

E.Abinesh vs Tamil Nadu Government Represented By on 11 August, 2022

Author: D.Bharatha Chakravarthy

Bench: D.Bharatha Chakravarthy

2024:MHC:3650

CRL OP(MD). No.

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on: 15.10.2024

Delivered on: 28.10.2024

CORAM

THE HON'BLE MR. Justice D.BHARATHA CHAKRAVARTHY

CRL OP(MD). No.5451 of 2022

and

CRL MP(MD).No.3848 of 2022

E.Abinesh

... Petitioner/Petitioner

Vs.

Tamil Nadu Government Represented by

S.Rajkumar,

Code No.461,

Food Safety Officer,

Thanjavur Town-1,

Thanjavur District.

... Respondent/Respondent/Complainant

PRAYER :- This Petition is filed under Section 482 Cr. P.C, to call for the records pertaining to the proceedings in S.T.C.No.867 of 2016 of the file of the learned Judicial Magistrate No.1 at Thanjavur and quash same as against the petitioner.

For Petitioner : Mr.T.Manoharan

For Respondent : Mrs.M.Aasha
Government Advocate (Crl. side)

ORDER

A.The Petition & The Factual Matrix:

This Criminal Original Petition is filed to call for the proceedings of STC No. 867 of 2016 on the file of the Judicial Magistrate No.1, Thanjavur and to quash the same.

2. The said case is a private complaint filed by the State of Tamil Nadu represented by the Food Safety Officer, Thanjavur Town-1, under Section 59 (1) of the Food Safety and Standards Act, 2006 (hereinafter the act). The petitioner is arrayed as Accused No. 2 in the said complaint. Apart from the petitioner, one Nandakumar, is arrayed as Accused No.1 and PepsiCo India Holding Private Limited is arrayed as the third Accused.

3. The gist of the allegations in the said complaint is that the complainant carried out an inspection of food items at Pandiyar Residency Bar and it was found that in a packaged drinking item being Lehar 7-UP 200 ml bottle, there was a solid particle visibly floating in the liquid. As such, the same was duly purchased in the presence of witnesses from the owner of the bar, duly sealed and sent for analysis. It was found that the product contained suspended laminated aluminium foil and that the product was unsafe food as per Section 3(1)(zz)(iii) of the Act.

4. As such, the first accused being the seller, the second accused being the distributor/marketer and the third accused being the manufacturer, are liable to be punished for an offence under Section 59(1) of the Act and hence, the complaint.

B.The Arguments:

5. Heard Mr.T.Manoharan, the learned counsel appearing on behalf of the petitioner and Mrs.M.Aasha, the learned Government Advocate (Criminal Side) for the respondents.

5.1. Mr.T.Manoharan, would submit that the petitioner, in this case, is only a distributor of the product. Nothing is seized from the petitioner. No particular act is attributed or attributable on the petitioner for the solid particle being present in the drink. It is a fully packaged product and after it leaves the manufacturing unit, there is nothing further which can be attributed to the distributor. No particular act is alleged against the petitioner in the complaint. Merely because there is an enabling provision to prosecute the distributor, the complaint cannot be filed. The entire complaint is filed only on vicarious liability. Moreover, the distributor is a company, a corporate entity. Unless it is enabled by the special statute, the Corporate entity is entitled to nominate a person to represent itself. It is only the corporate entity which is the distributor and unless and otherwise the concerned director or officer of the company is found to be

involved in the offence, he cannot be nominated by the prosecution. The case is filed on the basis of vicarious liability which is unknown to criminal law. The petitioner was not at all in the scene of occurrence and as such the case against the petitioner is liable to be quashed.

5.2. Mr.T.Manoharan, the learned counsel would rely upon the Judgment of the Hon'ble Supreme Court of India in S.P. Mani & Mohan <https://www.mhc.tn.gov.in/judis> Dairy -Vs- Dr. Snehalatha Elangovan¹ to contend that even if considering the materials of the complaint as correct and still if the ingredients are lacking against the accused, it is the duty of the Courts to discharge the accused. He would rely upon the Judgment of the Hon'ble Supreme Court of India in Assistant Commissioner, Assessment-II Bangalore and Ors -Vs- V. Velliappa Textiles Limited and Others², to contend that the Hon'ble Supreme Court of India introduced the concept of ego and alter ego with reference to prosecution of an officer of the company and the employee must be involved in the offence himself.

5.3. The learned counsel would further rely upon the Judgment in Ashok Parasampuria -Vs- Gharrkul Industries Private Limited³, it was decided that the High Court can hold that the particular director as not liable on the basis of unimpeachable and incontrovertible evidence beyond suspicion and even if basic averments are made in the complaint. The judgment of the Hon'ble Supreme Court in Gunmala Sales Private Limited was followed and held to be holding the field. It is specifically 2 AIR 2004 SC 86 3 2021 SCC Online SC 915 <https://www.mhc.tn.gov.in/judis> held that criminal liability will be attracted only on those who at the time of commission of offence were in charge of and were responsible for conduct of the business of the firm.

5.4. Mr. Manoharan will further rely upon the judgment in Ralli India Limited -Vs- Poduru Vidya Bhusan & Ors⁴, wherein the provisions of the present act also referred and held that the High Courts shall exercise their power to quash in such proceedings. The Learned Counsel would also rely upon the Judgment in Madumilan Syntax Limited and others -Vs- Union of India⁵, to contend that unless there are materials to the effect that individual was actually involved in the affairs of the firm, he cannot be prosecuted.

5.5. Per contra, Mrs.M.Aasha, the learned Government Advocate (Criminal Side) would contend that as per Sections 25 and 27 of the Act, all the three accused, namely, manufacturer, distributor and seller are responsible. The expert report categorically mentions that it is unsafe 4 2011 (13) SCC 88 5 AIR 2007 SC 1481 <https://www.mhc.tn.gov.in/judis> food. Once it is unsafe food all the three accused are liable to be prosecuted. Already this Court had dismissed the quash applications filed by the first accused and the third accused by judgment dated 11.08.2022 in Crl.O.P.(MD)Nos.5924 of 2018 and 695 of 2019. In view thereof, the various contentions raised by the learned counsel cannot be entertained by this Court and as such the Criminal Original Petition is liable to be dismissed.

C. Discussion & Findings:

6. I have considered the rival submissions made on either side and perused the material records of the case. The questions that arise for determination in the instant case is that (1) whether the instant prosecution on the basis of vicarious liability is sustainable ? (2) Whether the prosecution of the

second accused on behalf of the distributor is proper ?

Question No.1 :

6.1 Ordinarily, vicarious liability is unknown to criminal law.

Unless a person is personally involved in the crime he cannot be prosecuted. In the case where the offender is a Company incorporated <https://www.mhc.tn.gov.in/judis> under the Companies Act, the procedure under the general criminal law is that contained in Section 342 of BNSS. As per the same, if the corporate entity is the offender, it has to be prosecuted by its name and the said company is entitled to nominate any person to represent it. Any other person or officer of the company to be prosecuted should have actually committed the offence. However, the instant act is a special statute that fastens criminal liability on the officers of the company. Section 66 of the Act reads as follows :

“Section 66: Offences by companies.

(1) Where an offence under this Act which 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 where a company has different establishments or branches or different units in any establishment or branch, the concerned Head or the person in-charge of such establishment, branch, unit nominated by the company as responsible for food safety shall be liable for contravention in respect of such establishment, branch or unit:

Provided further that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, <https://www.mhc.tn.gov.in/judis> 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 purpose of this section,--

(a) "company" means anybody corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.” 6.2 The Hon’ble Supreme Court of India has in detail in the recent judgment of S.P. Mani and Mohan Dairy -Vs- Dr. Senhalatha Elangovan⁶ and as such, it can be seen that if the special statute fastens criminal liability on the officers of the corporate entity, the said persons can be prosecuted accordingly. Under Section 66(1) of the act every officer or director who is incharge of or responsible for the business of the company as well as the company is deemed to have been guilty of the offence and hence can be prosecuted. It is for the particular 6 (2023) 10 SCC 685 <https://www.mhc.tn.gov.in/judis> officer of the company to prove by way his defence that he did not have knowledge of the offence and inspite of his due diligence the offence is committed. Under 66(2) the officers and employees of the company who have connivance with regard to the offence or that the offence had been committed on account of their negligence are also liable to be prosecuted. Hence, the contention that the prosecution cannot be on vicarious liability cannot be countenanced for the prosecutions under the Act.

Question No. 2:

6.3 It can be noted that as per Section 27, every distributor and seller is also liable for unsafe food. Therefore, if the petitioner/second accused is the distributor, he can be prosecuted. But it is the contention of the petitioner/second accused that the distributor is Abi & Abi Marketing Private Limited, a company incorporated under the Companies Act. If the distributor is a company, it can be seen that the company and the director/officer of the company can be prosecuted provided the complaint shall contain the basic averments to point out the liability as per Section 66 of the Act. The said legal position is categorically reiterated in S.P. Mani cited supra.

<https://www.mhc.tn.gov.in/judis> 6.4 It can be seen that as per the cause title, the second accused is described as follows:

“E.mgpNd\;> taJ 26/M> j/ng.,sq;Nfhdt;

taJ: 26> mgp & mgp khh;nfl;bq;> vz;: 80> mgp & mgp lth;];> nkbf;fy; fhNy[; Kjy;Nfl; vjphpy;> jQ;rht+h; (kh)> - PIN : 613 004.” 6.5 Further in paragraph Nos.6 and 11 of the complaint also it mentioned as follows :

“6.....200 ML ghl;by; czT nghUis ahhplkpUe;J thq;fpdPh;fs;? vd;W Nfl;ljlw;F mjd; tpepNahfpg;ghsh; mgp & mgp khh;nfl;bq;fpypUe;J Neubahf ngw;Wf;nfh;Ntd; vd;W \$wpdhh;....”

7.....

8.....

9.....

10.....

11.vdNt ghJfhg;gw;w Lehar 7-up 200ml vd;w czT nghUis nghJkf;fSf;F kdpj czthf tpw;gid nra;j A1 vjphp M.ee;jFkhh;> j/ng. kzp ghz;bah;> N`hl;ly; ghz;bah; nurpld;rp (tpw;gidahsh;) A2 vjphp E.mgpNd\;> j/ng. ,sq;Nfhdt;> mgp & mgp khh;nfl;bq;> (tpepNahfpg;ghsh;) A3 vjphp ngg;rpNfh ,e;jpah Nfhy;bq; gpiuNtl; ypkpnll;> G.S.T. NuhL> khkz;LPh; (jahhpg;ghsh;) vd;gth;fs; czT ghJfhg;G kw;Wk; jur; rl;lk; 2006> gphpT 26(2)(i) czT ghJfhg;G kw;Wk; jur;rl;lk; 2006> gphpT 59(i)-d; fPo; ,ioj;Js;s Fw;wk; Fw;wtpay; jz;lidf;Fs;shdJ.” <https://www.mhc.tn.gov.in/judis> 6.6 It is not stated that said Abi & Abi Marketing is a partnership or any other entity and thus, it can be seen that the complaint proceeds as if the said concern is a proprietary concern and the petitioner/second accused being the proprietor.

6.7 Therefore, to raise the above contention that the basic averments as to the responsibility of the petitioner/second accused is lacking, firstly it has to be established that it is a corporate entity which is only the the distributor. We cannot arrive at the said conclusion by a reading of the complaint.

6.8 Though this court in exercise of the powers under Section 482 of the Code of Criminal Procedure can consider the unimpeachable and incontrovertible materials also, the petitioner has only produced the brochure of his company to contend that it is a corporate entity. The same cannot be considered as an unimpeachable material. Therefore, it would be open for the petitioner during the course of the Trial establish that it is only a corporate entity which is involved and only thereupon the above <https://www.mhc.tn.gov.in/judis> contentions can be countenanced.

Accordingly the question is answered.

D. The Result:

7.In the result, giving liberty to the petitioner to raise the plea in the course of the trial and with the aforesaid findings, this petition stands disposed of. Consequently, connected miscellaneous petition is closed.

28.10.2024 Internet : Yes Index : Yes NCC : Yes sji To

1.The Judicial Magistrate No.1 at Thanjavur.

2.Mr.S.Rajkumar, The Tamil Nadu Government, Code No.461, Food Safety Officer, Thanjavur Town-1, Thanjavur District.

3.The Additional Public Prosecutor, Madurai Bench of Madras High Court, Madurai.
<https://www.mhc.tn.gov.in/judis> D.BHARATHA CHAKRAVARTHY,J sji Pre-Delivery Order Made

Date : 28.10.2024 <https://www.mhc.tn.gov.in/judis>