nominated in relation to the different establishments/branches/units and the person so nominated shall be deemed to be the person responsible in respect of such establishment, branch or unit. Sub-section (4) of Section 17 overrides the preceding sub-sections and posits that where an offence has been committed by a company and it is proved that the offence was 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, other than the one nominated, such Director, Manager, Secretary or other officer shall be deemed guilty and be liable to be proceeded against and punished for the same. This sub-section, therefore, makes it clear that notwithstanding the nomination under sub-section(2) of Section 17 and notwithstanding Cl. (a)(i) of sub-section (1) of Section 17, any Director, Manager, Secretary or other officer of the company, other than the nominated person, can be proceeded against and punished if it is shown that the offence was committed with his consent or connivance or negligence. It

is crystal clear from the scheme of Section 17 that where a company has committed an offence under the Act, the person nominated under sub-section (2) to be in charge of, and responsible to, the company for the conduct of its business shall be proceeded against unless it is shown that the offence was committed with the consent/connivance/negligence of any other Director, Manager, Secretary or Officer of the company in which case the said person can also be proceeded against and punished for the commission of the said offence. It is only where no person has been nominated under sub-section (2) of Sec. 17 that every person, who at the time of the commission of the offence was in charge of and was responsible to the company for the conduct of its business can be proceeded against and punished under the law.

13. Form VIII relates to nomination of persons by a company. The nomination, as made in Form VIII dated 9.10.2002 in the present case reads as follows:

“Notice is hereby given that Mr. Harsh Kumar Jain s/o Sh. Dori Lal Jain, Chemist of Mahaan Proteins Limited (the company) by a Resolution passed at their meeting held on

3rd September 2002 at New Delhi to be incharge of, and responsible to, the said Company for the conduct of the business of the said company or its Unit thereof and authorized to exercise all such powers and take all such powers and take all such steps as may be necessary or expedient to prevent the commission by the said company of any offence under the Prevention of Food Adulteration Act, 1954.

A certified true copy of the resolution is enclosed.”

14. This nomination was accepted by Harsh Kumar Jain and acknowledged by Local Health Authority, Mathura on 23.12.2002. Whether this nomination could be interpreted to mean, nomination of a director for its corporate office at Delhi, is a mixed question of law and fact which can only be ascertained by the trial court after the evidence of the parties is recorded. Similarly, it is for the petitioner to prove in evidence that he was appointed as an alternate director in the company and that being an alternate director was not incharge of and responsible to the said company for the conduct of its business at its unit at Delhi, in case no nomination was made by the company

for its corporate office at Delhi.

15. Proviso to this Section makes it clear that it is for such person, who is accused of having committed an offence under PFA Act being the person who was incharge of and responsible for the conduct of its business, to prove that the offence was committed without his knowledge and he had exercised his diligence to prevent the commission of such offence. Therefore, the petitioner is at liberty to raise all the defences available to him under Section 17(2) of PFA Act at the trial stage and not in the present petition. The Magistrate had summoned the petitioner along with other accused persons vide impugned order dated 10.05.2006 on the basis of evidence, material and documents placed before him by the respondent department after assessing the prima facie case of the complainant.

16. Whether summons could be issued against the petitioner under sub-clause 2(i)(a) of Section 17 of the PFA Act would depend upon the court's finding

if there was a valid nomination in favour of Harsh Kumar Jain at the time of commission of the offence. It is only when the court comes to a conclusion that there was valid nomination in existence on the date of commission of the offence, the case would be governed by Section 17(1)(a)(i) of PFA Act and Section 17(1)(a)(ii) of PFA Act would not be attracted.

17. The Court in exercise of its power under Section 482 Cr.P.C. can quash the proceedings against an accused in its initial stages only if on the face of the complaint and the documents accompanying the same, no offence is constituted. In other words, taking into consideration the allegations in the complaint as they are, without any addition or subtraction to it, if no offence is made out then this Court is justified in quashing the proceedings in exercise of its power under Section 482 Cr.P.C. However, the Court cannot look into the defences of an accused at the initial stage to come to a conclusion if prima facie any offence was made out against the accused as per the averments

contained in the complaint and the documents accompanying the same. The defence has to be proved by an accused during the trial of the case.

18. Learned counsel for the petitioner has emphasised that to attract provisions of Section 17(1)(a)(ii) of PFA Act vicarious liability can be imposed upon the petitioner only if he was incharge of and was also responsible to the company for conduct of its business whereas petitioner being alternate director was neither responsible to the company for the conduct of its business nor was incharge of the same. As per the averments of the petitioner himself the petitioner was shown as executive director of the company, may be alternate director at the relevant time.

19. As per section 313 of the Companies Act, Board of Directors of a company can appoint an alternate director to act for a director (original director) during the absence of the original director. In this case since Dr. Santosh Kumar Garg, director of the company, had written to the company secretary on

16.4.2004 nominating the petitioner as an alternate director in the company in his absence as he was settled in USA and was not able to regularly attend the board meetings of the company, the company appointed the petitioner as alternate director in its meeting dated 12.5.2004. He has been shown as executive director in the list of directors of the company furnished to the respondent department.

20. Therefore, prima facie being an executive director, petitioner cannot be allowed to agitate at this stage that he was not incharge of and responsible to the company for conduct of its business. It is for him to prove in evidence that even when he was executive director, he was not incharge of and responsible to the company for conduct of its business.

21. The documents placed before this Court by the petitioner in the petition were not on the court record before the trial court when the trial court took cognizance of the offence under Sections 7/16 of PFA Act and summoned the petitioner and other

accused persons vide its order dated 10.5.2006. These documents have to be considered by the trial court at the relevant stage. Petitioner cannot be allowed to place on record the documents which are his defence in petition under Section 482 Cr.P.C. seeking quashing of the impugned order.

22. Hence, I find no infirmity or illegality in the impugned order dated 10.5.2006 of the learned Metropolitan Magistrate, the petition being without any merits is hereby dismissed.

**(ARUNA SURESH)
JUDGE**

**February 06, 2009
jk**