HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

Criminal Petition No.3658 of 2011

ORDER:

In this petition filed under Section 482 Cr.P.C., the petitioners/ A3 and A4 seek to quash the proceedings against them in C.C.No.390 of 2010 on the file of Additional Judicial First Class Magistrate, Amalapuram, East Godavari District which was taken cognizance for the offence under Section 18 (c) of Drugs and Cosmetics Act, 1940 (for short "the Act") punishable under Section 2(b)(ii) of the Act.

2) The brief facts of the case are that complainant is the Drugs Inspector. A1 is the manufacturer of Ayurvedic drugs and he manufactured Erecta Capsules and he obtained permission to manufacture said Capsules as Ayurvedic medicine. A3 who is a drug manufacturing company marketed the product of Erecta Capsules manufactured by A1. A2 is the proprietor of A1 Company. A4 is the Managing Director of A3 Company.

a) While so, on 28.10.2002, the Drugs Inspector—LW1 picked up Erecta Capsules B.No.UUB-1001 with Mfg. dt.12/02, Exp.dt.11/05 manufactured by A1 from the premises of M/s.Sri Sai Subrahmanya Pharms, Amalapuram as per the procedure laid down under Section 23 of the Act for the purpose of analysis and handed over one sealed portion of sample drug to LW2. On 29.03.2003, LW1 received Government analyst report, DCL, Hyderabad declaring the sample contains 13.3 mg. of Sildenafil Citrate falling under the definition of 'drug' as per Section 3(b) of the Act. The sampled drug Erecta

Capsules was labelled as Ayurvedic medicine containing Ayurvedic drugs. The manufacturer did not incorporate Sildenafil Citrate in the list of ingredients printed in the label. On 03.04.2003, LW1 addressed a letter to LW2 under Section 25(2) of the Act furnishing a copy of the report and requesting him to disclose the name, address and particulars of supplier of drug. On receiving necessary information in that regard, he has taken follow up action and on 15.04.2003, LW1 seized the balance stock of the subject drug from the premises of LW2. Ultimately on 16.05.2003, LW2 could trace the subject drug was purchased from the laboratory of A1. So on 17.05.2003, he addressed a letter to A1 requesting to withhold the balance stock and disclose the name and other particulars of the supplier of the said drug under Section 18A of the Act. On 23.06.2003, LW1 addressed a reminder to A1. On 01.08.2003, LW1 received a letter from A1. On 19.08.2003 LW1 deposited one sealed portion of the said drug in the Court of Additional Judicial First Class Magistrate, Amalapuram as per the provisions of Section 23(4)(ii) of the Act praying the Court to club the sample with the seized property already deposited in the Court. On 27.09.2003, LW3 received a letter from A1 confirming supply of the drug to A3 vide invoice No.U0084 dated 30.11.2001 and also distribution of the said drug along with a copy of invoice. A1 in the said letter expressed his intention to challenge the report of Government analyst. On 29.09.2003, LW1 received a letter from A3 stating that the said drug was purchased from A1 and also confirming

the supply of the drug to M/s.Ganapathy Remedies Pvt. Ltd., Vijayawada.

b) Thus, the case of the complainant is that A1 being Ayurvedic manufacturer cannot produce drugs under modern scientific system in his premises which is covered by Ayurvedic drug manufacturing license. A1 to A4 recognized the potentiality of Sildenafil Citrate and demand for the product in the market. They also know the efficiency of the drug in the treatment of erectile dysfunction. A1 to A4 decided to incorporate Sildenafil Citrate a highly efficient drug in the capsule Erecta so as to vastly improve the action of the capsule. No person in India can manufacture Sildenafil Citrate or its formulation except under a license duly obtained from the drugs Controller General of India. Thus, the accused have committed an offence by contravening Section 18(c) of the Act and punishable under Section 27(b)(ii) of the Act.

Hence, the instant petition on behalf of A3 and A4.

3) Heard arguments of Sri M.S.Srinivasa Iyengar, learned counsel for petitioners and learned Assistant Public Prosecutor (AP).

4) The prime argument of learned counsel for petitioners is that even as per the complaint allegations, petitioners/A3 and A4 are the marketers of the subject drug and they are not manufacturers or distributors or retailers. Therefore, they are not entitled to portion of sample or the analyst report directly from the Drug Inspector. In such an event in order to challenge the correctness of the analyst report

they have to wait till receiving the summons from the court and then make a request to the court to send the second sample to the laboratory. In this case, admittedly, manufacturing date of the said drug is 12/02 and its expiry date is 11/05 whereas the complaint was filed on 23.08.2007. Since the petitoners/A3 and A4 are not entitled to a copy of the report or piece of sample directly from the Drug Inspector, they have to wait till receiving the summons from the court to request the court to send the available sample for analyst in terms of Section 25(4) of the Act. It is the further case of the petitioners, in this case they have received summons in the month of December, 2010 to appear in the court in C.C.No.390 of 2010 on 05.01.2011. By the time they made their appearance in the Court, the expiry date of said drug was over long back and therefore, they had no occasion to request the Court to send the sample for analysis. On that argument learned counsel sought for quashment of proceedings. He relied upon the judgment of the Apex Court in ***Amery Pharmaceuticals vs. State of Rajasthan***[1] to argue that like manufacturer, petitioners also come under Section 25(4) of the Act.

5) Learned Assistant Public Prosecutor opposed the petition stating that the retailer from whom the Drugs Inspector obtained sample must have informed to the manufacturer as well as the about lifting of the sample and therefore, the petitioners ought to have

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[1] (2001) 4 SCC 382

availed the opportunity to request the Court to send sample for analysis at the earlier stage.

6) The point for determination is:

"Whether there are merits in this petition to allow?"

7) Admittedly, A1 and A2 are manufacturers of Erecta Capsules and A3 and A4 have marketed the said product on behalf of A1 and A2. It is also an admitted fact the manufacturing date of said drug was 12/02 and expiry date was 11/05. The complaint was filed on 23.08.2007 and the copy of the summons shows that petitioners were summoned to the court of Additional Judicial First Class Magistrate, Amalapuram to attend on 05.01.2011. The summons was issued on 27.11.2010. Therefore, there is no demur that even long prior to the date of complaint the expiry date of the said drug was over. In this backdrop, the contention of learned counsel for petitioners has to be appreciated.

8) In ***Amery Pharmaceuticals***'s case (1 supra) the manufacturer contended that non-supply of one portion of the sample has resulted in depriving him of a valuable right to test the correctness of the report of the Government Analyst. It was submitted that consequence of such non-supply was that the conclusiveness attached by law to the report of Government Analyst is lost and the report of the Government Analyst would not be binding on the manufacturer. It was also argued that the conclusiveness of the report of the

Government Analyst would nail the manufacturer with the findings in the report as he would otherwise be disabled from controverting the said findings, because he had no right to challenge such findings due to the absence of a portion of the sample with him.

9) Repelling the said argument, the Apex Court held that when the manufacturer in a given situation is not entitled a copy of the report of the government Analyst as of right, he must have the liberty to challenge the correctness of the facts stated in the report by resorting to any other mode by which such facts can be disproved. The Apex Court further held he can also avail himself of the remedy indicated in sub-section (4) of Section 25 of the Act by requesting the court to send the other portion of the sample remaining in the court to be tested at the Central Drugs Laboratory. It was further held that no court is under a compulsion to cause the said sample to be so tested if the request is made after a long delay. It was further held that the discretion has been conferred on the court to decide whether such sample should be sent to the Central Drugs Laboratory on the strength of such request. However, once the sample is tested at the Central Drugs Laboratory and a report as envisaged in Section 25(4) of the Act is produced in the court the conclusiveness mentioned in that sub-section would become incontrovertible.

10) In the considered view of this Court, the ruling of the Honourable Apex Court in the above judgment equally applies in all fours to the case on hand. In the instant case, admittedly, the

petitioners are the marketers and sample of the drug was not collected from them and they had no right of getting either remaining portion of the sample or copy of the report from the Drugs Inspector. Therefore, like manufacturer who is not entitled to a piece of sample and copy of the report from the Drugs Inspector, the petitioners who are also not entitled to the same and therefore, they have to necessarily resort to the court to disprove the analyst report under Section 25(4) of the Act. However, in this case, the complaint was filed long after expiry date. In that view, the petitioners had lost their valuable opportunity of challenging the correctness of the report. Therefore, their defence and rights are jeopardized in this case and continuation of the proceedings against them would amount to abuse of process of the Court.

11) Considering it, this Criminal Petition is allowed and the proceedings against the petitioners/A3 and A4 in C.C.No.390 of 2010 on the file of Additional Judicial First Class Magistrate, Amalapuram, East Godavari district are quashed so far as petitioners/A3 and A4 are concerned.

As a sequel, miscellaneous petitions pending, if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 02.08.2018
Murthy