

Nikita

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO.1422 OF 2019

Shailyamanyu Singh

... Applicant

V/s.

The State of Maharashtra

... Respondent

Mr. Sanjog Parab, Senior Advocate with Mr. Aviral Sahai, Shuchita Choudhary, Darshan H. Patankar i/b Cyril Amarchand Mangaldas for the Applicant.

Mr. Arfan Sait, APP for the State.

Mr. Joseph M. Chiramel, Drug Inspector, Food and Drugs Administration, Bandra is present.

CORAM : AMIT BORKAR, J.

DATED : APRIL 12, 2023

RC.:

- 1.** The application is directed against the legality and validity of the order dated 3rd December 2016 passed by learned Metropolitan Magistrate 15th Court, Mazgaon, Mumbai, in Criminal Case No.1500201/SW/16, thereby issuing process against the applicant.
- 2.** Respondent filed a complaint for offence punishable under Section 18-B, p/u 28A, Section 18(a)(vi) r/w Section 27(d) and Section 22(1)(cca) r/w Section 27(d) against accused nos. 4, 5 and 6. The applicant is accused no. 6.
- 3.** The averments in the complaint qua applicant are as under:

“7. That the Accused No.6, is Mr. Shailyamanya Singh – Director of M/s. Procter and Gamble Hygiene and Health Care Ltd., P & G Plaza, Cardinal Gracias Road, Chakala Andheri (E), Mumbai 400099 which is the manufacturing company which had manufactured the said drug at the manufacturing site at M/s. Akums Drugs & Pharmaceuticals Ltd., Plant V, Hardware under manufacturing no. 16/UA/2010 dated 13.08.2010 and distributed the said drug to Accused No.5.”

“31. That the investigation carried out by complainant, it is revealed as under -

iv. That, Accused No.6 and 7 distributed drugs for the purpose of sale and distribution to M/s. Star Express, navi Mumbai who is not holding any requisite license under Drugs and Cosmetics Act, 1940. Accused No.7 and 8 have not submitted properly relevant document for destruction of the said drug and not provided relevant documents of destruction and thereby contravened Section of 18(c) p/u Section 27(b) (ii) and 18-B P/u 28 A of Drugs and Cosmetics Act, 1940.”

“36 That the Investigation carried out by complainant, it is revealed as under -

(4) That, Accused No.7 and 8 have not submitted properly relevant document for destruction of the said drug and not provided relevant documents of destruction and thereby contravened Section of 18(c) p/u Section 27 (b) (ii) and 18-B p/u 28 A of Drugs and Cosmetics Act, 1940.”

4. The order of issuance of process has been challenged on the following grounds.

(a) The averments made in the complaint are insufficient to attract liability under Section 34 (2) of the Drugs and Cosmetics Act, 1940;

(b) Averments against accused No.6 are contradictory and

inconsistent.

5. Learned Senior Advocate for Applicant submitted that reading Paragraph 19 and paragraphs 7, 31(4), and 36(4) makes it clear that the averments are contradictory and inconsistent. Relying on the judgments in the case of **Lalankumar Singh S/o Shri Udit Narayan Singh and Ors. Vs. State of Maharashtra** reported in (2015) SCC OnLine Bom 8485, **S.M.S. Pharmaceuticals Ltd. V. Neeta Bhalla and Anr.** reported in (2005) 8 SCC 89 and unreported judgment of this Court in Criminal Application No.3684 of 2009 delivered on 1st September 2017 (Nagpur Bench), it is submitted that the averments in the complaint are insufficient to make out a case of 'consent and connivance' as contemplated in section 34(2) under the Act.

6. Per contra, learned APP submitted that the averments in the complaint are sufficient to constitute ingredients of offences alleged against the applicant. He submitted that the averments in Paragraphs 31(iv) and 36(4) had been made after an investigation carried out by the complainant. Relying on the judgment in the case of **Dinesh B. Patel v. State of Gujarat & Anr.** reported in 2010 AIR SCW 5899 and **Vikas Rambal & Ors. v. State Rep. By, Drugs Inspector** reported in 2022 SCC OnLine Mad 4822, it is submitted that the averments in the complaint are sufficient to show that the applicant was involved in the distribution of drugs which cannot be termed as bald averment.

7. I have considered submissions on behalf of both sides. For

adjudicating the issue involved, it is relevant to quote Section 34(2) of the Drugs and Cosmetics Act, 1940, which reads as under:

“34. Offences by companies.— (1) ----

(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.

8. A careful reading of Section 34(2) makes it clear that the said section starts with a *non-obstante* clause. Sub-section 2 of Section 34 is attracted when there are sufficient averments in the complaint to show consent, connivance, or any act which can be termed neglect by any director or any other officer. Sub-section 2 enables the complainant by making sufficient and necessary averments in the complaint as regards consent and connivance to proceed against such accused.

9. In so far as the first submission on behalf of the applicant that the averments in the complaint are insufficient to attract sub-section (2) of section 34 is concerned, on careful perusal of the averments, it appears that, after holding an investigation, the complainant has specifically stated that accused No.6 along with

accused No.7, distributed drugs for the purpose of sale to M/s Star Express, Navi Mumbai which was not holding a requisite license under Drugs and Cosmetics Act, 1940. The applicant has not raised a dispute about the applicability of Section 18. The only submission is that the averments in the complaint are insufficient to prima facie fulfill ingredients of an offence under Section 18 of the Drugs and Cosmetics Act, 1940, read with Section 34(2) of the said Act. A perusal of the complaint shows that averments in Paragraphs 31(iv) and 36(4) have been made after an investigation carried out by the complainant. By making specific averment in Paragraphs 31(iv) and 36(4) that the accused No.6 (applicant) had distributed drugs in favour of a company not holding a license, the complainant has Prima facie fulfilled ingredients of an offence under Section 18 of the Act. On overall perusal of the complaint, if it is clear that the accused was actively involved in the alleged offence and necessary averments are made in the complaint, the Complainant is entitled to proceed against such accused. At the stage of issuance of process, the Court is required to consider the averments in the complaint, assuming them to be correct. At this stage, this Court cannot enter into the arena of the genuineness of the averments. The averments as quoted above, in my opinion, are sufficient to attract inference of consent and connivance of the applicant in the distribution of drugs in favour of the person who is not holding a license under the provisions of the Act.

10. The second submission on behalf of the applicant is that in paragraph 19, it is averred that accused No. 8 distributed drugs to

M/s. Star Express, Navi Mumbai. It is submitted that the averments in paragraph 19 contradict the averments made against the applicant. At the stage of considering the validity of the order of issuance of process, the Court cannot consider the truth or otherwise of the averments. If there is such a contradiction as alleged, the Magistrate should consider it at an appropriate stage. However, such ground is not sufficient to dismiss the complaint at its threshold without giving an opportunity to the prosecution to explain the alleged contradiction.

11. On behalf of the applicant, the learned senior advocate drew sustenance to his submission by relying on the Apex Court decision in the case of **Lalankumar Singh** (supra). On careful perusal of the judgment, in my opinion, the said judgment is not applicable. In the facts of the said case, the Apex Court was considering Section 34(1) of the Act. In the facts of the present case, the applicant's liability is attracted as per section 34(2) of the Act. Reading of said judgment makes it clear that the Apex Court has not laid down a ratio or obiter regarding Section 34(2) of the Drugs and Cosmetics Act, 1940.

12. The learned senior advocate relying on the judgment of this Court, which was a subject matter before the Apex Court in the case of **Lalankumar Singh** (supra), invited my attention to the judgment of a learned Single Judge of this Court to urge that the Single Judge had considered Section 34(2) of the Drugs and Cosmetics Act, 1940 and, therefore, dismissed the petition. According to him, the Apex Court did not even consider it appropriate to deal with Section 34(2). Thus, in his submission,

the reasoning of the learned Single Judge of this Court in paragraph 22 is deemed to be set aside. According to him, the Apex Court has laid down the ratio that section 34(2) of the Drugs and Cosmetics Act, 1940, was not attracted.

13. It is well settled that a judgment of a Court contains three parts: (i) finding of facts, (ii) statement of the principle of law applicable to the legal issue raised on the facts, based on which the case is decided; and (iii) decision which is based on the finding of fact, applicable principles of law, and in appropriate cases, the need to mould the relief in a particular manner. Out of the three parts, only the second part, which is ratio decidendi or statement of law applied and acted upon by the Court, constitutes a binding precedent. Neither the finding on facts nor the ultimate decision in the form of the relief granted nor the manner adopted to dispose of the case is a precedent.

14. More than 100 years back, the concept of ratio decidendi was clearly distilled by Lord Halsbury in ***Quinn v. Leathem*, 1901 AC 495 (HL)**, wherein he observed:

“... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. *The other is that a case is only an authority for what it actually decides.* I entirely deny that it can be quoted for a proposition that may seem to follow logically from it.”

15. It is useful to refer notable cases where the Supreme Court has explained the concept of ratio decidendi, which are as follows :

i. Regl. Manager v. Pawan Kumar Dubey: reported in (1976) 3 SCC 334, para 7 reads as under:-

“It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts.”

ii. Union of India v. Dhanwanti Devi: reported in (1996) 6 SCC 44, p.52 para 9 reads as under:-

“It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its ratio decidendi.”

iii. Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.(2005) 7 SCC 234 at P. 265 para 69

“It is a well-settled proposition that the ratio decidendi of a case is the principle of law that decided the dispute in the facts of the case and, therefore, a decision cannot be relied upon in support of a proposition that it did not decide.”

16. Therefore, in my opinion, the judgment in the case of **Lalankumar Singh** (supra) cannot be interpreted to mean that the said judgment interprets Section 34(2) of the Drugs and Cosmetics Act, 1940. It must be noted that there cannot be a dispute about the preposition of law that, in the absence of necessary pleading to attract Section 34(2), of person cannot be prosecuted for the offences under the Drugs and Cosmetics Act, 1940. Therefore, the only scope of the application is to consider whether the averments are sufficient to draw inference to consent

and connivance under Section 34(2) of the Drugs and Cosmetics Act, 1940 as held earlier, in my opinion, the averments made in paragraphs 31(iv) and 36(4), read with paragraph 7 of the complaint, are sufficient to attract such inference of consent and connivance as contemplated under Section 34(2).

17. At this stage, it is necessary to refer to the judgment relied upon on behalf of the prosecution. The Apex Court, in the case of **Dinesh Patel** (supra) in paragraphs 7 to 9, held as under:

“7. In the present matter, however, the respondents were not arrayed only because they were the directors. That is certainly one reason. However, in addition to that, a statement has been made in paragraph 6 of the complaint that by manufacturing of the concerned medicine for sale, the company and its directors had committed the breach of the Act. Thus, there was an allegation that the directors were privy to the manufacturing of medicine by the company.

8. In our opinion, the averments in paras 4, 5, 6 and 8 of the complaint cannot be described as the bald statements. The emphasized portion in para 6 of the complaint suggests manufacturing of the medicine by the company and its directors. The averments in all these paras would have to be read together and the para 6 of the complaint would have to be read in the light of the other averments. It seems that in the reported decision in the complaint, there was no link pleaded in the directors and the manufacturing process. That is not the situation here. This was the case of the manufacture of the drug for human consumption and, after it was tested in the laboratory, was found to be defective since there was a growth of fungus, which is a very serious matter related to public health.

9. Under the peculiar circumstances of this case and realizing the seriousness of the allegations, we would not take a technical view based on pleadings in the complaint. Mr. Raichura contended that as per the settled law by this Court in complaints under Section 138 of the Negotiable Instruments Act against company and directors also specific averment about the active role of directors in running the company has to be made, failing which the directors cannot be proceeded against. Same logic should apply even in the present case. We cannot agree. Firstly, the language of Section 34(2) of the Act substantially differs from the language of Section 141 of the Negotiable Instruments Act. Secondly, here we are dealing with the offence which has a direct impact on the public health. We, therefore, would choose not to interfere with the order of the High Court. It will be open for the directors to show to the Trial Court that they had nothing to do with the manufacture process and, therefore, they should not be held liable under Section 34(2) of the Act."

18. The learned Single Judge of the Madras High Court in the case of **Vikas Rambal** (supra) has followed the judgment of **Dinesh Patel** and dismissed the application on behalf of the company's director.

19. The conspectus of the decision in the case of **Dinesh Patel** is that in the absence of specific averments about the active role of the director in running the company, the Director cannot proceed. In the facts of the said case, the allegation of commission of the offence was of manufacturing and, therefore, in the context of said averments, the Apex Court held that specific averments about the active role of the director in running the company are necessary. However, in the present case, sufficient averments are made

regarding the distribution of drugs to a person not holding a license. Once the complainant, after holding investigation, makes out a case for distribution of Drugs to an unlicensed person, prima facie, the averments are sufficient to proceed against accused No.6. Therefore, in my opinion, no fault can be found with the order of issuance of process. There is no merit in the *application*.

20. Learned senior advocate submitted that neither M/s. Star Express has been made accused, nor is there any material or averments to connect accused Nos.6 and 7 with M/s. Star Express is placed on record. In my opinion, in the limited scope of application arising out of the validity of the exercise of power while issuing process, such inquiry is not contemplated as it is for the Magistrate at an appropriate stage to consider its effect.

21. *For the aforesaid reasons, Criminal Application is dismissed.*
No costs.

22. Since the ad-interim relief has been running in favour of the applicant for more than three years, the same is continued for a period of four weeks from today.

23. It is made clear that the Trial Court shall proceed with the complaint uninfluenced by the observations made in the present observations, which are made to consider the validity of the order of issuance of process.

(AMIT BORKAR, J.)

Note: This order is modified as per order dated 21 April 2023 to delete reference of Cr. Application No.1423 of 2019 & consequential corrections.