

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

CRMC No. 110/2014

**Reserved on 13.09.2022
Pronounced on 22.09.2022.**

Cadila Pharmaceuticals Limited and ors

..... petitioner (s)

Through :- Mr. Pranav Kohli Sr. Advocate
with Mr. Arun Dev Singh
Advocate

V/s

Drug Inspector, Kathua and ors

.....Respondent(s)

Through :- Mr. Amit Gupta AAG.

Coram: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGEMENT

1 Through the medium of instant petition, the petitioners have challenged the complaint filed by respondent No.1/Drugs Inspector, Kathua against the petitioners and proforma respondent alleging commission of offences under Section 8(a)(i) read with Section 27 (d) of the Drugs and Cosmetics Act, 1940 (hereinafter referred to as the 'Act of 1940'). Challenge has also been thrown to order dated 09.08.2012 passed by the learned District Judicial Mobile Magistrate (T), Kathua (hereinafter referred to as the 'trial Magistrate') whereby the learned Magistrate has opined that, *prima facie*, offences under Section 8(a)(i) read with Section 27 (d) of the Act of 1940 are made out against the accused and the process has been issued against them.

2 Record shows that respondent No.1/Drugs Inspector has lodged the impugned complaint against the petitioners and co-accused before the trial Magistrate. As per the complaint, on 24.11.2011, the complainant conducted a

routine inspection of the premises of M/S Shivam Pharmaceutical and sample of the drug “Trulax, Batch No. 9003, manufacturing date 07/2009, expiry date 06/2012” was collected from the said premises. The said sample, upon analysis by the Government Analyst, was found to be not of standard quality. During investigation, it was found that the drug in question was supplied by petitioner No.2, whereas the same was manufactured by petitioner No.1/M/S Cadila Pharmaceutical Ltd. Thus, petitioner No.1 happens to be the manufacturer and petitioner No.2 happens to be the distributor of the drug in question. At the instance of petitioner No.1/the manufacturing company, the sample was sent to Central Drug Laboratory, Kolkata for reanalysis. After reanalysis of the sample, it was reported by the CDL, Kolkata that the sample was not of standard quality. Accordingly, the prosecution was launched against the petitioners and the other co-accused.

3 The petitioners have raised a number of grounds to challenge the impugned complaint and the proceedings emanating therefrom, but the main grounds that have prevailed during the course of arguments are that the prosecution against the petitioner Company without impleading its Directors or office bearers, who were responsible for conduct of day to day business of the company, cannot proceed. It has also been contended that the drug in question is a proprietary medicine, as such, the tests applied for its analysis and reanalysis by the Government Analyst and CDL, Kolkata are not in accordance with the Drugs and Cosmetics Rules, 1945 (hereinafter referred to as the ‘Rules of 1945’) which has resulted in incorrect test results.

4 Respondent No.1/complainant has filed his reply to the petition. In his reply, the allegations made in the impugned complaint have been reiterated and it has been contended that the scope of jurisdiction of this Court under Section 482 of Cr.P.C is very limited and it cannot be exercised as a matter of

course. It has also been contended that the Court should keep in mind the interest of the public health while adjudicating the instant matter and that it is open to the petitioners to raise the aforesaid contentions before the trial Magistrate during trial of the impugned complaint.

5 Heard learned counsel for the parties and perused the material on record including the trial Court record.

6 As already noted, the first contention raised by learned Senior Counsel, appearing for the petitioners, is that, without impleading Directors/office bearers responsible for conducting day to day business of the company, the proceedings against the said company, cannot sustain. It has been contended that the Company is a juristic person and it has to be represented by its office bearers or Directors while launching prosecution against it and in view of Section 34 of the Drugs and Cosmetics Act, both the company as well as the persons responsible for conducting its day to day business are the necessary parties to the proceedings. On this ground, it is urged that the prosecution against the petitioner company is liable to be quashed.

7 In order to test the merits of the contentions raised by the petitioners, it would be apt to notice the provisions contained in Section 34 of the Drugs and Cosmetics Act. It reads as under:

“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.

8 From a perusal of the aforesaid provision, it appears that when an offence has been committed by a company, every person, who, at the time when the offence was committed, was incharge 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. The provision extends the concept of vicarious liability to the persons responsible for conduct of business of the company in a case where the offence has been committed by the company. In criminal law, there is no concept of criminal liability and it is only if there is a statute which makes a person vicariously liable for the acts of another person that such a person can be prosecuted for a criminal offence. One such example is the provision contained in Section 34 of the Drugs and Cosmetic Act whereby the persons incharge of and responsible for the conduct of business of the company are made vicariously liable for the offences committed by the company. However, the said provision makes it clear that not only those persons but even the company would be deemed to be guilty of the offence.

9. While it is clear that the prosecution against the Directors or the office bearers, who are responsible for conduct of day to day business of the company, cannot proceed without impleading the Company as an accused, but

the question that arises for consideration is whether or not, the prosecution against the Company without impleading its Directors or office bearers can proceed. The answer to this question lies in interpretation of the expression “as well as the company” appearing in Sub-Section (1) of Section 34 of the Drugs and Cosmetics Act.

10 It has been contended by the petitioners that the expression “as well as the company” appearing in Section 34 (1) of the Drugs and Cosmetics Act conveys that both the company and persons who, at the time when the offence was committed, were in charge of and were responsible to the company, have to be necessarily impleaded as the accused. In **Aneeta Hada vs. Godfather Travels and Tours Private Limited, (2012) 5 SCC 661**, the Supreme Court while dealing with a similar argument relating to interpretation of expression “as well as” appearing in Section 141 of Negotiable Instruments Act, which is identical to the provision contained in Section 34 of the Drugs and Cosmetics Act, observed as under:

“58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words “as well as the company” appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicted.

59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under [Section 141](#) of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis

of the ratio laid down in C.V. Parekh (supra) which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal (supra) does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada (supra) is overruled with the qualifier as stated in para 51. The decision in Modi Distilleries (supra) has to be treated to be restricted to its own facts as has been explained by us hereinabove”.

11 From the aforesaid analysis of law on the subject, it becomes clear that the company is the principal offender, whereas its office bearers or Directors, responsible for conducting its day to day business, become vicariously liable for the acts of the company. The expression “as well as the company” connotes that when the offence is committed by the company, it is only if the company is prosecuted, its Directors/officer bearers can be prosecuted. It can, thus, safely be inferred that the company, which is a principal offender can be prosecuted even in the absence of its Directors/persons responsible for conduct of its day to day business, but reverse is not true. Therefore, while the principal offender can be prosecuted without impleading the persons vicariously liable for its acts, the persons, who are vicariously liable for the acts of the principal offender, cannot be prosecuted without prosecuting the principal offender.

12 The High Court of Andhra Pradesh, in the case of Balaji Trading Company vs Kejriwal Papers Ltd and others, while considering a similar question in the context of provisions contained in Section 141 of Negotiable Instruments Act which, as already stated, are identical to Section 34 of the Drugs and Cosmetics Act, observed as under:

“23. Section 141 is specifically incorporated to prosecute the companies for the offence under Section 138 of the Act. The mandate of the section clearly indicates that the company is liable for prosecution when a cheque is Issued on its behalf and bounced on presentation of such cheque. The intendment of the section is not to give scope for individuals to escape by issuing

cheques in the names of the companies. Therefore, when cheques are issued in the name of the company, the company is invariably liable for prosecution for the offence under Section 138 of the Act. Regarding the prosecution of the Directors of the company, the legal position makes it clear that the person who is in charge of and was responsible to the company in conduct of its business at the material time is also liable to be prosecuted. But, the non-prosecution of any of the Directors is no bar to prosecute the company. The revision petitioner is pleading that he is prejudiced on account of mentioning of his name as the person representing the company. The prosecution never intended to prosecute Sri Rahul Kejriwal in his Individual capacity. The Courts below also made it clear that Sri Rahul Kejriwal is not personally liable for prosecution on account of the absence of specific allegations that he is in charge of the affairs of the company or managing its affairs. The judgments placed on behalf of the revision petitioner are only regarding the aspect whether a Director or Directors are liable to be prosecuted when there are no specific allegations that he or they were in charge of and were responsible to the company in conduct of its business. In the light of the above circumstances, I find sufficient force in the grounds of revision. The company is liable for prosecution despite non-prosecution of the Director or Directors responsible for the management of the affairs of the company or in charge of its affairs”.

13. From the aforesaid analysis of law on the subject, there is no escape to the conclusion that a company, which is the principal offender, can be prosecuted for offences under Drugs and Cosmetics Act without prosecuting its Directors/persons responsible for conducting its day to day business.

14 Having held that the company can be prosecuted without prosecuting its Directors/persons responsible for conduct of its day to day business, the question arises, as to whether a company can be prosecuted for an offence which carries sentence of imprisonment, besides the sentence of fine as is the case at hand. The petitioners have been prosecuted for the offences which carry sentence of imprisonment for a term not less than one year, extending up to two years, with fine not less than Rs.20000/-. Since the company is a juristic person, as such, it is impossible to execute sentence of imprisonment against

the company. Law does not compel performing an impossibility. What has to be the course of action in such an eventuality became a subject of discussion before the Supreme Court in the case of **Standard Chatered Bank and others vs. Directorate of Enforcement and others, (2005) 4 Supreme Court Cases 530**. The Constitution Bench of the Supreme Court, while dealing with this aspect of the case, held that there is no immunity to the companies from prosecution merely because the prosecution is in respect of the offences for which punishment prescribed is mandatory imprisonment and fine. Paras (29), (30) & (31) of the judgment are relevant to the context which are reproduced hereunder:

“29. The contention of the appellants is that when an offence is punishable with imprisonment and fine, the court is not left with any discretion to impose any one of them and consequently the company being a juristic person cannot be prosecuted for the offence for which custodial sentence is the mandatory punishment. If the custodial sentence is the only punishment prescribed for the offence, this plea is acceptable, but when the custodial sentence and fine are the prescribed mode of punishment, the court can impose the sentence of fine on a company which is found guilty as the sentence of imprisonment is impossible to be carried out. It is an acceptable legal maxim that law does not compel a man to do that which cannot possibly be performed [impotentia excusat legem]. This principle can be found in Bennion’s Statutory Interpretation 4th Edn. at page 969. "All civilized systems of law import the principle that lex non cogit ad impossibilia...." As Patterson, J. said "the law compels no impossibility". Bennion discussing about legal impossibility at page 970 states that: "If an enactment requires what is legally impossible it will be presumed that Parliament intended it to be modified so as to remove the impossibility element. This Court applied the doctrine of impossibility of performance [Lex non cogit ad impossibilia] in numerous cases [State of Rajasthan vs. Shamsher Singh, 1985(Supp.) SCC 416 & Special Reference No. 1 of 2002.

30.As the company cannot be sentenced to imprisonment, the court has to resort to punishment of imposition of fine which is also a prescribed punishment. As per the scheme of various enactments and also the Indian Penal Code, mandatory custodial sentence is prescribed for graver offences. If the appellants’ plea

is accepted, no company or corporate bodies could be prosecuted for the graver offences whereas they could be prosecuted for minor offences as the sentence prescribed therein is custodial sentence or fine. We do not think that the intention of the Legislature is to give complete immunity from prosecution to the corporate bodies for these grave offences. The offences mentioned under Section 56(1) of the FERA Act, 1973, namely those under Section 13, clause (a) of sub-section (1) of Section 18; Section 18A; clause (a) of sub-section (1) of Section 19; sub-section (2) of Section 44, for which the minimum sentence of six months' imprisonment is prescribed, are serious offences and if committed would have serious financial consequences affecting the economy of the country. All those offences could be committed by company or corporate bodies. We do not think that the legislative intent is not to prosecute the companies for these serious offences, if these offences involve the amount or value of more than one lakh, and that they could be prosecuted only when the offences involve an amount or value less than one lakh.

31. As the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. Such a discretion is to be read into the Section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is a blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm or company undertake series of activities that affect the life, liberty and property of the citizens. Large scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy .

15. From the foregoing enunciation of law on the subject, it is clear that the company that is alleged to have committed a criminal offence is liable to be prosecuted even without impleading its Directors/persons responsible for conduct of its day to day business and, upon conviction, the said company can be sentenced to punishment of fine, even though the offence for which the company has been convicted carries punishment of imprisonment as well. The argument of learned Senior Counsel, appearing for the petitioners that the prosecution against the petitioner/company cannot proceed without impleading its Directors/persons responsible for conduct of its day to day business is, therefore, without any merit.

16 It was next contended by learned Senior Counsel, appearing for the petitioners that the drug, which is subject matter of impugned complaint, was a proprietary medicine as defined in Section 3(h) of the Drugs and Cosmetics Act and, as such, in terms of Rule 46 of the Drugs and Cosmetics Rules, it was not open to the Government Analyst or CDL Kolkata to adopt pharmacopoeia tests or methods for analysis of the sample of the drug in question. Learned Senior Counsel has contended that the petitioner/company had, vide its letter dated 05.05.2022 informed the respondent/Drug Inspector that the product in question is a proprietary medicine and, as such, the same is required to be reanalyzed according to the Specification and Testing Procedure (STP). It is submitted that in spite of this letter, the CDL Kolkata has analyzed the sample of the drug by applying pharmacopoeia tests as is clear from the report of the CDL Kolkata.

17. The drug, which is subject matter of the impugned complaint is named 'Traulax' with its contents 'Milk of Magnesia IP and liquid Parafin IP'. According to the petitioners, it is a proprietary medicine. The report of Government Analyst, which is on record of the file, shows that the sample has

been analyzed by using Indian pharmacopeia tests. The report of CDL Kolkata also shows that the Indian pharmacopeia tests have been used for analysis of the sample of the drug.

18 In order to determine the merits of argument raised by learned Senior Counsel appearing for the petitioners, it would be apt to notice the provisions contained in Rule 46 of the Drugs and Cosmetics Rules. It reads under:

“Procedure on receipt of sample.—On receipt of a package from an Inspector containing a sample for test or analysis, the Government Analyst shall compare the seals on the packet 1[or on portion of sample or container] with the specimen impression received separately and shall note the condition of the seals on the 2[packet or on portion of sample or container]. After the test or analysis has been completed, he shall forthwith supply to the Inspector a report in triplicate in Form 13 of the result of the test or analysis, together with full protocols of the tests or analysis applied.

[Explanation.—It shall be deemed to be full and sufficient compliance with the requirement of the rule in respect of the supply of “protocols of the tests or analysis applied”, if—

(1) for pharmacopoeial drug, where the tests or methods of analysis prescribed in the official pharmacopoeia are followed, references to the specific tests or analysis in the pharmacopoeias are given in the report;

(2) for patent or proprietary medicines for which the tests and methods prescribed in any of the official pharmacopoeias are applicable and are followed, references to the specific tests or analysis in the pharmacopoeias are given in the report;

(3) for patent or proprietary medicines containing pharmacopoeial drugs for which the official tests or analysis or methods of assays are modified and applied, a description of the actual tests or, as the case may be, analysis or methods of assays so applied is given in the report;

(4) for patent or proprietary medicines for which no pharmacopoeial tests or methods of analysis are available or can be applied but for which tests or methods of analysis given in standard books or journals are followed, a description of such tests or methods of analysis applied together with the reference

to the relevant books or journals from which the tests or methods of analysis have been adopted, is given the report;

(5) for those drugs for which methods of test are not available and have been evolved by the Government Analyst, a description of tests applied is given in the report.]

19. From a perusal of clause (2) of Explanation to Rule 46 quoted hereinabove, it is clear that, for proprietary medicine for which the tests and methods prescribed in any of the official pharmacopoeias are applicable and are followed, references to the specific tests or analysis in the pharmacopoeias are to be given in the report. According to clause (3) of Explanation to Rule 46, for proprietary medicine containing pharmacopoeia drugs for which the official tests or analysis or methods of assays are modified and applied, a description of the actual tests or, as the case may be, analysis or methods of assays so applied are to be given in the report. According to clause (4) of the said Explanation, for proprietary medicine for which no pharmacopoeia tests or methods of analysis are available or can be applied but for which tests or methods of analysis given in standard books or journals are followed, a description of such tests or methods of analysis applied together with the reference to the relevant books or journals from which the tests or methods of analysis have been adopted, is to be given in the report.

20. The aforesaid Rule makes it clear that, for proprietary medicine, tests and methods, may be prescribed even in official pharmacopoeia or if the proprietary medicine contains pharmacopoeia drugs, modified tests or analysis or methods of assays can be applied. In the 3rd category of proprietary medicine for which pharmacopoeia tests are not available, methods of analysis given in standard books or journals can be followed.

21. From the above discussion, it becomes clear that it is not that in the case of every proprietary medicine pharmacopoeia tests cannot be applied.

From a bare reading of Rule 46 quoted above, it can be inferred that even in the case of proprietary medicines, pharmacopoeia tests for their analysis are prescribed. As to in which category, the drug in question falls and whether any pharmacopoeia tests are available for its analysis are questions that can be determined only during trial of the case when the authors of the reports of Government Analyst and CDL Kolkata are examined and cross-examined. These questions cannot be determined in these proceedings while exercising jurisdiction under Section 482 of the Cr.PC.

22. Apart from the above, Section 25(4) of the Drugs and Cosmetics Act makes the result of report of CDL Kolkata conclusive evidence of the facts stated therein. Therefore, at this stage, it would not be open to the petitioners to wriggle out of the report of the CDL Kolkata which is a part of the impugned complaint.

23 For the foregoing reasons, I do not find any merit in this petition. The same is, accordingly, dismissed. Record of the trial Magistrate be sent back along with copy of this order.

(SANJAY DHAR)
JUDGE

JAMMU
22.09.2022
Sanjeev

Whether order is speaking: Yes
Whether order is reportable: Yes