

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: August 13, 2013
Judgment Pronounced on: September 19, 2013

+ **CRL.M.C. No.5149-51 of 2006**

A.K. BHAT & ORS. Petitioners

Through: Mr. Ravi Sharma & Mr. Ankit
Mishra, Advocates

Versus

STATE THROUGH TOHIT BAJPAI DRUG INSPECTOR

.....Respondent

Through: Mr. Rohit Bajpai, Drug Inspector
for Respondent-State

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR

% **JUDGMENT**

1. Quashing of Criminal Complaint No.121/2004 under Sections 18 (a) (i) read with Section 17-B punishable under Section 27 (c) and 27 (d) of *The Drug and Cosmetics Act, 1940* and trial court's order of 1st March, 2004 summoning petitioners as accused, is sought in this petition on three counts.

2. Firstly, on the ground that patent and proprietary medicines are a class of medicines not falling within the Indian pharmacopoeia or any other recognized western pharmacopoeia and keeping in view their unique formulation, they cannot be analyzed as per any standard form test for any of the components of the drug sought to be tested.

3. Secondly, on the ground that statutory right of re-testing provided under Sub-section 3 of Section 25 of *The Drugs and Cosmetics Act, 1940* stands defeated in view of respondent's Communication of 9th October, 2003 (*Annexure-G*) intimating that there is no residual quantity of sample for re-checking.

4. Thirdly, on the ground that Government analyst's report of 28th May, 2003 (*Annexure-C*) stands vitiated due to procedural violation of the procedure as described by Rule 46 of *The Drugs and Cosmetics Rules, 1945*.

5. The case set up by respondent is that on 11th April, 2002, a sample of *Tixylix Children's Cough Linctus* was lifted from petitioners' retailer-*M/s. Kay Sons, New Delhi* and as per Government Analyst Report, it tested negative for *Pholcodine* and was accordingly declared as a spurious drug and as per respondent, Public Analyst Report was made available to *M/s. Kay Sons, New Delhi* from whom the sample of the drug in question was taken and since no request for testing was received from *M/s. Kay Sons, New Delhi* or from petitioners within statutory period of 28 days as provided under Section 25 of *The Drugs and Cosmetics Act, 1940*, so complaint (*Annexure-A*) was filed before the court of competent jurisdiction and accordingly petitioners have been summoned as accused by the trial court.

6. At the hearing, it was strenuously contended by learned counsel for petitioners that neither petitioner-company nor first and second petitioner, who are the Directors of third petitioner-company were made aware of

Government Analyst Report (*Annexure-C*) in time and thereby petitioners had lost their valuable right of getting their sample re-tested. To contend that infringement of statutory right under Sub-Section 3 of Section 25 of *The Drugs and Cosmetics Act, 1940* vitiates the entire proceedings, reliance was placed by petitioners' counsel upon decisions in *Municipal Corporation of Delhi v. Ghisa Ram* AIR 1967 SC 970; *State of Haryana v. Unique Farmaid (P) Ltd. And Others v.* (1999) 8 SCC 190 and *Medicament Biotech Limited and Another v. Rubina Bose, Drug Inspector* (2008) 7 SCC 196.

7. Reliance was also placed by petitioners' counsel upon decision in *State of Maharashtra v. Jawaharlal Shamlal Ujawana* rendered in 1979 CrL.L.J.530 to contend that Rule 46 of *The Drugs and Cosmetics Rules, 1945* is mandatory and must be strictly followed and if breached, then the proceedings under *The Drugs and Cosmetics Act, 1940* are vitiated. Finally, it was contended with much vehemence by learned counsel for petitioners that there is no justification whatsoever in continuing petitioners' prosecution in the complaint in question as Government Analyst Report does not describe the method adopted for carrying out the requisite test and since statutory Rule 46 of *The Drugs and Cosmetics Rules, 1945* stands violated and petitioners' statutory right for getting the sample re-tested stands defeated as no residual quantity of the sample is available for re-checking, therefore, it is a fit case for quashing the complaint in question and the impugned summoning order.

8. On behalf of respondent, the stand taken is that there is no violation of Rule 46 of *The Drugs and Cosmetics Rules, 1945* and as per Section

18A of *The Drugs and Cosmetics Act, 1940* name of manufacture of drug is to be disclosed by the retailer and in the instant case, it was belatedly disclosed due to which petitioners have lost their statutory right under Section 25 of *The Drugs and Cosmetics Act, 1940* to get the sample re-tested within mandatory period of 28 days.

9. Attention of this Court was drawn to Sub-Section 3 of Section 25 of *The Drugs and Cosmetics Act, 1940* to point out that the right to challenge the test report of the Government Analyst is available to the person from whom the sample was taken or the aggrieved party can move an application before the concerned court to get the sample re-tested and in the instant case, petitioners' had not filed any such application before the trial court and so, the decisions relied upon on behalf of petitioners' are of no avail to them. Lastly, it was submitted on behalf of respondent that Government Analyst has followed validated procedures, as prescribed in Schedule B read with Rule 124B of *The Drugs and Cosmetics Rules, 1945* for testing the sample in question and so Government Analyst's report cannot be faulted with. Reliance was placed upon Apex Court's decision in *M/s. Amery Pharmaceuticals & Anr. V. State of Rajasthan (2001) 4 SCC 382* to assert that the manufacture is not entitled to get a copy of Government Analyst's report as a matter of right because the sample in question was taken from the Retailer. Thus, dismissal of this petition is sought.

10. Upon consideration of the submissions advanced on behalf of both the sides and on perusal of the complaint in question, Government Analyst's report, material on record and the decisions cited, it transpires

that it is not the case of petitioners' that they had moved concerned authority or the trial court within the statutory period to seek re-testing of the sample in question and so prima facie, it cannot be said that there is any violation of Rule 46 of *The Drugs and Cosmetics Rules, 1945* or Sub-Section 3 of Section 25 of *The Drugs and Cosmetics Act, 1940*.

11. Apex Court in *Ghisa Ram (supra)*, *Medicamen (supra)* and *Unique Farmaid (supra)*, found that complaint was filed after the expiry of the shelf life of the drug which deprived accused of valuable right of re-testing, necessitating quashing of the proceedings. There is no doubt that when mandatory procedure is contravened to the prejudice of accused, then certainly, dismissal/quashing of the complaint can be sought but in the instant case, there is no tangible basis to conclude at the threshold of these proceedings that there is apparent contravention of Rule 46 of *The Drugs and Cosmetics Rules, 1945* or violation of Sub-Section 3 of Section 25 of *The Drugs and Cosmetics Act, 1940* as petitioners' letters of 11th July, 15th July and 25th July, 2003 (*Annexures- D to F*) upon which petitioners' case is based, are disputed and thus required to be tested at trial. Therefore, it would be premature for this Court to rely upon aforesaid correspondence of petitioners' to conclude that petitioners' statutory right under Section 25 (3) of *The Drugs and Cosmetics Act, 1940* stands violated.

12. The parameters within which the inherent jurisdiction of this Court under Section 482 of *Cr.P.C.* is to be exercised are well known. It needs no reiteration that to quash criminal proceedings at its threshold, the complaint or the FIR, as the case may be, has to be taken on its face value

and thereafter, if it is found that the offence alleged is not made out or that the violation of mandatory provision of law vitiates the entire proceedings, then only criminal proceedings can be quashed. On this aspect, pertinent observations of the Apex Court in *State of Haryana v. Bhajan Lal* 1992 Supp (1) SCC 335 are as under: -

"Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused."

13. In the instant case, there is no apparent basis to conclude that Government Analyst Report ought to be excluded from consideration without it being tested at trial. Whether petitioners' right to get the sample in question re-tested is defeated or not is a moot question which cannot be answered at this initial stage as petitioners' correspondence is infact the defence of petitioners' which is refuted and is thus, required to be tested at trial. The applicability of Apex Court's decision in *Emery (supra)* to the facts of the instant case is also required to be seen at trial after the factual position is established. Thus, there is no basis for this Court to opine at this initial stage of these criminal proceedings that Government Analyst Report must be outrightly rejected or that petitioners' statutory right to get the sample in question re-tested stands violated justifying quashing of the proceedings arising out of Complaint (*Annexure-A*).

14. In view of the aforesaid, it cannot be said that the continuance of proceedings arising out of the complaint in question is unwarranted or an

abuse of the process of the court. Resultantly, this petition and the application are dismissed with liberty to petitioners to raise the pleas taken in this petition at the appropriate stage of trial.

15. This petition is accordingly disposed of while clarifying that any observation made in this judgment shall not be construed as an expression on merits, lest it may prejudice either side at trial. While vacating interim order, trial court is directed to expeditiously proceed with the trial in accordance with the law.

16. Trial court be apprised of this order forthwith.

(SUNIL GAUR)
Judge

SEPTEMBER 19, 2013

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