IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.11.2016

CORAM:

THE HON'BLE MR.JUSTICE C.T. SELVAM

Crl.R.C.No.926 of 2016
and
Crl.M.P.Nos.7205 and 7206 of 2016

Dr.G.Sathyan .. Petitioner/Petitioner/Accused No.3

vs.

State:Represented by
Drugs Inspector, Kottivakkam Range
O/s.The Assistant Director of Drugs Control
Zone IV, Chennai - 600 006. .. Respondent/Respondent/Complainant

Criminal Revision filed under Section 397 and 401 Cr.P.C., to call for the records pertaining to the impugned order dated 31.05.2016 in Crl.M.P.No.1094 of 2015 in C.C.No.352 of 2014 passed by the Special Judge/Chief Judicial Magistrate, Chengelpet.

For Petitioner : M/s.V.T.Narendra
For Respondent : Mr.K.Madhan
Government Advocate (Crl.side)

O R D E R

This revision arises against the order of learned Special Judge/Chief Judicial Magistrate, Chengelpet, passed in Crl.M.P.No.1094 of 2015 in C.C.No.352 of 2014 on 31.05.2016.

2. The petitioner is the third accused in case pending trial in C.C.No.352 of 2014 on the file of learned Special Judge, Chief Judicial Magistrate, Chengelpet. The case is one being tried for offences under Sections 18(c) r/w section 27(b)(ii) of the Drugs and Cosmetics Act, 1940. Petitioner filed a discharge petition under section 245 Cr.P.C in Crl.M.P.No.1094 of 2015 in C.C.No.352 of 2014 and by order dated 31.05.2016, learned Chief Judicial Magistrate, Chengelpet, dismissed also the same by way of a common order. Against the said order, petitioner moved the present revision.

3. Heard learned counsel for petitioner and learned Government Advocate [Crl.side].

4. A bare reading of the complaint reveals that this petitioner is arrayed as an accused in his capacity as a partner of the first accused firm. Section 34 of the Drugs and Cosmetics Act, 1940 reads as follows:

> 34. Offences by companies.—
>
> (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 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 or that he exercised all due diligence to prevent the commission of such offence.
>
> (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.
>
> Explanation.—For the purposes of this section—
>
> (a) "company" means a body corporate, and includes a firm or other association of individuals; and
>
> (b) "director" in relation to a firm means a partner in the firm.

5. In decision reported in Tidal Laboratories Pvt Ltd vs State of Tamil Nadu, 2013 SCC Online Mad 2453, this Court has observed as follows:

> "...
>
> 12. With regard to the next fold of submission of the learned senior counsel for the petitioners that in the absence of any

specific averment as to how the petitioners are responsible or in charge of the affairs of the company, the respondent cannot be compelled the petitioners to face criminal trial. In the instant case, a reading of the complaint would show that absolutely there is no averment to the effect as to how the petitioners are responsible for the conduct of the business of the company or in charge of the day-to-day affairs of the company. In this regard, it would be appropriate to refer the judgment of the Hon'ble Apex Court reported in (2010)11 SCC 469 in the case of STATE (NCT OF DELHI) .vs. RAJIV KHURANA, wherein it has been held as follows:

"20. The legal position which emerges from a series of judgments is clear and consistent that it is imperative to specifically aver in the complaint that the accused was in charge of and was responsible for the conduct of the business of the company. Unless clear averments are specifically incorporated in the complaint, the respondent cannot be compelled to face the rigmarole of a criminal trial".

13. In 1992 (58) E.L.T.6 (Mad.), (supra), a single Judge of this Court has held that a person, who at the time when the offence under section 34 of the Act was committed, was in charge of and responsible for the conduct of the business of the company, will be vicariously liable. The relevant paragraph in the said judgment reads as follows:

"The last argument of the learned Counsel has a sufficient force. Under Section 34 of the Drugs and Cosmetics Act, were an offence under the Act had been committed by a company, the persons who will be vicariously liable, would be those, who at the time when the offence was committed were in charge of and responsible for the conduct of the business of the company as well as the company itself. Before choosing to prosecute any person vicariously, prima facie the complaint must contain allegations, that such persons were in charge of and responsible for the conduct of the business of the company, at the relevant time. The absence of this basic averment would be sufficient to half the prosecution, against those persons, who do not fall within this category contemplated by law. Only after the initial burden of "incharge of" and "responsible" is discharged by the prosecution, the proviso to Section 34 (1) would come into operation, shifting the onus on the persons concerned, to prove that the offence was committed without the knowledge in spite of exercise of all due diligence to prevent commission of such an offence. The law on this question is well settled. A perusal of the complaint clearly shows, that petitioners 2 and 3 were the directors of the first petitioner and were residents of Bombay. Nowhere, it has been stated in the complaint, that petitioners 2 and 3 were in charge of and responsible for the conduct of the business of the first petitioner. The second petitioner is a lady and the wife of the third petitioner. On the sole ground that no allegations have been made against petitioners 2 and 3, which would attract the ingredients of Section 34(1) of the Act, the pending prosecution in so far as it relates to them, will have to be quashed and shall accordingly stand quashed. As far as petitioners 1, 4 and 5 are concerned, the prosecution will have to be sustained. The first petitioner is the company itself, while the fourth petitioner is not only the Chairman, but also the person in charge of the conduct of the business of the first petitioner at Bombay, where the manufacturing unit is situated. As far as the fifth petitioner is concerned, he is the person in charge of the day-to-day conduct of the business at Madras. Of course, it will be open for these petitioners to contend, before the trial Magistrate, that the offence alleged had not been established and further the proviso to Section 34(1) of the Act will attract their case. At this stage, I do not find any scope to interfere, as far as petitioners 1, 4 and 5 are concerned.

14. A reading of the said judgments would show that under section 34 of the Act, where an offence under the Act had been committed by a company, the persons who were responsible for the conduct of the business of the company as well as the company itself shall be deemed to be guilty. In this case, there is no averment to the effect that these

persons are responsible and in charge for the conduct of the business of the company and hence, merely they are the Directors, it does not mean that automatically they are liable to be prosecuted. There should be a clear averment as to how the Directors are responsible and in charge for the conduct of the business of the company when they are all residing at Mumbai where the alleged offence said to have been committed at Chennai. In this regard, one more judgment of a Full Bench of Hon'ble Supreme Court reported in 2005 STPL (DC) 878 SC in the case of S.M.S.PHARMACEUTICALS LTD., .vs. NEETA BHALLA AND ANOTHER, wherein it has been held as follows:

"....Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a Company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company.....The conclusion is inevitable that the liability arises on account of conduct, act or omission on the part of a person and not merely on account of holding an office or a position in a company. Therefore, in order to bring a case within Section 141 of the Act the complaint must disclose the necessary facts which make a person liable".

Therefore, I am of the opinion that in the absence of specific allegation as to how they are responsible for the conduct of the business of the company, the complaint itself is not legally sustainable."

6. We find ourselves in agreement with the above observations and accordingly this Criminal revision case shall stand allowed. The order of learned Special Judge/Chief Judicial Magistrate, Chengelpet, passed in Crl.M.P.No.1094 of

2015 in C.C.No.352 of 2014 on 31.05.2016, shall stand set aside. Petitioner/A3 shall stand discharged in the case. Consequently, connected miscellaneous petitions are closed.

Sd/-
Asst.Registrar (CS VI)

/true copy/

Sub Asst. Registrar

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To

1.The Special Judge/Chief Judicial Magistrate,
Chengelpet.

2.The Drugs Inspector,
Kottivakkam Range,
The Assistant Director of Drugs Central,
Zone IV, Chennai-6

3.The Public Prosecutor,
High Court, Madras.

+1cc to Mr.T. Narendran, Advocate Sr. 64142

Crl.R.C.No.926 of 2016
and
Crl.M.P.Nos.7205 and 7206 of 2016

GJII(CO)
VR(11/04/2017)