

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.06.2022	PRONOUNCED ON : 30.06.2022
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CORAM::

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

Crl.A.No.671 of 2010

State Rep. by
The Senior Drugs Inspector,
Zone - III, Chennai - 6.

...Appellant/Complainant

/versus/

1. M/s.Subiksha Trading Services Pvt. Ltd.,
No.113, Radhakrishnan Mutt Road,
R.A.Puram, Chennai - 28.
Represented by its Managing Director,
Mr.R.Subramanian.

2. R.Subramanian,
S/o.Ramaswami,
Managing Director,
M/s.Subiksha Trading Services Pvt Ltd.,
No.113, Radhakrishnan Mutt Road,
R.A.Puram, Chennai - 28.

...Respondents/Accused 1 & 2

Prayer: Criminal Appeal is filed under Section 378 of Cr.P.C., to aside the judgment of acquittal of the respondents/accused [A1 & A2] passed by the Honourable Court of IV Metropolitan Magistrate, Saidapet, Chennai - 15 in C.C.No.1471 of 2003 dated 09.08.2010.

For Appellant : Mr.S.Udaya Kumar,
Government Advocate (Crl.Side)

For R1 : Mr.S.Gopalakrishnan,
Official Liquidator

For R2 : Mr.I.Subramanian,
Senior Counsel, for
Mr.Prakash Gokhlaney

J U D G M E N T

The appeal by the State represented by Senior Drug Inspector. Aggrieved by the order of acquittal by the Trial Court in a complaint filed against the respondents for

contravention and violation of Sections 18(c) of the Drugs and Cosmetics Act, 1940 read with 65 (6), 65(4)(3)(ii) and 65(4)(4) of Drugs Rules 1945.

2.The case of the complainant is that, on 11.12.2000, the Senior Drug Inspector inspected the 1st accused/Company, in which, 2nd accused is the Managing Director and 3rd accused is the Manager. The 1st accused firm found that the carbon copies of the sales bills for the period 01.01.2000 till date, was not maintained. Similarly, the purchase bills for tablets Rantac 15 mg Batch No.1112, Daonil tablets batch No.290350 and Metformin 500 mg tablets (cipla) were not available. The inspection was conducted based on a specific complaint from one Muthu Kumar alleging that, when Dr.K.Balachandran, Senior Civil Surgeon, has prescribed Glyciphage and Zinetac 150 mg for his ailment. The 1st respondent firm sold to him Metformin 500 (cipla) and Rantac 150mg vide bill No.1610 dated 15.11.2000. After serving notice for production of these documents, the respondents failed to produce the said carbon copies of the sales bills and purchase bills for the respective drugs.

3.Complaint was filed stating that, the inspection has to be revealed that 1st accused firm not maintaining the prescription register upto date. No entries for supply of drugs on prescription were made. The carbon copies of the sales bills for the sale of drug during 01.11.2000 not maintainable and not furnished for verification during inspection. The purchase bills for Rantac 150 mg batch No.1112, Daonil tablets batch No.290350 and Metformin 500 mg (cipla) which alleged to have been sold under sales bills No.1610 dated 15.11.2000 not maintainable and furnished during inspection. The printed format with details of supplies of drug on prescription of registered medical practitioners from 01.11.2000 to 06.12.2000 not produced during inspection. Mr.R.Senthil Rajesh, registered Pharmacist produced few of the documents. After obtaining certified copies of the extract, same was returned. To the show cause notice dated 11.12.2000 for production of documents and the subsequent reminder dated 30.03.2001 received by the 1st accused firm and the reply dated 24.04.2001 seeking copy of the letter issued during investigation was sought. Though, the copy of the said letter already served to the accused persons, another copy was sent to them along with letter dated 26.04.2001. Thereafter, show cause notice dated 29.04.2001 to the firm for contraventions of Sections 18(c) of Act read with 65(3), 65(4)(3)(ii), 65(4)(4) and 65(6) of Drugs and Cosmetic Rules was served on the accused. The reply of the accused dated 19.09.2001 was not satisfactory and taking other necessary action, complaint was lodged, after obtaining sanction. The accused which is the company represented by its Managing Director and Manager. After the complaint taken cognizance, 3rd accused absconded and case against him was split up.

4.To prove the charges, 5 witnesses were examined and 24 documents were marked. On the side of the accused 3 witnesses were examined.

5.The Trial Court, after considering the evidence acquitted the accused for all charges holding that P.W.1 to P.W.3 admit that Pharmacist is responsible for maintaining of records pertaining to the business of the accused company. While so, the prosecution failed to explain why the pharmacist not prosecuted. Therefore, holding that the complainant did not issue proper show cause notice to the appropriate person, who is responsible to the authority. To reply their show cause notice, neither the Managing Director of the Company nor the Manager are competent person to say anything with regard to the show cause notice. Even without ascertaining the persons concern with business of the 1st accused, complaint filed in haste to be dismissed.

6.The complainant being aggrieved by the dismissal of the complaint, has preferred the appeal before this Court, stating that, during inspection on 11.12.2000, P.W.1 has noticed the following deficiencies:-

"(i). The Prescription Register (The details of supplies of drugs on prescription of the medical practitioners) was not maintained up to date by the firm which is in contravention of Section 18(c) read with 65(3) of the Drugs and Cosmetics Act and Rules.

(ii).The Carbon copies of the sale bill for sale of drugs from 01.01.2000 including the sale bill no 1610 dated 15.11.2000 which is in contravention of Section 18(c) read with 65(4)(3)(ii) of the Drugs and Cosmetics Act and Rules.

(iii).The purchase bill for Rantac 150mg Tablet, B.No.1112, Daonil Tablets, B.No.290350 and Metformin 500 mg which were sold under Sale bill No.1610 dated 15.11.2000 which is in contravention of Section 18(c) read with 65(4)(4) of the Drugs and Cosmetics Act and Rules."

7. Thereafter, show cause notice dated 29.08.2001 was sent to A1 firm by P.W.3. On receipt of the show cause notice, 1st accused firm replied through its authorised signatory dated 19.09.2001. However, did not produced the records called for under the show cause notice memo. Hence, on 29.01.2001 reminder letter was sent to 1st accused firm to produce list of present and past Directors and the resolution pointing them as

Directors, also similar request was made to the Registrar of Companies. After completion of investigation, prosecution launched against 1st accused firm under which 2nd accused/Managing Director obtained license to trade with Drugs and Cosmetics.

8.The Trial Court acquitted the accused persons on the erroneous understanding of law holding that the pharmacist alone committed the offence and the accused 1 to 3 cannot be held responsible for not maintaining the records. It has failed to consider the fact that Drug license was given to 1st accused firm wherein, it is mandatory on the part of the licensee to comply the provision of Drugs and Cosmetics Act 1940 and rules framed thereunder.

9. The Pharmacist is responsible only for supervision of sales of drugs pertaining to the business of the Company and it is the responsibility of the licensee, who is the Managing Director to maintain and ensure production of the records when asked by the Drug Inspector. To the show cause notice to the 1st accused firm, reply was sent to the authorised signatory and same was received by P.W.3. Having received the show cause notice and replied contrary to the facts, the trial Court has held that show cause notice was not served on the appropriate persons and trial Court failed to take note of Ex.P.16 show cause notice and reply from authorised representative of the accused firm marked as Ex.P.17. The sales of medicine should be done under the supervision of registered Pharmacist. Whereas, maintenance of record such as purchase bill, sales bill and prescription register should be maintained by persons who holds the Drug license i.e., A1 firm and A2 the Managing Director. The license issued to a retailer under Form-VI specifically mandates the licensee should sale drug purchased only from duly licensed dealer or duly licensed manufacturer. While so, 1st accused firm and its Managing Director as licensee liable for prosecution for his failure to produce purchase bill to indicate that they have purchased the drug from duly licensed manufacturer or duly licensed dealer.

10.The trial Court erred in ignoring the said provision of law and acquitted the accused on erroneous reason.

11.The Learned Senior Counsel appearing for the 2nd respondent submitted that the person in charge of the Pharmacist was P.W.6 Mr.R.Senthil Rajesh. The inspection report as well as the complaint admits that during the inspection that Senthil Rajesh alone is present. P.W.1 to P.W.3, who are the Officers of Drug and Control Department admit that, it is the duty of the Pharmacist to maintain documents. While so, without arraying the person in charge of that shop A1 to A3 who are not present in the shop were arrayed as accused.

12.The Learned Senior Counsel for the 2nd respondent submitted that the complaint deprived by one Muthu Kumar itself

show that the complaint is motivated and in collusion with business reveals. Based on the letter alleged to have been given by one Suresh who is the fictitious person invented by the prosecution. The entire complaint is spined on receipt of the show cause notice, it was represented to the Department that the documents are available with them and they will be produced in due course but without waiting in haste, the complaint was filed.

13. The show cause notice (Ex.P.16), the respondent firm who is authorised signatory had given its explanation as below:-

"1. We request you to furnish us a copy of the complaint received by you from Mr.Muthukumar, Chennai-4. As you have stated that you have taken up an inspection only based on the said complaint, it is necessary that we have a copy of the complaint so that we can appropriately respond to the contents therein.

2. In respect of your claims that carbon copies of sales bills, prescription register and purchase bills are not available, we wish to state that your claims are false and untrue. The said records are available in the shop as required in law and in case you require so, we are willing to produce these at your office at a mutually convenient date and time.

As you may be aware, our company sells all medicines at a 10% discount. Various vested interests and competing retailers whose businesses have been severely affected by our consumer friendly policy of offering 10% discount on all medicines have been trying to impede our business by giving false and frivolous complaints and also by trying to unduly influence various Government officials to act unreasonably against us. We hope that you will therefore act appropriately in respect of these complaints and not become a tool in the hands of these vested elements and that you will act fairly and honestly in this regard."

14. Thereafter, there is no material to show that the respondents produced the documents called for. However, on the date of inspection itself i.e., on 11.12.2000, the 3rd accused Suresh appears to have produced a copy of sale bills for the period 01.12.2000 till date.

15.It is contended by the Learned Counsel for the respondents that, it is not carbon copy as mandated under the provision of law but it is a duplicate copy generated through computer print out.

16.This Court, on considering the show cause notice and reply which is marked as Ex.P.16 & Ex.P.17 and the sanction to prosecute finds that the complainant as placed sufficient material to show that the respondent firm has not produced necessary document called for during inspection and even thereafter, not properly replied or produced the document. While so, the liability for producing the document is primarily on the licensee and not on the pharmacist who is responsible for sale of drug, maintenance of documentation etc. Even assuming that the Pharmacist is responsible for documentation. The responsibility is not exclusively on the Pharmacist but it is an inclusive responsibility. The primary responsible is on the license holder to whom license was granted on specific condition that he should purchase drug only from licensed drug manufacturer.

17.In this case, the respondents have not produced the purchase bills to prove that the purchase of their drugs was from licensed Drug manufacturer or dealer. Therefore, the reasoning given by the trial Court to acquit the respondents are erroneous and liable to be set aside.

18.For easy reference, the relevant Sections of the Drugs and Cosmetics Act 1940 and The Drugs Rules 1945 are extracted below:-

"Section 18 of the Drugs and Cosmetics Act, 1940:-

Prohibition of manufacture and sale of certain drugs and cosmetics.-

From such date as may be fixed by the State Government by notification in the Official Gazette in this behalf, no person shall himself or by any other person on this behalf-

(a).....

(b).....

(c) manufacture for sale or for distribution or sell, or stock or exhibit or offer for sale, or distribute any drug or cosmetic, except under, and in accordance with the conditions of, a licence issued for such purpose under this Chapter:

Rules 65 of the Drugs Rules 1945:-

65. Condition of licences. Licences in [Forms 20, 20-A, 20-B, 20-F, 20-G, 21 and 21-B] shall be subject to the conditions stated therein and to the following general conditions -

(1).....

(2).....

(3) (1) The supply of any drug other than those specified in Schedule X on a prescription of a Registered Medical Practitioner shall be recorded at the time of supply in a prescription register specially maintained for the purpose and the serial number of the entry in the register shall be entered on the prescription. The following particulars shall be entered in the register:-

(a) serial number of the entry,

(b) the date of supply,

(c) the name and address of the prescriber,

(d) the name and address of the patient, or the name and address of the owner of the animal if the drug supplied is for veterinary use,

(e) the name of the drug or preparation and the quantity or in the case of a medicine made up by the licensee, the ingredients and quantities thereof,

(f) in the case of a drug specified in Schedule C or Schedule H the name of the manufacturer of the drug, its batch number and the date of expiry of potency, if any,

(g) the signature of the registered Pharmacist by or under whose supervision the medicine was made up or supplied:

Provided that in the case of drugs which are not compounded in the premises and which are supplied from or in the original containers, the particulars specified in items (a) to (g) above may be entered in a cash or credit memo book, serially numbered and specially maintained for this purpose:

Provided further that if the medicine is

supplied on a prescription on which the medicine has been supplied on a previous occasion and entries made in the prescription register, it shall be sufficient if the new entry in the register includes a serial number, the date of supply, the quantity supplied and a sufficient reference to an entry in the register recording the dispensing of the medicine on the previous occasion:

Provided also that it shall not be necessary to record the above details in the register or in the cash or credit memo particulars in respect of?

(i) any drugs supplied against prescription under the Employees State Insurance Scheme if all the above particulars are given in that prescription, and

(ii) any drug other than that specified in Schedule C or Schedule H if it is supplied in the original unopened container of the manufacturer and if the prescription is duly stamped at the time of supply with the name of the supplier and the date on which the supply was made and on condition that the provisions of sub-rule (4)(3) of this rule are complied with.

(4) (1) The supply by retail, otherwise than on a prescription of a drug specified in Schedule C shall be recorded at the time of supply either?

(i) in a register specially maintained for the purpose in which the following particulars shall be entered :-

(a) serial number of the entry,

(b) the date of supply,

(c) the name and address of the purchaser,

(d) the name of the drug and the quantity thereof,

(e) in the case of a drug specified in Schedule C, the name of the manufacturer, the batch number and the date of expiry of potency,

(f) the signature of the person under whose supervision the sale was effected, or

(ii) in a cash or credit memo book, serially numbered containing all the particulars specified in items (b) to (f) of sub-clause (i) above.

(2) The option to maintain a register or a cash or credit memo book shall be made in writing to the Licensing Authority at the time of application for the grant or renewal of a license to sell by retail: Provided that the Licensing Authority may require records to be maintained in a register if it is satisfied that the entries in the carbon copy of the cash/credit memo book are not legible.

(3)(i) The supply by retail of any drug shall be made against a cash/credit memo which shall contain the following particulars :-

(a) Name, address and sale license number of the dealer,

(b) Serial number of the cash/credit memo,

(c) the name and quantity of the drug supplied.

(ii) Carbon copies of cash/credit memos shall be maintained by the licensee as record.

(4)(i) Records of purchase of a drug intended for sale or sold by retail shall be maintained by the licensee and such records shall show the following particulars, namely:-

(a) the date of purchase,

(b) the name and address of the person from whom purchased and the number of the relevant license held by him,

(c) the name of the drug, the quantity and the batch number, and

(d) the name of the manufacturer of the drug.

(ii) Purchase bills including cash or credit memo shall be serially numbered by

the licensee and maintained by him in a chronological order.

(5).....

(6) The licensee shall produce for inspection by an Inspector appointed under the Act on demand all registers and records maintained under these Rules, and shall supply to the Inspector such information as he may require for the purpose of ascertaining whether the provisions of the Act and Rules thereunder have been observed."

19. Reading of the above Rules, which is alleged to have been violated, it is clearly found that the responsibility of maintaining a carbon copy of cash or credit memos and maintenance of records on purchase of drug intended for sale is vested on the licensee. Therefore, even if Pharmacist is responsible for documentation, the primary responsibility under the statute to maintain carbon copy of sale bills and records of purchase is upon the licensee, who are accused 1 & 2 in this case. If the trial Court during the course of trial had found that, there are further accused appear to be guilty of the offence, the course open to the trial Court is to exercise its power under Section 319 of Cr.P.C., but not acquittal of the accused. The trial Court ought to have exercised its power under Section 319 of Cr.P.C to proceed against the persons whom there is evidence to proceed. Non-inclusion of such person as accused will not vitiate the trial against the persons where there is a prima facie material to prosecute. The trial Court has miserably failed to exercise its power under Section 319 of Cr.P.C but wrongly exercised its power to acquit the accused against whom the prosecution has alleged violation of Drugs and Cosmetics Act as licensee.

Section 319 of Criminal Procedure Code reads as below:-

Power to proceed against other persons appearing to be guilty of offence:

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1) then—

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.

20. The Learned Senior Counsel for the respondent states that 1st respondent company has become defunct and the 2nd respondent is no more in drug business. Stating that, after lapse of 12 years, remand or retrial will put great hardship to the 2nd appellant/accused. Hence prayed, leniency may be shown since charges against the respondents are only for non-production of documents and it is not a very serious violation.

21. In view of the above fact, taking note of the submissions made by the Learned Senior Counsel on behalf of the accused pointing out the error in the trial Court judgment, further interference required. Accordingly, the Criminal Appeal is disposed of.

Sd/-

Assistant Registrar(CS-II)

//True Copy//

Sub Assistant Registrar

bsm

To

1. The IV Metropolitan Magistrate,
Saidapet, Chennai.
2. Do Thro the Chief Metropolitan Magistrate,
Egmore, Chennai.

3. The Public Prosecutor,
High Court, Madras.
4. The Official Liquidator,
High Court, Madras.

Copy To

The Section Officer,
Criminal Section,
High Court, Madras.

Crl.A.No.671 of 2010

SKM(CO)
RGA(13/07/2022)