IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

Criminal Petition No.1716 of 2011

Between :-

M/s.Medopharm,
50, Kairambedu village,
Guduvanchery
Kanchipuram District
Tamil Nadu State
And others .. Petitioners

And

The State of A.P.
Rep.by Drug Inspector,
Visakhapatnam
Rep.by Public Prosecutor
High Court of A.P., Hyderabad .. Respondent

DATE OF JUDGMENT PRONOUNCED: 22nd July, 2015

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE M.S.K.JAISWAL

1. Whether Reporters of Local Newspapers may be allowed to see the Judgment? Yes/No

2. Whether the copies of Judgment may be marked to Law Reporters/Journals Yes/No

3. Whether His Lordship wish to see the fair copy of the Judgment? Yes/No

HON'BLE SRI JUSTICE M.S.K.JAISWAL

Criminal Petition No.1716 of 2011

ORDER:-

This petition is filed under Section 482 Cr.P.C., for quashing all further proceedings in C.C.No.831 of 2010 on the file of the Chief Metropolitan Magistrate, Visakhapatnam, insofar as they are against the petitioners/A.1 to A.5.

2. The facts, in brief, are as under:-

On 06-11-2008 the then Drugs Inspector picked up the sample of Cledomox Suspension in Powder form Barch No.0808007, manufactured in March, 2008 by the 1st petitioner firm with expiry date as August, 2009 from M/s.Srinivasa Medical and General Stores, Kanakamahalaxmi Nagar, Visakhapatnam (listed witness No.3). The necessary formalities were complied with. The sample was sent to the Government Analyst, Drugs Control Laboratory, Hyderabad, on 07-11-2008. Report was issued to the effect that the sample was not that of standard quality. The samples does not comply in respect of Assay of Clavulanic Acid as per USP as it contain 11.65 mg/5 ml. instead of 28.5 mg/5 ml. Notice was issued to the listed witness No.3 and ultimately it was found that the drug was manufactured by A.1 firm and supplied to A.6, who is M/s.Sai Venkataramana Pharma, Bholakpur, Musheerabad, Secunderabad. After obtaining the requisite papers, the Drugs Inspector filed a charge-sheet on the file of the Chief Metropolitan Magistrate, Visakhapatnam, alleging offences punishable under Sections 18(B)(d) read with Section 18(a)(i) punishable under Section 27(c) of the Drugs and Cosmetics Act, 1940.

3. After appearance, the petitioners/A.1 to A.5 have filed the present petition to quash all further proceedings in the case on the ground that the documents and the material on record do not make out a case for subjecting the petitioners/accused for trial. It is contended that there was abnormal delay in launching the prosecution, which is contrary to the provisions of the Act. It is also contended that the complaint filed by the complainant do not show as to what is the role

that is attributed to A.1 to A.4 in the firm which is said to have manufactured the drug. The complainant had not followed any of the principles to prosecute all the partners vicariously and hence the prosecution is liable to be quashed.

4. On the other hand, learned Public Prosecutor submits that the objections of the petitioners/accused are such that need to be enquired and tried during the course of trial and that there are no grounds to quash the proceedings.

5. At this stage, for considering the application of the accused under Section 482 Cr.P.C., what is required to be seen is as to whether a *prima facie* case has been made out against the accused so as to subject them to trial or whether the case suffers from material irregularity or illegality, thereby making the prosecution unsustainable and liable to be quashed.

6. Certain dates which are admitted are relevant. They are as under:-

March, 2008	"Cledomox" suspension (in powder form) was manufactured by A.1 firm
12-04-2008	It was sold to M/s.Sai Venkataramana Pharma
28-08-2008	M/s.Sai Venkataramana Pharma sold the drug to M/s.Rohini Pharmaceuticals.
27-10-2008	M/s.Rohini Pharmaceuticals sold the drug to the retailer M/s.Srinivasa Medicals & General Stores (LW.3)
07-11-2008	The Drug Inspector lifted the sample from LW.3
28-08-2009	The Government Analyst declared the sample to be not of Standard Quality
31-08-2009	Cledomox drug expired
16-09-2009	The report of the Government Analyst received by the Drug Inspector, Visakhapatnam, after the shelf life of the drug.
14-11-2009	A.1 firm addressed a letter to the Drug Inspector for a portion of the sealed sample for its evaluation
30-07-2010	Complaint was filed before the Court.

7. From the above dates, the fact that emerges is that the drug was manufactured in March, 2008 with the expiry date as August, 2009. Though the sample was lifted on 07-11-2008, the same was analysed by the Government Analyst on 28-08-2009 i.e., just 3 days prior to the date of expiry. It was found to be sub-standard. Thereafter, after following the procedure contemplated under the Act, the complaint was filed on 30-07-2010.

8. The main contention of the petitioners/accused is that this delay in prosecution can be a ground on which all the proceedings can be quashed. In support of this contention, learned Counsel appearing for the petitioners/accused relied upon the decision reported in **GUPTA CHEMICALS PVT.LTD., v. STATE OF RAJASTHAN**[1] in paras 11, 12 and 13 the Supreme Court held as under:-

> "From a perusal of the aforequoted provisions it is manifest that ordinarily in the absence of any material to the contrary, the report of the insecticides analyst will be accepted as final and conclusive of the material contained therewith. This is however subject to the right of the accused to have the sample examined by the central insecticides laboratory provided he communicates his intentions for the purpose within 28 days of the receipt of the copy of the report. It needs no emphasis that this right vested under the statutes valuable for the defence, particularly in a case where the allegations are that the material does not conform to the prescribed standard.
>
> As noted earlier in the present case the appellants had intimated the insecticide inspector their intention to have the sample tested in the central insecticides laboratory within the prescribed period of 28 days of receipt of the copy of the state analyst report, yet no step was taken by the inspector either to send the sample to the central insecticides laboratory or to file the complaint in the court with promptitude in which case the appellants would have moved the magistrate for appropriate order for the purpose. The resultant position is that due to sheer inaction on the part of the inspector, it has not been possible for the appellants to have the sample examined by the central insecticides laboratory and in the meantime, the shelf-life of the sample of insecticide seized had expired and for that reason no further step could be taken for its examination.
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> In the circumstances, we are of the view that continuing this criminal prosecution against the appellant will be a futile exercise and abuse of the process of court. The High Court was not right in dismissing the petition filed under Section 482 of Cr.P.C."

I n **M/s.MEDICAMEN BIOTECH LTD., v. RUBINA BOSE, DRUG**

INSPECTOR[2]**,** the Supreme Court observed at para 10 as under:-

> "We find that this judgment helps the case of the appellant rather than that of the respondent because in spite of two communications from the appellant that it intended to adduce evidence to controvert the facts given in the report of the Government Analyst, the fourth sample with the Magistrate had not been sent for re-analysis. The observations in Amery Pharmaceuticals's case (2001 AIR SCW 1132) are also to the same effect. We find that the aforesaid interpretation supports the case of the appellants inasmuch they had been deprived of the right to have the fourth sample tested from the Central Drugs Laboratory. It is also clear that the complaint had been filed on the 2nd July 2002 which is about a month short of the expiry date of the drug and as such had the accused appellant appeared before the Magistrate even on 2nd July 2002 it would have been well nigh impossible to get the sample tested before its expiry. In the affidavit filed to the petition by Dr. D. Rao, Deputy Drugs Controller, and in arguments before us, it has been repeatedly stressed that the delay in sending of the sample to the Central Drugs Laboratory had occurred as the appellant had avoided service of summons on it till 9th May 2005. This is begging the question. We find that there is no explanation as to why the complaint itself had been filed about a month before the expiry of the shelf life of the drug and concededly the filing of the complaint had nothing to do with the appearance of the accused in response to the notices which were to be issued by the Court after the complaint had been filed. Likewise, we observe that the requests for retesting of the drug had been made by the appellant in August/September 2001 as would be clear from the facts already given above and there is absolutely no reason as to why the complaint could not have been filed earlier and the fourth sample sent for retesting well within time. We are, therefore, of the opinion that the facts of the case suggest that the appellants have been deprived of a valuable right under Sections 25(3) AND 25 (4) of the Act which must necessitate the quashing of the proceedings against them."

9. What is manifest from the above is that a valuable right is given to an accused to get the sample analysed by the Central Drugs Laboratory and that is possible only when the complaint if lodged well within time. In the instant case, when drug was manufactured in March, 2008, the sample was lifted on 07-11-2008, its date of expiry was August, 2009. Just three days prior to the date of expiry, the Government Analyst analysed the same and found that the drug was not of standard quality. Thereafter, the complaint was filed on 30-07-2010 i.e., nearly 11 months after the shelf life of the drug expired. Since the shelf life of the drug expired even before the report of the

Government Analyst was communicated to the accused, further prosecution or its continuation becomes futile and therefore proceedings are liable to be quashed.

10. The other objection of the petitioners/accused is that for the absence of any specific allegation against the petitioners who are admittedly the partners of a firm, the prosecution cannot be launched. It is submitted that as per Section 34 of the Act, it is obligatory on the part of the complainant to set out any complaint as to what is the role that is played by each of the persons prosecuted. In the absence of there being any allegation against all the persons who are not directly involved in the manufacturing process or its sale, they cannot be prosecuted. In support of this contention, learned Counsel relied upon the authority reported in **NATIONAL SMALL INDUSTRIES CORPN.LTD. v. HARMEET SINGH PAINTAL**[3], wherein at para 39 the Supreme Court held as under:-

> "From the above discussion, the following principles emerge:
>
> (i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.
>
> (ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.
>
> (iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make accused therein vicariously liable for offence committed by company along with averments in the petition containing that accused were in-charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.
>
> (iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.
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> (v) If the accused is Managing Director or Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.
>
> (vi) If the accused is a Director or an Officer of a company who signed the cheques on behalf of the company then also it is

not necessary to make specific averment in complaint.

(vii) The person sought to be made liable should be in- charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases."

11. In the case on hand, the Drug Inspector had not followed any of the principles to prosecute the partners vicariously liable for the alleged offence committed by A.1 firm. It is submitted that on this ground continuation of the prosecution against the petitioners/accused No.1 to 5 is nothing but abuse of law. In that view of the matter and having perused the material on record, I have no hesitation in holding that continuing the prosecution against the petitioners/accused for the material violations amounts to the abuse of process of law and therefore the same is liable to be quashed. The point is accordingly answered.

12. In the result, the Criminal Petition is allowed and the proceedings initiated against the petitioners/A.1 to A.5 in C.C.No.831 of 2010 on the file of the Chief Metropolitan Magistrate, Visakhapatnam, are hereby quashed.

Miscellaneous petitions, if any, pending in this Criminal Petition shall stand closed.

M.S.K.Jaiswal, J

July, 2015
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[1] (2010) 7 SCC 735
[2] AIR 2008 SC 1939
[3] (2010) 3 SCC 330