

Meena

IN THE HIGH COURT OF BOMBAY AT GOA  
**CRIMINAL WRIT PETITION NO. 170 OF 2017**

Serdia Pharmaceuticals (India) Pvt. ... petitioners  
Ltd. And others

\versus

Union of India ... Respondent

Shri S.S. Kantak, Senior Advocate with Shri B. Khandekarpar,  
Advocate for the petitioners.

Ms. S. Linhares, Special Public Prosecutor for the respondent.

**CORAM : NUTAN D. SARDESSAI, J.**

**DATED : 19<sup>th</sup> March 2018.**

**ORAL ORDER:**

1. Heard Shri S.S. Kantak, learned Senior Counsel for the petitioners who contended that the order of the learned J.M.F.C. dated 10/08/2016 issuing summons to the petitioners was without due application of the judicial mind. No case whatsoever was made out against the petitioners under Section 27 of the Drugs and Cosmetics Act, 1940 ( 'The Act', for short). On this premise alone it was his contention that the petition had to be allowed and the impugned order dated 10/08/2016 was required to be quashed and set aside. He placed reliance in **Anil Kumar and others v/s. M.K. Aiyappa and another** [(2013) 10 SCC 705]

and **Priyanka Srivastava and another v/s. State of Uttar Pradesh and others** [(2015) 6 SCC 287] to substantiate his case apart from that of the learned Single Judge in **Ravi Rascendra Mazumdar and another v/s. Union of India** (Cr. Writ Petition No.175/2017). He placed further reliance in the **State of Haryana v/s. Brij Lal Mittan and others** [(1988) 5 SCC 343] and contended that the prosecution against the three petitioners namely petitioner Nos.2, 3 and 4 could not be sustained and the impugned order had to be quashed and set aside.

2. His next plank of argument was that there was no Panchanama and sealing at the initial attachment of the drugs by the Inspector concerned. In that context he took me through the provisions of Sections 22 and 33 of the Act apart from the reference to the sample which was taken and the report drawn by the Government Analyst. Last but not the least he adverted to the reply filed on behalf of the respondents in which there was a clear admission that there was no seizure of the samples as contemplated by law and that it was a fit case to quash the order under challenge. Last but not the least he adverted to the complaint and submitted that there were no averments whatsoever therein to show that the petitioner Nos.2, 3, and 4 were incharge of and responsible for the affairs of the petitioner

no.1 so as to fasten the liability on them.

3. Ms. Linhares, learned Special Public Prosecutor conceded in fairness that the learned JMFC while taking cognizance had not assigned any reason while issuing process against the accused i.e. the petitioner Nos. 2 to 4 herein. She also conceded in fairness that the complaint did not make out any case against the present petitioner Nos.2 to 4 to indicate that they were incharge of and responsible for the affairs of the company at the time of the commission of the alleged offence. She however submitted that an application for amendment was moved before the learned J.M.F.C. indicating the real directors of the Petitioner No.1 - Company who were incharge of and responsible for the affairs at the relevant time. Her next plank of argument was that in terms of Section 22 sub-section 2 of the Act, the procedure contemplated under the Code of Criminal Procedure regarding search and seizure was not applicable in respect of the samples being taken and therefore there was no basis in the contention of the learned Senior Counsel that the samples so taken were unreliable in the absence of any Panchanma and sealing at the initial stage by the Inspector of Drugs and Cosmetics. She referred to the Circular dated 20/07/2010 to buttress her case that there was no requirement to take samples in the presence of

the two witnesses and /or under a Panchanama. Moreover, any apprehension in the mind of the petitioners regarding the taking of the samples and/or its authenticity was laid to rest by giving a portion of the sample to the party concerned.

4. A consideration of the complaint and its bare reading would indicate that there are no averments whatsoever connecting the petitioner Nos.2 to 4 with the offences alleged against them for which they are made to face the prosecution before the learned J.M.F.C. There is not even an averment in the complaint that they were incharge of and responsible for the affairs of the petitioner no.1 company and on that premise alone, the prosecution against the petitioner Nos.2 to 4 cannot stand. Secondly, the learned J.M.F.C. while considering the complaint has not assigned any reasons and has merely recorded "Cognizance taken. Issue summons to the accused" which does not indicate the application of mind of the learned J.M.F.C. at the time of taking cognizance and issuing process against the petitioner Nos.2 to 4. This order which is non speaking cannot stand the test of legal scrutiny and on that premise too the petitioner Nos.2 to 4 are entitled to seek for the quashment of the order under challenge.

5. In **Anil Kumar** (supra), the Hon'ble Apex Court held while considering the scope of Section 156 (3) Cr.P.C. that the

application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) Cr.P.C., should be reflected in the order, though a detailed expression of his views was neither required nor warranted. This view of the Hon'ble Apex Court in **Anil Kumar** (supra), was considered by the Apex Court in **Priyanka Srivastava**(supra).

6. In **State of Haryana** (supra), the Hon'ble Apex Court had dealt with the scope of Section 34 of the Act and in that context interpreted 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 incharge of and was also responsible to the company for the conduct of its business. This judgment too would substantiate the contention of Shri Kantak, learned Senior Counsel that the prosecution against the petitioner Nos.2 to 4 cannot be continued before the learned J.M.F.C. as the matter stands on date.

7. In **Ravi Muzumdar** (supra), the learned Single Judge of this Court considered the contention that the impugned order was

unreasonable order and did not show that the Magistrate has applied mind to the contents of the complaint and the ingredients of the offence as alleged. On a consideration of the submissions and circumstances of the case, the learned Single Judge had concluded that prima facie it appeared that the impugned order lacked reasons, it did not show for what offences the process had been issued and that it would be relevant inasmuch as according to the respondents, the petitioners and the company were guilty of the offence contained therein.

8. In **State of Goa** (supra), the learned Single Judge of this Court by his order dated 13/11/2003 had found in the facts at large before him that the Inspector had admittedly not taken the samples in the presence of independent witnesses nor had he drawn a Panchanama regarding the drawing of the samples. However, this aspect of the matter is left open to the learned Senior Counsel to canvas before the learned J.M.F.C. as and when the occasion arise.

9. Considering the case carved on behalf of the respondent that an application for amendment has been moved before the learned JMFC seeking substantial amendment therein including the status of the actual directors who were incharge of and responsible for its affairs at the relevant time, the prosecution as

of now would only lie against the petitioner no.1. Considering thus the contentions of Shri S.S. Kantak, learned Senior Counsel and Ms. S. Linhares, learned Special Public Prosecutor, the impugned order is set aside and the matter is remitted to the learned Magistrate for deciding the question of issuance of process afresh and in accordance with law.

**10.** The prosecution stands quashed against the petitioner Nos.2 to 4.

**NUTAN D. SARDESSAI, J.**