

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.**

Criminal Application No. 06787 of 2017

District : Dhule

1. M.Sea Pharmaceuticals Pvt. Ltd.,
Village Surajpur, Nahan Road,
District Sirmour,
Himachal Pradesh.
(Company under Companies Act).
2. Krishna Moorthy Chandru
s/o. Krushna Moorthy,
Age : 54 years,
Occupation : Busiess,
R/o. H.No.31,
Apna Ghar Society Pitampura,
Delhi,
Director, M.Sea Pharmaceuticals
Pvt. Ltd.,
Village Surajpur, Nahan Road,
District Sirmour,
Himachal Pradesh.

.. Applicants
(Original
accused
nos.01 & 05)

versus

1. The State of Maharashtra,
Through Drugs Inspector,
Dhule, S.N. Sale,
C/o. Office of
Assistant Commissioner,
Food & Drugs Administration,
First Floor,
Pratishaym Building,
Station Road, Dhule 424 001.
2. Commissioner,
Food and Drug Administration,
M.S. Survey No. 341, Bandra,
Mumbai.

.. Non-applicants
(No.01 -
Original
informant)

.....

*Mrs. Rashmi S. Kulkarni, Advocate, holding
for Mr. Sanket S. Kulkarni, Advocate, for
the applicants.*

*Mr. S.P. Sonpawale, Addl. Public Prosecutor,
for non-applicant nos.01 and 02.*

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 10TH JULY 2018

JUDGMENT :

01. Present application has been filed invoking the powers of this Court under Section 482 of the Code of Criminal Procedure, 1973, for quashing the proceedings i.e. R.C.C. No. 124 of 2016, pending before Chief Judicial Magistrate, Dhule, against the applicants.

02. Non-applicant no.02, through the Drug Inspector, filed complaint against the present applicants and others. It was contended in the application, that Drug Inspector Shri Jeevan D. Jadhav had visited the premises of M/s. Abhijeet Pharma on Agra Road, Dhule, on 20.05.2015. At the time of visit, the partner of the said business firm was present. At that time, sample of Amoxtar-CV Dry Syrup from batch no. MSDS-61, manufacturing date 12/2014 and expiry date 05/2016, manufactured by the present applicant no.01 was taken. Thereafter, on the next day i.e. on 21.05.2015, one sealed sample was sent for analysis to the Government Analyst,

Mumbai. A report was received from the Government Analyst, Drug Control Laboratory, Mumbai, on 20.07.2015, stating that the said sample which was sent to the laboratory was not of standard quality.

03. Thereafter, then Drug Inspector, Shri U.B. Gharote issued notice on 28.07.2015, as contemplated under Section 18-A of the Drugs and Cosmetics Act, 1940 [**For the purpose of brevity, hereinafter referred to as "the said Act"**], to M/s. Abhijeet Pharma. M/s. Abhijeet Pharma disclosed from where the product was purchased and the photo-copy of the invoice bill was attached to its letter dated 29.07.2015. Thereafter, notice under Section 18A of the said Act was also given to one M/s. All Star Remedies, Jagadhari - 135 003. M/s. All Star Remedies gave reply and disclosed that the product is being manufactured by the present applicant. They had also attested photo-copy of the bill for their purchase. Thereafter, notice was further issued under Section 18-A of the said Act to the present applicant. It is stated that the original accused no.04 is the approved analytical chemist of accused no.05 and he was responsible for testing of the drug. In fact, accused no.04 had declared that the said drug was of standard quality. It was then stated that accused nos.01 to 05 were responsible for the manufactured drug for distribution and then distributed the product which was not of standard quality. Hence, the complaint was filed on 04.03.2016, stating that the accused persons have contravened Sections 18(a)(i), 18(a)

(vi), read with Section 16 of the Drugs and Cosmetics Act, which is made punishable under Section 27(d) read with Section 34 of the said Act.

04. After perusal of the complaint and the documents placed on record, the learned Chief Judicial Magistrate issued process against all the accused by his order dated 31.03.2016 and it was made returnable on 29.06.2016.

05. The applicants have contended that they had replied the notice that was issued to them and even before they could reply the said notice, already sanction to prosecute was obtained by the complainant which is not legal. Further, though report of the analyst was received by the complainant on 20.07.2015 and the reply which was given by the applicants was on 31.08.2015, yet the complaint was filed by the complainant intentionally belatedly on 04.03.2016. The complainant had every knowledge that the expiry date for the sample which was taken by the complainant was 05/2016. The learned Chief Judicial Magistrate did not consider the said fact and though the order of issuance of process was passed on 31.03.2016, the summons was made returnable on 29.06.2016. That was after the date of expiry of the drug. It has also been stated that on the first day of appearance as per the order, accused persons were not served and they were ultimately served and were required to appear before the concerned court on 03.07.2017. Therefore, the vital right of the

applicants to get the sample re-analyzed and to challenge the report of the Government Analyst has been denied. It would be abuse of process of law, under such circumstance, to ask them to face the trial and therefore, they have prayed for quashing the entire proceedings.

06. A reply has been filed on behalf of non-applicant nos.01 and 02. The facts in the complaint have been again reiterated. It has been contended that after receipt of laboratory report on 05.08.15, notice under Section 25(2) and 23(4)(iii) of the said Act along with one part of sample to the applicant, an opportunity was given to challenge the report, if he wants, before Chief Judicial Magistrate, Dhule, by making an application within 28 days. Accordingly, the applicant replied to the said notice on 31.08.2015 and gave entire explanation and the reasons for sample being declared as not of standard. The applicant did not opt for challenging the report of Government Analyst and therefore, the applicant now cannot take advantage of the lapse of time.

07. Heard learned Advocate Mrs. R.S. Kulkarni, holding for learned Advocate Mr. S.S. Kulkarni, for the applicants. Also, heard learned Addl. Public Prosecutor Mr. S.P. Sonpawale for the non-applicants.

08. In order to cut short, I would like to say that both the parties have argued in respect of their respective contentions. Further, learned Advocate

for the applicants has relied on the decision of the Hon'ble Supreme Court in the case of *State of Haryana Vs. Brij Lal Mittal & others* [AIR 1998 SC 2327], wherein it has been held that "the vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises if at the material time he was in-charge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of the company it does not necessarily mean that he fulfills both the requirements." Further, under similar facts, this Court in the case of *Anandkumar & others Vs. The State of Maharashtra & others* [2017 ALL MR (Cri) 3236] has held that when complaint came to be filed just before expiry of shelf life of drug and it was nowhere averred in the complaint that the petitioners were responsible for objectionable drug and same was manufactured with their consent or production of said drug was attributed to any neglect on their part, then continuation of prosecution in such case would be mere formality. Therefore, in this case, the petitions were allowed and the accused persons were discharged.

09. Further, in the case of *Medicamen Biotech Ltd. & another Vs. Rubina Bose, Drug Inspector* [AIR 2008 SC 1939], Drug Inspector after receiving the test report from the Drugs Laboratory, declared the drugs as not conforming to the prescribed standards. The said report was denied by the accused persons and in that

case also, the appellants were deprived of the right to have fourth sample tested from the Central Drugs Laboratory. In that case also, the complaint was filed a month short of the expiry date of the drug thereby making impossible to get the sample tested before its expiry. It was held that the appellants have been deprived of a valuable right under Section 25(3) and 25(4) of the Drugs and Cosmetics Act.

10. Further, in the case of *Northern Mineral Ltd. Vs. Union of India (UOI) and another [AIR 2010 SC 2829]*, which was in fact, the case under the Insecticides Act, 1968, but the provisions are *pari materia*, it was held that Section 24(3) gives right to the accused to rebut the conclusive nature of the evidence of Insecticide Analyst by notifying its intention to adduce evidence in contravention of the report before the Insecticide Inspector or before Court where proceedings in respect of the samples is pending. On the date, notice was issued, there was no proceedings pending before any court. Then intention to adduce evidence was conveyed to the Inspector concerned. Under such circumstance, the Inspector was obliged to institute complaint forthwith, produce sample and request the court to send the sample for analysis. When this has not been done, it amounts to denying valuable right to the appellant and, therefore, in that case also, the criminal prosecution against the appellant therein was dismissed.

11. Further, in the similar facts, in the case of *M.S. Theivendran & others Vs. The State of Maharashtra & others* [2015 ALL MR (Cri) 1394], this Court has quashed and set aside the proceedings under the Drugs and Cosmetics Act, 1940.

12. It can be seen that the facts are very simple. Samples in this case were extracted on 20.05.2015. On the next day i.e. on 21.05.2015, one of the samples was sent for analysis. The report of the analyst was received by the complainant on 20.07.2015 wherein the drug was declared as not of standard quality. The complainant has not explained as to why the notices under Section 18A of the said Act were not sent to so many persons i.e. at least, some of the accused persons including the manufacturer whose name would have been on the product. After sending notice to the person from whom the sample was taken and his reply has been received, further recourse is taken. Ultimately, the notice was issued to the present applicants on 05.08.2015. It is stated to be along with original copy of test report and one sealed intact portion of the sample under Sections 25(2) and 23(4)(iii) of the said Act. Though the complainant had received the reply to the show cause notice wherein it was submitted by them that the product is of standard quality and then clear intention was made known to the complainant that they intend to challenge the report given by the government analyst.

13. Therefore, taking into consideration ratio laid down in the case of *Northern Mineral Ltd. (supra)*, though that case was under the Insecticides Act, but the provision is *pari materia*. It was for the complainant to institute the complaint immediately and produce the sample with a request to the court to send the sample for analysis. It is to be noted that the reply was given to the show cause notice by the appellant on 31.08.2015. However, the complaint has been filed on 04.03.2016. The expiry of the sample extracted was 05/2016. Even on that day, if the complainant who would have presented the complaint itself ought to have pointed out the said fact to the learned Chief Judicial Magistrate and made a request to send the sample immediately or make the summons returnable before the period of expiry of the drug. No explanation has been given in the complaint, as to why inspite of receipt of notice reply dated 31.08.2015, the complaint was not filed immediately. On the contrary, it is stated in the complaint, that the controlling authority, Food & Drugs Administration, vide its letter dated 10.08.2015, had issued an order to enquire in the matter and launch a prosecution. That means, the sanction was obtained even before the reply was given by the applicants. The show cause notice was issued to the applicant on 05.08.2015 and the sanction was accorded on 10.08.2015. That means, within 05 days, the sanction has been obtained. As per the ratio laid down in the

case of *Northern Mineral Ltd. (supra)*, the valuable right of the appellant (in the present case, applicants) has been defeated and, therefore, the criminal prosecution against them is required to be dismissed.

14. On the similar lines, in the case of *Anandkumar & others (supra)* and in the case of *M.S. Theivendran & others (supra)*, the vital right of the appellant to challenge the report of the Central Analyst and get the sample re-analyzed has been upheld. Further, as regards applicant no.02, who is accused no.01, it is not mentioned in the complaint that he was responsible for the day-to-day affairs of the Company - applicant no.01. Merely because he is designated as Director, he cannot be held vicariously liable and, therefore, the ratio laid down in the case of *State of Haryana Vs. Brij Lal Mittal & others (supra)* would be applicable.

15. In *Medicamen Biotech Ltd. & another (supra)* also, the Hon'ble Supreme Court has upheld the right of the accused persons under Sections 25(3) and 25(4) of the said Act. Here, in this case also, while issuing order of process, the learned Chief Judicial Magistrate has not considered what was the expiry date of the product of which sample was taken. Further, it is also to be noted that though the summons was made returnable for the accused persons on 29.06.2016 (which was itself after the period of expiry), accused persons were not served. Much time

has been consumed to serve the accused persons. When the applicants have been deprived of their vital right, it would be the empty formality to face the trial. It would be the abuse of process of law and, therefore, inherent powers of this Court under Section 482 of the Code of Criminal Procedure, 1973, deserve to be invoked in view of the decision of the Hon'ble Supreme Court in the case of *State of Haryana & others Vs. Ch. Bhajan Lal & others* [AIR 1992 SC 604].

16. In the result, the application is allowed. The proceedings of Regular Criminal Case No. 0124 of 2016, pending before the Chief Judicial Magistrate, Dhule, is hereby quashed and set aside, as against the present applicants.

(Smt. Vibha Kankanwadi)
JUDGE

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