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SANJAY KUMAR KEDIA

v.

NARCOTICS CONTROL BUREAU & ANR.

DECEMBER 3, 2007

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[S.B. SINHA AND HARJIT SINGH BEDI, JJ.]

Narcotic Drugs and Psychotropic Substances Act: 1985:

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s. 37—Application for bail—Companies providing network facilities for arranging supply of banned psychotropic substance on line—Owner arrested u/ss. 24 and 29—Plea of applicant that his companies were protected from prosecution by s. 79 of Information Technology Act—Held: Applicant and his associates were not innocent intermediaries or network service providers as defined under s. 79 of I.T. Act but the said business was only a facade and comouflage for more sinister activity—In this situation, s. 79 will not grant immunity to an accused who has violated provisions of the Act as this provision gives immunity from prosecution for an offence only under I.T. Act itself—In the face of overwhelming inculpatory evidence it is not possible to give finding envisaged under s.37 of the Act for grant of bail that there were reasonable grounds for believing that applicant was not guilty of offence alleged, or that he would not resume his activities should bail be granted—Information Technology Act, 2000—s. 79.

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1659 of 2007.

From the Judgment and final Order dated 07.06.2007 of the High Court at Calcutta in CRM No. 5124 of 2007.

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K.T.S. Tulsi and Uday Umesh Lalit, Arun Kumar Srivasma, Manoj Prasad, Amit Pawan and G. Bhargava for the Appellant.

Vikas Singh, ASG., B.B. Singh, Binu Tamta and Sushma Suri for the Respondents.

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The following Order of the Court was delivered by

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ORDER

HARJIT SINGH BEDI, J. 1. Special Leave granted.

2. The appellant Sanjay Kumar, Kedia, a highly qualified individual, set up two companies M/s. Xponse Technologies Limited (XTL) and M/s. Xponse IT Services Pvt. Ltd. (XIT) on 22.4.2002 and 8.9.2004 respectively which were duly incorporated under the Indian Companies Act, 1956. On 1.2.2007 officers of the Narcotics Control Bureau (NCB) conducted a search at the residence and office premises of the appellant but found nothing incriminating. He was also called upon to appear before the NCB on a number of occasions pursuant to a notice issued to him under Section 67 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the "Act") and was ultimately arrested and the bank accounts and premises of the two companies were also seized or sealed. On 13.3.2007 the appellant filed an application for bail in the High Court which was dismissed on the ground that a *prima facie* case under Sections 24 and 29 of the Act had been made out and that the investigation was yet not complete. The appellant thereafter moved a second bail application. before the High Court on 16.4.2007 which too was dismissed with the observations that the enquiry was at a critical stage and that the department should be afforded sufficient time to conduct its enquiry and to bring it to its logical conclusion as the alleged offences had widespread ramifications for society. It appears that a bail application was thereafter filed by the appellant before the Special Judge which too was rejected on 28.5.2007 with the observations that the investigation was still in progress. Aggrieved thereby, the appellant preferred yet another application for bail before the High Court on 4.6.2007 which too was dismissed on 7.6.2007. The present appeal has been filed against this order.

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3. Notice was issued on the Special Leave Petition on 30.7.2007 by a Division Bench noticing a contention raised by Mr. Tulsi that service providers such as the two companies which were intermediaries were protected from prosecution by Section 79 of the Information Technology Act, 2000. An affidavit in reply has also been filed on behalf of the

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A respondent - NCB and a rejoinder affidavit in reply thereto by the appellant.

4. We have heard learned counsel for the parties at length.

5. Mr. Tulsi has first and foremost argued that the allegations against B the appellant were that he had used the network facilities provided by his companies for arranging the supply of banned psychotropic substances on line but there was no evidence to suggest that the appellant had been involved in dealing with psychotropic substances or engaged in or controlled any trade whereby such a substance obtained outside India had C been supplied to persons outside India and as such no case under Section 24 of the Act had been made out against the appellant. Elaborating this argument, he has submitted that the two drugs which the appellant had allegedly arranged for supply were phentermine and butalbital and as these D Psychotropic Substances Rules 1987 in terms of the notification dated 21.2.2003 and were also recognized by the Control Substances Act, a law applicable in the United States, as having low potential for misuse and it was possible to obtain these drugs either on written or oral E prescription of a doctor, the supply of these drugs did not fall within the mischief of Section 24. He has further argued that in the circumstance, the companies were mere network service providers they were protected under Section 79 of the Technology Act from any prosecution.

6. Mr. Vikas Singh, the learned Additional Solicitor General for the respondents has however pointed out that the aforesaid drugs figured in F the Schedule appended to the Act pertaining to the list of psychotropic substances (at Srl. Nos. 70 and 93) and as such it was clear that the two drugs were psychotropic substances and therefore subject to the Act. It has also been pointed out that the appellant had been charged for offence under Sections 24 and 29 of the Act which visualized that a person could G be guilty without personally handling a psychotropic substance and the evidence so far collected showed that the appellant was in fact a facilitator between buyers and certain pharmacies either owned or controlled by him or associated with the two companies and that Section 79 of the Technology Act could not by any stretch of imagination guarantee immunity

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from prosecution under the provisions of the Act.

7. It is clear from the Schedule to the Act that the two drugs phentermine and butalbital are psychotropic substances and therefore fall within the prohibition contained in Section 8 thereof. The appellant has been charged for offences punishable under Section 24 and 29 of the Act. These Sections are re-produced below:

24. *“Punishment for external dealings in narcotic drugs and psychotropic substances in contravention of section 12.—* Whoever engages in or controls any trade whereby a narcotic drug or a psychotropic substance is obtained outside India and supplied to any person outside India without the previous authorization of the Central Government or otherwise than in accordance with the conditions (if any) of such authorization granted under section 12, shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees”.

29. *Punishment for abetment and Criminal conspiracy.* - (1) Whoever abets, or is a part to a criminal conspiracy to commit an offence punishable under this Chapter, shall, whether such offence be or be not committed in consequence of such abetment or in pursuance of such criminal conspiracy, and notwithstanding anything contained in section 116 of the Indian Penal Code (45 of 1860), be punishable with the punishment provided for the offence.

(2) A person abets, or is a party to a criminal conspiracy to commit, an offence, within the meaning of this section, who, in India abets or is a party to the criminal conspiracy to the commission of any act in a place without and beyond India which -

(a) would constitute an offence if committed within India: or

(b) under the laws of such place, is an offence relating to narcotic drugs or psychotropic substances having all the legal conditions

A required to constitute it such an offence the same as or analogous to the legal conditions required to constitute it an offence punishable under this Chapter, if committed within India.

B 8. A perusal of Section 24 would show that it deals with the engagement or control of a trade in Narcotic Drugs and Psychotropic substances controlled and supplied outside India and Section 29 provides for the penalty arising out of an abetment or criminal conspiracy to commit an offence under Chapter IV which includes Section 24. We have accordingly examined the facts of the case in the light of the argument of
C Mr. Tulsi that the companies only provided third party data and information without any knowledge as to the commission of an offence under the Act. We have gone through the affidavit of Shri A.P. Siddiqui Deputy Director, NCB and reproduce the conclusions drawn on the investigation, in his words.

D “(i) The accused and its associates are not intermediary as defined under Section 79 of the said Act as their acts and deeds was not simply restricted to provision of third party data or information without having knowledge as to commission of offence under the
E NDPS Act. The company (Xponse Technologies Ltd. And Xpose IT Services Pvt. Ltd. Headed by Sanjay Kedia) has designed, developed, hosted the pharmaceutical websites and was using these websites, huge quantity of psychotropic substances (Phentermine and Butalbital) have been distributed in USA with the help of his
F associates. Following are the online pharmacy website which are owned by Xponse or Sanjay Kedia.

(1) Brother Pharmacy.Com and LessRx.Com: Brothers
G pharmacy.com, online pharmacy was identified as a marketing website (front end) for pharmaceutical drugs. LessRx.com has been identified as a “back end” site which was being utilized to process orders for pharmaceutical drugs through
H Brotherpharmacy.com. LessRx.com’s registrant and administrative contract was listed True Value Pharmacy located at 29B, Rabindra Sarani, Kolkata, India-700073. Telephone No. 033-2335-7621 which is the address is 203.86.100.95.

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The following websites were also utilizing this IP address: A

ALADIESPHARMACY.com,

EXPRESSPHENTERMINE.com,

FAMILYONLINEPHARMACY.com,

ONLINEEXPRESSPHARMACY.com,

SHIPPEDLIPITOR.com

Domain name Servers for LessRx.com (IP address: 203.86.100.95) were NS. PALCOMONLINE.com and NS2PALCOMLINE.com. C

The LessRx.com's website hosting company was identified as Pacom Web Pvt Ltd, C-56/14, 1st Floor, Institutional Area, Sector 62, Noida-201301. Sanjay Kedia entrusted the hosting work to Palcom at VSNL, Delhi. These servers have been seized. Voluntary statement of Shri Ashish Chaudhary, Prop. of Palcom Web Pvt Ltd. indicates that He maintained the websites on behalf of Xponse. D

According to the bank records, funds have been wired from Brothers pharmacy, Inc's Washington Mutual Bank Account #0971709674 to Xponse It services Pvt Ltd, ABN AMRO bank account No. 1029985, Kolkata. E

(2) Deliveredmedicine.com : A review of the Xponse's website- XPONSEIT.com was conducted and observed and advertisement for XPONSERX. That XPONSERX was described as a software platform developed for the purpose of powering online pharmacies. XponseRx was designed to process internet pharmacy orders. Drug Enforcement Administration (DEA), USA conducted a "whois" reverse lookup on domain name XPONSERX.COM was at domaintools.com was at domaintools.Com was registered to XPonse IT Services Pvt Ltd, Sanjay Kedia, 29B, Rabindra Sarani, 12E, 3rd floor, Kolkata, WB 70073. Telephone no.91-9830252828 was also provided for Xponse. Two websites were also provided for Xponse. Two websites were featured on the F G H

A XPONSEIT.COM websites as featured clients. And these were DELIVEREDMEDICINE.COM AND TRUEVALUEPRESCRIPTIONS.COM. Review indicated that these two websites were internet pharmacies.

B Consequently a “whois” reverse look-up on domain name DELIVEREDMEDICINE.COM at domainstools.com conducted by DEA revealed that it was registered to Xponse Inc., 2760 Park Ave., Santa Clara, CA, USA which is the address of Sanjay Kedia.

C (3) Truevalueprescriptions.com: Review of this website indicated that this website was TRUEVALUEPRESCRIPTIONS listed Phentermine as a drug available for sale. It appeared that orders for drugs could be made without a prescription from the TRUEVALUE website, it was noted that orders for drugs could be placed without seeing a doctor. According to the website, a customer can complete an online questionnaire when placing the order for a drug in lieu of a physical exam in a physician’s office. Toll free telephone number 800-590-5942 was provided on the TRUEVALUE website for customer Service.

E DEA, conducted a “whosi” reverse look-up on domain name TRUEVALUEPRESCRIPTIONS.COM at domaintools.com and revealed that IP address was 203.86.100.76 and the server that hosts the website was located at Palcom, Delhi which also belongs to Xponse.

F From the aboce facts it is clear that the Xponse Tecnologies Ltd and Xponse IT Services Pvt Ltd were not acting merely as a network service provider but were actually running internet pharmacy and dealing with prescription drugs like Phentermine and Butalbital.”

G 9. We thus find that the appellant and his associates were not innocent intermediaries or network service providers as defined under Section 79 of the Technology Act but the said business was only a facade and camouflage for more sinister activity. In this situation, Section 79 will

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not grant immunity to an accused who has violated the provisions of the Act as this provision gives immunity from prosecution for an offence only under Technology Act itself. A

10. We are therefore of the opinion that in the face of overwhelming inculpatory evidence it is not possible to give the finding envisaged under Section 37 of the Act for the grant of bail that there were reasonable grounds for believing that the appellant was not guilty of the offence alleged, or that he would not resume his activities should bail be granted. B

11. For the reasons recorded above, we find no merit in this appeal, which is accordingly dismissed. We however qualify that the observations made above are in the context of the arguments raised by the learned counsel on the bail matter which obligated us to deal with them, and will not influence the proceedings or decision in the trial in any manner. C

R.P.

Appeal dismissed.