IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.08.2020

CORAM:

THE HON'BLE MR.JUSTICE G.K.ILANTHIRAIYAN

Crl.O.P. Nos.3906 and 3908 of 2020
and
Crl. M.P. Nos.2247, 2249, 2255 & 2256 of 2020

1.M/s. Medplus Pharmacy,
Unit of Optival Health Solutions Pvt. Ltd.,
Old No.9/1, New No.27, Muthamman Kovil Street,
Ayanavaram,
Chennai - 600 023,
Rep. by its Director,
K.S.Murali Krishna.

2.K.S.Murali Krishna. ...Petitioners in Crl.OP.No.3906 of 2020

3.Paramesham Kasthuri ...Petitioner in Crl.OP.No.3908 of 2020

Vs.

State of Tamil Nadu rep. by
The Drugs Inspector,
Ayanavaram Range i/c,
O/o. The Assistant Director of Drugs Control,
Zone II,
Chennai - 600 006. ...Respondent

COMMON PRAYER: Criminal Original Petitions filed under Section 482 Cr.P.C., praying to call for the records in C.C. No.6679 of 2018 on the file of the learned X Metropolitan Magistrate Court, Egmore, Chennai and to quash the proceedings as far as these petitioners are concerned.

For Petitioners : Mr.Mohammed Rafi[in both petitions]

For Respondent : Mr.S.Karthikeyan[in both petitions]
Additional Public Prosecutor

C O M M O N O R D E R

These petitions are filed to call for the records in C.C. No.6679 of 2018 on the file of the learned X Metropolitan Magistrate Court, Egmore, Chennai and to quash the proceedings as far as these petitioners are concerned.

2. Mr. M.Mohammed Rafi, the learned counsel for the petitioners would submit that in Crl. O.P. No. 3906 of 2020, the first petitioner is the company, the second petitioner is the Director of the company and the petitioner in Crl.O.P. No.3908 of 2020 is the General Manager of the company's branch at Ayanavaram. He would submit that the respondent conducted inspection on 04.05.2015 at M/s.Medplus Pharmacy situated at Ayanavaram, Chennai - 600 023 and on inspection, the respondent issued show cause notice dated 03.07.2015, for which the first and second petitioners submitted detailed reply to the Drug Inspector concerned. He would further submit that without application of mind and without considering the explanation submitted by the petitioners , the respondent mechanically lodged complaint as against the petitioners under Section 18 (c) of Drugs and Cosmetics Act, 1940 read with Rules 65(2), 65 (3)(1), 65(4)(3)(i) of Drugs and Cosmetics Rules, 1945 punishable under Section 27(d) of Drugs and Cosmetics Act. He would further submit that under Section 34(1) of Drugs and Cosmetics Act, the persons in charge of at the time of offence was committed, are responsible and the company shall be deemed to be guilty of the offence, but the petitioners are Director and Manger of the company, they have no knowledge about the day to day affairs of the company which is having various branches in South India. Insofar as the petitioners are concerned, the first petitioner is the company and other two are Director and General Manager of the company. Therefore, they are not responsible for the conduct of the day of day affairs of the company. In this regard, the learned counsel has relied upon the judgment of the Hon'ble Supreme Court in the case of Pepsi Co Oncia Holding Pvt. Ltd. Vs. Food Inspector reported in 2011 (1) SCC 176.

3. Per contra, Mr. S.Karthikeyan, learned Additional Public Prosecutor appearing for the respondent would submit that during the course of inspection, one J.Agila Semmalar was not present who is the endorsed registered pharmacist. Without his personal supervision, sales were done on Bill No.20151600675005272 dated 04.05.2015 and Bill No.20151600675005282 dated 04.05.2015, which is in contravention of Section 18(c) of Drugs and Cosmetics Act, 1940 read with Rule 65(2) of Drugs and Cosmetics Rules, 1945. Further he submitted that on verification of the prescription register, it was found that the sales of the drugs effected from 01.04.2015 to 03.05.2015 were not maintained properly in the prescription register, which is in contravention of Section 18(c) of the said Act.

4.Similarly, on verification of the purchase invoices, carbon copies of sales bills and physical stocks of certain drugs it was observed that the firm has supplied the following drugs by way of retail, but the firm have not maintained proper records of purchase as required under the Rule 65 (4) (3) (i) of the said Rules. Therefore the petitioners committed offence under the Drugs and Cosmetics Act, 1940 and prayed for dismissal of this quash petition.

5. Heard, Mr. M.Mohammed Rafi, the learned counsel for the petitioners and Mr. S.Karthikeyan, learned Additional Public Prosecutor appearing for the respondent.

6. It is relevant to extract the portions of the counter affidavit filed by the respondent. It reads as follows:

> "... 3. It is submitted that specific averments given in the complaint (Chargesheet) in para 12 and 14 (annexure iv) regarding the person is responsible for conduct of business and also the relevant documents enclosed along with complaint as 9th and 10th in the list of documents.
>
> As per Form 32 and other documents, the second petitioner is one of the director. Section 34 of the Drugs and Cosmetics Act 1940 annexed proviso clearly requires such person to prove himself that he has no knowledge about the commission of offence either to enquiry officer.
>
> The Same proviso continues that such a person has to exercise all due diligence to prevent commission of such offences, to this aspect the petitioner had miserably failed to exhaust.
>
> i.To explain to the enquiry officer at the time of inspection
>
> ii.At the time of receipt show cause memo reply
>
> iii. At the time of submission of constitution particulars. And also the petitioner had failed to submitted any documentary evidence such as instructions given to their employees and warning to the personals who would be in charge of the individual outlets instructing to them comply with / not violate the Drugs and Cosmetics Act 1940 and rules there under 1945. Hence the complaint is not mechanically filed and based on the merits with respect to reply dated 17/08/2015 and 14/03/2018 which was submitted by themselves during enquiry by the then Drugs Inspector.

Section 34 of the Drugs and Cosmetics Act 1940 requires every person who is responsible for the violations are to be impleaded in prosecution.

4.It is stated that the objective of the co mpany stated in Memorandum of Association (annexure V) of optival health solutions private limited (petitioner 1) reveals that it can buy, sell, import or deal in any manner in Medical and Pharmaceutical products, medicinal preparations, vetrinay products including setting up contract manufacturing facility. Here the company (1st petitioner) is contravened and themselves replied that the directors are responsible for the affairs contravened and themselves replied that the directors are responsible for the affairs.

It was noticed by the then Drugs Inspector,

i. the company (1st petitioner) has sold the all kind of drugs including Schedule H without the prescription.

ii. Without the maintenance of the Prescription register.

iii. Without the personal supervision of the registered Pharmacist.

As per rule 65 of Drugs and cosmetics rules 1945 necessitates.

The profit generated out of business carried out by the employees will be credit of directors only. Therefore, there is no fault in including the director (2nd petitioner) whose name has been furnished as responsible by them only.

5. As per their "memorandum and article of association under certificate of incorporation dated 11/07/2005, in power of Director under para 65 (annexure VI) stated that "subject to the provision of the Act, the management and control of the business of the company shall be vested in the directors and may exercise all such power of the company and do all such acts and things as the company is by the memorandum and article of association. It is submitted that 2nd petitioner is the authorised signatory for the company and applied for the drugs licence to sell the drugs at 1st petitioner. The second petitioner being one of the director have 1800 retail shop but he was applied for

the renewal of licence and signed in Form 19 (application form) and declaration Form (annexure VII) for this concern and in the declaration form, he himself clearly declared that “I am conversant with the provision of Drugs Act 1940 and Drugs rules 1945 and I will abide by the conditions of the licence” hence he has adequate knowledge in drugs licence and the Drugs and cosmetics Act 1940 and rules made thereunder. Hence it is submitted that it is well fit in, that the first petitioner represented by 2nd petitioner, one of the director, who control the business and applied for the licence for carrying out the business.

6. It is submitted as alleged in para c of grounds, in the reply dated 17/08/2015 (annexure I) they have not stated that a duly registered Pharmacist was present in the shop during inspection, it is a false allegation.

In the reply letter dated 17/08/2015, under point 1 they clearly stated that the registered pharmacist had to go on emergency work and the drugs sold, by oversight for emergency purpose.

It is submitted that, they have not mentioned that Mr.P.Sankaralingam, is a registered pharmacist and have been appointed by them as a pharmacist in their pharmacy to the investigating officer in any communication.

It is also submitted that even after the inspection 1st petitioner has not applied for the endorsement of the Mr.P.Sankaralingam as a registered pharmacist in their drugs licence in Form 20, 21. Hence their allegation in para c is not genuine information and it is misleading the honorable Court.

7. It is humbly submitted to consider that the case of Pepsico India Holdings Pvt Ltd. Vs. Food Inspector & Anr. (reported in 2011 (1) SCC 176), instituted under Prevention of Food Adulteration Act, 1954, where there is a provision of authorizing a director or manager under Section 17(2) as the person responsible to exercise all such powers and take all such steps to prevent the commission by the company of any offence. Whereas in Drugs and Cosmetics Act, 1940, the offences by the companies as covered under Section 34, every person who is 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 proceed against and punished accordingly.

Hence both the Act are entirely different, it humbly submitted before this Hon'ble Court not to consider the above judgment as it is not merely correct to compare the case filed under Drugs and Cosmetic Act 1940. It is submitted that in the complaint copy, the drugs inspector made the specific allegation against the petitioner 1 and petitioner 2 and the respective documents filed along with the complaint copy filed in X MM Court, hence this Court could not be compared with the case quashed for not making specific allegation against the accused and included them (both the directors) for merely being a drug inspector to find out who is responsible for day to day activities and conduct of business and filed a complaint against them.

"If it is alleged that directors were privy to manufacturing of medicine concerned by Company then they were responsible for affairs of company and, therefore. When a drug manufactured by Company is found to be defective, all Directors could be prosecuted. Complaint filed against the Directors could not be disposed of under Section 482 Cr.P.C. as it required appreciation of facts on basis of evidence to be led before the trial Court. Hence the directors must prove before trial Court that they had nothing to do with manufacturing process and therefore they should not be held liable under Section 34(2), Dinesh B.Patel Vs. State of Gujarat, (2010) 11SCC 125".

6. On perusal of records, the petitioners are arrayed as A1 to A3. According to the complaint, the first accused is the company, and the second and third accused are the Director and General Manager. Insofar as the allegations as against the petitioners are that the first petitioner is the company, and the second and third petitioners are being the Director and General Manager, they have been impleaded as accused. On inspection of the Drug Inspector, it was found irregularities and issued show cause notice dated 03.07.2015. By the reply dated 17.08.2015, the petitioners submitted their explanation and denied the allegations made in the show cause notice.

7. The points for consideration are that whether the complaint is sustainable as against the petitioners?

8. It is seen that in Crl.O.P.No.3906 of 2020 the first petitioner is the company and the second petitioner is the Director of the first petitioner and the petitioner in Crl. O.P. No.3908 of 2020 is the General Manager of the Ayanavaram Branch. It is relevant to extract Section 34(1) of Drugs and Cosmetics Act, 1940 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 of 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."

9. It is seen from the complaint, the petitioners being the Director and General Manager of the first petitioner, have no direct knowledge inrespect of the licence and sales by the fourth accused. They also never involved in day to day affairs of the company, since the first petitioner company is having various branches in South India. There is no specific allegations as against the second and third petitioners as that they are in charge of the company and also responsible to the company for the conduct of its day to day business affairs except vague and bald statement against them. Therefore, the entire proceedings is vitiated as against the petitioners herein.

10. In this regard, the Judgment rendered by the Hon'ble Supreme Court relied upon by the learned counsel for the petitioners in the case of Pepsi Co Oncia Holding Pvt. Ltd. Vs. Food Inspector reported in 2011 (1) SCC 176, is extracted hereunder:

> "...50...It is now well established that in a complaint against a company and its Directors, the complainant has to indicate in the complaint itself as to whether the Directors concerned were either in charge off or responsible to the company for its day to day management, or whether they were responsible to the company for the conduct of its business. A merely bald statement that a person was a Director of the company against which certain allegations had been made is not sufficient to make such a Director liable to in the absence of any specific allegations regarding his role in the management of the company".

11. In the case on hand, the petitioners being the Director and General Manager, have not involved in the day to day affairs

of the company. Further there is no averment in the complaint that the petitioners involved in the business transaction. Therefore, they are not responsible for the company for the conduct of its business. As such, the above judgment of the Hon'ble Supreme Court of India is squarely applicable to this case and the present complaint cannot be sustained as against the petitioners.

12. In view of the above discussions, these Criminal Original Petitions are allowed and the proceedings in CC.No.6679 of 2018 on the file of the learned X Metropolitan Magistrate Court, Egmore, Chennai is hereby quashed as against the petitioners alone. As far as the other accused is concerned, the trial Court is directed to complete the trial within a period of six months from the date of receipt of a copy of this order. Connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

bkn

To

1.The X Metropolitan Magistrate Court,
Egmore,
Chennai.

2.Do-thro The Chief Metropolitan Magistrate,
Egmore,
Chennai.

3.The Drugs Inspector,
Ayanavaram Range i/c,
O/o. The Assistant Director of Drugs Control,
Zone II,
Chennai - 600 006.

4.The Public Prosecutor,
High Court,
Madras.

Crl.O.P.No.3906 of 2020

AJS(CO)
RN(22/10/2020)