

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL WRIT PETITION NO.50 OF 2018

1. Nihar son of Jayant Vakanalli,
Aged about 46 years,
Director, Medisynth Chemicals Pvt.
Ltd., D-282, M.I.D.C. TTC, Turbhe,
Navi Mumbai, resident of A-7/1,
Saraswat Colony, Santacruz [West],
Mumbai.
2. Ashutosh son of Arvind Nair,
Aged about 50 years,
Director, Medisynth Chemicals Pvt.
Ltd., D-282, M.I.D.C. TTC, Turbhe,
Navi Mumbai, resident of A-7/1,
Saraswat Colony, Santacruz [West],
Mumbai.
3. Ms. Supriya Shriniwas Shanbhag,
Aged about 41 years,
Approved Manufacturing Chemist,
Medisynth Chemicals Pvt.
Ltd., D-282, M.I.D.C. TTC, Turbhe,
Navi Mumbai, resident of P/3, 704,
Shree Saraswati CHS, Near Acharya
College, Mumbai.
4. Mahesh son of Vishnu Jadhav,
Aged about 31 years,
Approved Quality Control Chemist,
Medisynth Chemicals Pvt.
Ltd., D-282, M.I.D.C. TTC, Turbhe,
Navi Mumbai, resident of 03/B/9,
Ajinkya Tara Society, Sector-10,
Koperkhairane, Navi Mumbai.
5. Medisynth Chemicals Pvt.
Ltd., D-282, M.I.D.C. TTC, Turbhe,
Navi Mumbai.

..... **PETITIONERS**

...VERSUS...

State of Maharashtra, through
Shri Neeraj V. Lohakare,
Drug Inspector,
Office of Asstt. Commissioner,
Food & Drugs Administration,
Maharashtra State, Barrack No.2,
Unit No.2, Complex, Gadchiroli,
Tq. & Dist. Gadchiroli.

..... **RESPONDENT**

Mr. S.P. Dharmadhikari, Senior Advocate with Mr. M.P.
Khajanchi, Advocate for Petitioners.
Mr. M.K. Pathan, APP for Respondent/State.

CORAM: **ROHIT B. DEO, J.**
DATE: **4th FEBRUARY, 2021.**

ORAL JUDGMENT:

The petitioners are invoking the extraordinary jurisdiction under Article 227 of the Constitution of India and the inherent powers of the court under Section 482 of the Criminal Procedure Code, 1973 (Code) seeking quashment of the order dated 27.10.2017 rendered by the Judicial Magistrate First Class, Chamorshi in Criminal Complaint Case 591 of 2017 whereby cognizance is taken of the complaint and process issued for offences under Section 3(c), Section 3(d) and 4(b) read with Schedule 13 and 18 of Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 punishable under Section 7 of Drugs

and Magic Remedies (objectionable Advertisements) Act, 1954 (for short 'Act').

2. The learned Senior Counsel Mr. Dharmadhikari has twin submissions to canvass.

3. The first submission is that even if the complaint is taken at face value, no offence is made out in view of the exemption notification dated 24.01.1961 issued by the Ministry of Health.

4. The other submission is that qua accused 1 to 4 the process could not have been issued for the additional reason that there is no averment in the complaint that accused 1 to 4 were in charge of the affairs of the accused 5 company.

5. Both the submissions are well merited.

6. Considering the latter submission, there is no whisper in the entire complaint that accused 1 to 4 are responsible for the conduct of business of the accused 5 company or that they were in charge of the affairs of the company.

7. Section 9 of the Drugs and Magic Remedies (Objectionable Advertisements), Act, 1954 reads thus:

9. Offences by companies.— (1) *If the person contravening any of the provisions of this Act is 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 contravention 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 was committed with the consent or connivance of, or is attributable to any neglect on the part of any director or manager, secretary or other officer of the company, such director, manager, secretary or other officer of the company, 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, and*

(b) *“director” in relation to a firm means a partner in the firm.*

8. *Pari materia* provisions fell for consideration in

plethora of decisions. It is well settled, that the principle of vicarious liability cannot be invoked in the absence of the necessary averment as would suggest that the director or any other officer, is the in charge of the affairs of the company. Further, it is not even the case of the complainant that the offences are committed with the connivance or consent of the director or other officer named as accused. The latter part of Section 9 would therefore, not be relevant. Adverting to the first submission, the substratum of the complaint is that in the leaflet which was placed in the carton of the drug “UTRONIC Syrup” for Women the following objectionable matter is printed “Indications: UTRONIC is an ideal remedy for menstrual irregularities such as Amenorrhoea (delayed), Oligomenorrhoea (Scanty), Dysmenorrhoea (painful), Menorrhagia (bleeding/spotting in between periods). The therapeutic efficacy of UTRONIC is due to the time-tested properties of its constitution which in combination – act in synergism to cover wide range of uterine ailments”.

9. The complaint asserts that the advertisement printed on the leaflet of the drug contravene Section 3(c), Section 3(d) and Section 4(b) read with Schedule 13 and 18 of the Drugs and Magic Remedies (Objectionable Advertisements) Act.

10. The learned Senior Counsel points out, and there is no rebuttal from the complainant, that the notification referred to *supra* exempts leaflets or literature accompanying packaging of drugs which contains information as is required for the guidance of registered medical practitioners in respect of matters referred to in the said notification, from the rigors of Clauses (c) and (d) of Section 3 of the Act.

11. The petitioners have approached this Court with a specific case that the leaflet was inserted in the carton as guidance of registered medical practitioners in respect of matters relating to (a) therapeutic indications of the drug, (b) its administration, (c) its dosage, (d) its side-effects and (e) the precautions to be observed in treatment with the drug.

12. As noted *supra* there is no rebuttal in as much as the complainant has not filed an affidavit in response.

13. Even *de hors* the non-traverse, if the complaint is holistically read, it is apparent that the drug which was seized was in the carton and obviously not meant for the end user – patient. In this view of the matter, in view of the exemption notification

Clauses (c) and (d) of Section 3 could not have been invoked. While the complaint does make a reference to Section 4(b) of the Act, the reference is misconceived since it is not even an allegation that the contents of the leaflet are false. In this view of the matter, the order of issuance of process will have to be quashed, and is accordingly quashed.

14. Rule is made absolute in terms of prayer clause (a) and (b) which read thus:

[a] issue an appropriate Writ, order or a direction to quash Criminal Complaint Case No. 591 of 2017 [State Vs. Nihar & others] dated 19th August, 2017 [Annex.P-3] filed by the respondent against the petitioners which is pending before learned Judicial Magistrate First Class, Chamorshi, Distt. Gadchiroli;

[b] issue an appropriate Writ, order or a direction to quash and set aside the impugned order dated 27th October, 2017 [Annex.P-4] passed by the learned Judicial Magistrate First Class,

Chamorshi, Distt. Gadchiroli, in Criminal
Complaint Case No. 591 of 2017 [State Vs. Nihar
& others]

JUDGE

NSN