

IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR

Reserved on: 29.07.2022
Pronounced on:04.08.2022

CRM(M) No.14/2021
c/w
CRM(M) No.303/2019

ASHISH DAMIJA
MANORMA DHAMIJA ... PETITIONER(S)

Through: - Mr. Varut Kumar Gupta, Advocate.
Mr. Pankaj Kumar Sharma, Advocate.

Vs.

UT OF J&K ...RESPONDENT(S)

Through: - Mr. Sheikh Mushtaq, AAG.

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

JUDGMENT

1) By this common judgment, two petitions, CRM(M) No.14/2021 filed by petitioner Ashish Dhamija and CRM(M) No.303/2019 filed by petitioner Manorma Dhamija, are proposed to be disposed of. Through the medium of these petitions, the petitioners have challenged complaint filed by respondent Drugs Control Officer alleging commission of offences under Section 18(a)(i) read with Section 17(B)(d), 27(c), 36-AB, 124B and Schedule V S. No.3 of the Drugs and Cosmetics Act, 1940 and the rules made thereunder.

2) The record shows that the respondent Drugs Control Officer has lodged the impugned complaint against the petitioners and co-accused before the Court of Chief Judicial Magistrate, Shopian. As per the complaint, on 23rd January, 2018, respondent Drugs Control Officer inspected the premises of co-accused, Shahnawaz Ahmad Khanday, who is stated to be the proprietor of Bismillah Medicate, Ringward, Keller, Shopian, and sample of the drug Biocenac-P B.No.ADT-02-1725 was collected from his shop. The said sample, upon analysis by the Government Analyst, was found to be of not of standard quality. During investigation, it was found that the drug in question has been manufactured by M/S Adwin Pharma Village Rampur District Sirmour, Himachal Pradesh. The petitioners herein happen to be the partners of the manufacturing firm. At the instance of the manufacturing firm, the sample under the direction of Chief Judicial Magistrate, Shopian, was sent to Central Drugs Laboratory, Kolkata, for re-analysis. After reanalysis of the sample, it was reported by the Central Drugs Laboratory, Kolkata, that the sample is not of standard quality. Accordingly, the prosecution was launched against the petitioners and other co-accused who happen to be the distributors and retailers of the drug in question.

3) The petitioners have raised a number of grounds to challenge the impugned complaint and the proceedings emanating therefrom but the main ground that has prevailed during the course of arguments is that the respondent/complainant has not impleaded the

firm of which the petitioners happen to be the partners as an accused and that there are no allegations in the impugned complaint to show that the petitioners were the persons responsible for the conduct of day to day business of the firm in question, at the relevant time.

4) The respondent/complainant has filed his reply to the petitions. 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 the Cr. P. C is very limited and it cannot be exercised as a matter of course. It has been further submitted that the Court should keep in mind the interests of public health while adjudicating the instant matter and that the petitioners can always raise these contentions before the trial court during the 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 contention of the petitioners in both these petitions is that the firm, of which they happen to be the partners, has not been impleaded as an accused in the impugned complaint and, as such, without impleadment of the firm, no prosecution can proceed against its partners.

7) In order to test the merits of the contention raised by the petitioners, it would be apt to notice the provisions contained in Section 34 of the Drugs and Cosmetics Act, 1940. 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) Proviso to sub-section (1) of Section 34 of the Act gives a window of escape to the persons who are sought to be made vicariously liable for the acts of the company if they can prove that the offence was committed without their knowledge or that they had exercised all due diligence to prevent the commission of offence. Sub-section (2) of Section 34 of the Act further provides that when an offence has been committed by the company and it is proved that the said 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, they shall be deemed to be guilty of that offence. Thus, even if the afore-named office bearers of the company are not responsible for the conduct of business of the company or even if they are not incharge of the company, still then these office bearers can be deemed to be guilty of the offence if it is shown that the offence has been committed with their consent or connivance or due to their negligence.

10) The Explanation to the aforesaid provision provides that the company also includes a firm or other association of individuals and that 'Director' in relation to a firm means a partner in the firm. Thus, the explanation makes it clear that the provisions contained in Section 34 are equally applicable to the case of a partnership firm.

11) The question, whether prosecution against the Directors or persons incharge of the affairs of a company can be launched without impleading the company as an accused in a case where the statute provides for vicarious liability of the persons incharge of the company for the offences committed by the company, was subject matter of discussion before the Supreme Court in the case of **Aneeta Hada v. Godfather Travels and Tours Private Limited**, (2012) 5 SCC 661. In the said case, the Court has interpreted the provisions contained in Section 141 of the Negotiable Instruments Act, which is in pari materia with the provisions contained in Section 34 of the Drugs and Cosmetics Act. After considering its earlier decisions on the subject, the Court held 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 drag-net 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, which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada is overruled with the qualifier as stated in para 51. The decision in Modi Distillery has to be treated to be restricted to its own facts as has been explained by us hereinabove.

12) The aforesaid proposition of law laid down in **Aneeta Hada's** case (supra) was relied upon by the Supreme Court in the case of **Anil Gupta v. Star India Private Limited and another**, (2014) 10 SCC 373 and it was observed as under:

13. In the present case, the High Court by impugned judgment dated 13th August, 2007 held that the complaint against respondent no.2-Company was not maintainable and quashed the summon issued by the Trial Court against respondent no.2-Company. Thereby, the Company being not a party to the proceedings under Section 138 read with Section 141 of the Act and in view of the fact that part of the judgment referred to by the High Court in Anil Hada (supra) has been overruled by three Judge Bench of this Court in Aneeta Hada (supra), we have no other option but to set aside the rest part of the impugned judgment whereby the High Court held that the proceedings against the appellant can be continued even in absence of the Company. We, accordingly, set aside that part of the impugned judgment dated 13th August, 2007 passed by the High Court so far it relates to appellant and quash the summon and proceeding pursuant to complaint case No.698 of 2001 qua the appellant.

13) From the aforesaid enunciation of law on the subject, it is clear that without impleading the company as an accused, its Directors or incharge officers or the persons responsible for the conduct of its day to day business cannot be prosecuted for an offence which is deemed to have been committed by the company.

14) The next question which falls for determination is as to whether the proposition of law laid down by the Supreme Court in the aforesaid cases can be made applicable to a case of partnership firm. As already noted, Explanation to Section 34 of the Drugs and Cosmetics Act provides that the company includes a firm and Director in relation to a firm means partner of a firm.

15) The Supreme Court in the case of **State of Karnataka v. Pratap Chand & Ors.**, (1981) 2 SCC 335, while dealing with a matter pertaining to prosecution of a partner of a firm under the Drugs and Cosmetics Act, 1940, observed that for the purposes of imposing liability on the company under the said Section, a company includes a body corporate, a firm or an association of individuals and that a Director in relation to a firm means a partner in that firm. The Court went on to observe that even in the case of partners, when a firm commits an offence, the requirement of either sub-section (1) or sub-section (2) to Section 22C of the Minimum Wages Act which is in pari material with Section 34 of the Drugs and Cosmetics Act, must be satisfied, which means that in terms of sub-section (1), the partner should be incharge of and responsible to the firm for the conduct of

its business as contemplated in sub-section (1) of Section 34 of the Drugs and Cosmetics Act. Further, in terms of sub-section (2) of the said provisions, a partner may also be liable just as a Director is liable for the conduct of the business of the company, if the offence is committed with the consent or connivance of or is attributable to any neglect on the part of the partner concerned.

16) From the above it is clear that the requirement of impleading a company as an accused in a prosecution where the offence is alleged to have been committed by the company is equally applicable to a partnership firm and the firm has to be impleaded as an accused along with the partner who is responsible for the conduct of business of the said firm.

17) Similar view has been taken by the High Court of Bombay in the case of **Philip J. vs. Ashapura Minechem Ltd. & anr.** (Criminal Writ petition Nos.2909-10, 2914 -15 of 2013 decided on 29.01.2016). In the said case, the Court has held that the conclusions drawn by the Apex Court in the case of **Aneeta Hada** (supra) are not based merely on the fact that the company is a separate legal entity and juristic person but these conclusions are drawn on the basis of the fact that Section 141 of the NI Act deals with vicarious liability. It was observed that the Supreme Court had arrived at an irresistible conclusion for maintaining the prosecution under Section 141 of the NI Act, arraigning of the company as an accused is imperative, mainly and mostly on the basis of vicarious liability of the Directors

of the company and not necessarily because the company is a juristic person and it has its own respectability. The Court went on to observe that the main basis for arriving at its conclusion by the Supreme Court was the vicarious liability which the Directors or partners of the firm can have towards the company and hence without joining the company on the touchstone of vicarious liability, they cannot be prosecuted. Ultimately, the Court held that the ratio laid down in the case of **Aneeta Hada** (supra) can be made equally applicable in the case of partnership firm and that the partners are liable to be sued for their vicarious liability.

18) Gujarat High Court in the case of **Oanali Ismailji Sadikot vs. State of Gujarat**, (Special Criminal Application (Quashing) No. 4536 of 2015 decided on, 03 March 2016), has laid down that for maintaining the prosecution against the Director under Section 141 of the NI Act, arraigning of company as an accused is imperative and in view of the Explanation to Section 141 of the said Act, this legal position needs to be automatically made applicable in the case of prosecution against a partnership firm also. The Court went on to hold that it has to be held that for maintaining prosecution against a partner under Section 141 of the Negotiable Instruments Act, arraigning of partnership firm as an accused is imperative.

19) Similar views have been expressed by a Coordinate Bench of this Court in the case of **Patel Nishit Vinod Chandra, Corona Remedies Private Limited vs. State of J&K** (CRMC No.29/2017

decided on 06.09.2019) in the context of Section 34 of the Drugs and Cosmetics Act.

20) From the forgoing analysis of the law on the subject, it is clear that without impleading a partnership firm as an accused, prosecution against its partners under Section 34 of the Drugs and Cosmetics Act is not maintainable. In the instant case, the respondent/complainant has impleaded only the partners of the manufacturing firm M/S Adwin Pharma without impleading the firm as an accused in the complaint. Thus, on this ground alone, the proceedings against the petitioners herein are not sustainable.

21) Apart from the above, if we have a look at the impugned complaint, there is no averment in the said complaint that the petitioners are either incharge or responsible for the conduct of the day to day business of the partnership firm. A perusal of the record annexed to the impugned complaint before the trial court shows that during the investigation of the complaint information was given to the respondent/complainant that one Ramesh Dhamija was the managing partner of the firm who expired on 08.11.2017, meaning thereby he was the person responsible for conduct of the day to day business of the firm before his expiry. The drug, which is subject matter of the impugned complaint, has been supplied by the manufacturer somewhere in February, 2017, as is clear from the invoices which are on record. Thus, at the relevant time, as per the record of trial court it is Ramesh Dhamija, who was the Managing

partner of the Firm. None of the petitioners was managing partner of the firm in question at the relevant time and in the absence of any averment in the impugned complaint that they were incharge or responsible for the conduct of day to day business of the firm at the relevant time, they could not have been prosecuted.

22) For the foregoing reasons, continuance of the criminal proceedings against the petitioners on the basis of the impugned complaint would be an abuse of process of law. The same, therefore, deserves to be quashed. Accordingly, both the petitions are allowed and the impugned complaint and the proceedings emanating therefrom to the extent of the petitioners are quashed.



(SANJAY DHAR)
JUDGE

Srinagar,
04.08.2022
"Bhat Altaf, PS"

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No