

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.01.2019

CORAM:

THE HONOURABLE Mr.JUSTICE M.NIRMAL KUMAR

Crl.O.P.No.28921 of 2011
and
M.P.No.1 of 2011

[Orders Reserved on 02.11.2018]

M.Y.Ahmed

... Petitioners / Accused

Vs.

The Drugs Inspector,
O/o. Of Deputy Drugs Controller (India),
Central Drugs Standard Organization,
South Zone, 2nd Floor,
Shastri Bhawan Annex,
Chennai - 600 006

... Respondent / Complainant

PRAYER: Petition is filed under Section 482 of Criminal Procedure Code, praying to call for records in C.C.No.3697 of 2011, on the file of the Learned X Metropolitan Magistrate Court, Egmore, Chennai, and quash the same.

For Petitioners : Mr.R.Karthikeyan

For Respondent : Ms.Meenakumari, SCGSC

ORDER

This Criminal Original Petition has been filed praying to quash the proceedings in C.C.No.3697 of 2011, on the file of the Learned X Metropolitan Magistrate, Egmore, Chennai.

2. The case, in brief, would run thus;

(i) The petitioner is the proprietor of M/s. Amanath Pharmaceuticals, Pondicherry, having manufacturing Unit at R.S.No.36/5, Pathukannu, Koodapakkam Village, Pondicherry. The petitioner has a valid licence to manufacture drugs including

Bismuth Trioxide, commonly known as CBS-120 Tablets, upto 18.11.2014. A complaint, dated 02.03.2010 was received by the Deputy Drugs Controller (India), alleging that the second accused and another one had been involving illegal drugs manufacturing and fake drugs. Based on the complaint, the respondent inspected the premises mentioned in the complaint, on 14.05.2010 and found the second accused was marketing the products of M/s.Amanath Pharmaceuticals, Pondicherry. In order to confirm the quality of the subject drug, four portions of each containing 10 x 10 Tablets of CBS-120 Tablet, Batch No.CS-101, D/M 01/2010, E/D 12/2011 manufactured by M/s.Amanath Pharmaceuticals, was drawn under Form 17, dated 14.05.2010, for analysis by following the procedures laid down under Section 23 of Drugs & Cosmetics Act, 1940, (in short, 'the Act') and sent to the Government Analyst, Central Drugs Laboratory, Kolkata, for analysis vide Form 18, dated 17.05.2018. Accordingly, a report dated 02.09.2010 received, declaring that the sample are not of standard quality. Therefore, a letter dated 29.10.2010 was sent to the first accused directing to stop further sale of the subject drug and to inform the quantity manufactured and sold and also to explain why they should not be proceeded for manufacturing a 'not of standard quality' drug CBS-120. In reply, the petitioner stated that they have an independent analyst report, which is in their favour. The explanation offered by the petitioner was rejected by the respondent and preferred the complaint against the petitioner herein in C.C.No.3697 of 2011, on the file of the learned X Metropolitan Magistrate, Egmore, Chennai.

3. The learned counsel appearing for the petitioner would submit that the Government Analyst, Central Drugs Laboratory, Kolkata, has not conducted the analysis in a proper way and further the petitioner enclosed the analysis report of the Government approved Laboratory, which confirms that the sample is of standard quality. As on the date of drawing samples, as per Section 21 of the said Act, the complainant was not a Gazetted Officer, authorized by the Act, to conduct search and seizure. Further, no inspection was conducted in the manufacturing premises, and the petitioner is only a Distributor, where inspection was conducted. The learned counsel, in support of his contentions, has relied on the decision of the Hon'ble Apex Court in State of Maharashtra Vs. R.A.Chandawarkar and Others reported in [1999 (2) Mh.L.J.650]; in Zim Laboratories Ltd., Vs. State of Maharastra (CD 1999 BHC573; in Unicon Vs. Drug Inspector reported in (2010 SCC Online Mad 5946) and in (M/s.Alpha Laboratories Vs. State of Rajasthan) reported in (2014 SCC online RA 6062).

4. The learned Central Government Standing Counsel appearing for the respondent would submit that based on the complaint dated 02.03.2010, the Deputy Drugs Controller (India), alleging that the second accused and another one had been involving illegal drugs manufacturing and fake drugs, the respondent inspected the premises mentioned in question on 14.05.2010 and found the second accused was marketing the products of M/s.Amanath Pharmaceuticals, Pondicherry. In order to confirm the quality of the subject drug, four portions of each containing 10 x 10 Tablets of CBS-120 Tablet, Batch No.CS-101, D/M 01/2010, E/D 12/2011 manufactured by M/s.Amanath Pharmaceuticals, was drawn under Form 17, dated 14.05.2010, for analysis by following the procedures laid down under Section 23 of Drugs & Cosmetics Act, 1940, and sent to the Government Analyst, Central Drugs Laboratory, Kolkata, for analysis vide Form 18, dated 17.05.2018, Accordingly, a report dated 02.09.2010 received, declaring that the sample are not of standard quality. Therefore, the respondent preferred a complaint against the petitioner herein in C.C.No.3697 of 2011, on the file of the learned X Metropolitan Magistrate, Egmore, Chennai. Adding further, the learned standing counsel would submit that a prima facie case has been made out and unless rebutted, it would make the accused liable to conviction. Since there is ground for presuming that the accused had committed the offence, a Court can justifiably say that a prima facie case against him exists. He would further submit that the provisions of Drugs and Cosmetics Act, 1940 has been strictly complied with in all respects. Therefore, he prayed for dismissal of the petition.

5. I have heard the learned counsels appearing on either side and perused the materials available on record.

6. The learned counsel appearing for the petitioner would submit that the Drug Inspector has sent the sample directly to Central Drugs Laboratory, Calcutta, bypassing the procedure of sending the sample to Government Analyst under Section 25(1) of the said Act and adopting Section 25(4) of the said Act, had caused great prejudice, curtailing the petitioner's valuable right. Further, the test adopted by the Central Laboratory is not proper test, which ought not to have been carried on.

7. The other contention is that the Drug Inspector was not appointed and Notified for the area in the Official Gazette by the appropriate Government. Hence, he is not an authorized person to conduct such seizure and send the drugs for Analyst.

8. As regards the first contention, the Apex Court in the decision in Ram Shankar Misra Vs. State of U.P., reported in (1981 SCC 255) has held as follows:-

"4. The mode prescribed under Section 25 (4) is one method of sending it to the Director of the Central Drugs Laboratory. The other method is by the Drugs Inspector sending it direct as contemplated under the first part of Section 25(1). It is significant that Sub-section (4) of Section 25 starts with the words "unless the sample has already been tested or analysed in the Central Drugs Laboratory." These words clearly indicate that apart from the mode prescribed in Section 25(4), the sample can be sent for analysis to the Central Drugs Laboratory. "

9. It is admitted by the respondent that he was notified as Drug Inspector, as per Section 21 of the said Act, only on 27.07.2010. In this case, admittedly, the Drug Inspector had inspected the premises on 14.05.2010, drawn the samples on the same day and sent for analysis on 17.05.2010, when he was notified as a Drug Inspector. The Hon'ble Supreme Court in the decision in S.A.Kishore Vs. State by Drug Inspector, Bangalore, reported in (2013 SCC Online Kar 3213), held as follows:-

"5. Though the learned State Public Prosecutor would seek to justify the order, the fact remains that Section 21 of the DC Act enables an inspector, appointed under the notification published in the official gazette, to act as a public servant and therefore, compliance with the procedure as to the need for such notification being published in the Official gazette, is a must, for otherwise, he may not be deemed a gazetted officer and could not be considered as a public servant. Therefore, in view of the admitted circumstance that the petitioner's appointment was not duly gazetted as on the date of the inspection or as on the date he filed the case before the court, was certainly not authorised in the eye of law and hence, the proceedings would have to be set at naught."

10. Further, the Kerala High Court in an unreported decision in *Drugs Inspector, Kottayam rep.by State Public Prosecutor Vs. C.D.Ramachandran Pillai* made in Crl.A.No.514 of 2002, has held as follows:-

6. While considering the contentions with respect to the competency of the Drugs Inspectors and the Analyst, the trial court has considered several decisions. After considering the decision in *State of Maharashtra Vs. R.A.Chandawarkar* (1999 Crl.L.J. 4449), the learned Magistrate has found that, in the present case, the prosecution could not produce any notification either with respect to PW3 who launched the complaint or with Crl.A.No.514 of 2002 respect to CW2-Mohandas, the Drugs Inspector, who took the sample. Consequently the court found that by taking of sample and launching of the complaint by the Drugs Inspector without a valid notification is illegal. According to me, the above finding of the learned Magistrate is fully correct, particularly in view of the decision reported in 1999 Crl.L.J. 4449, in which it is held that, "The provisions of S.21 of the Act makes it clear that the post of Drug Inspector is a very vital public post with wide range of powers to take samples and seize the samples and prosecute the persons for selling the adulterous, spurious and substandard quality drugs. In view of such vital powers conferred by S.21 of the Act on such Drug Inspectors, S.21 mandates that the Central Government or the State Government, may issue notification in official Gazette so as to appoint such Drug Inspectors for such areas as assigned to them. The intention of the legislature is very clear from the said S.21 of the Act, that the appointment of such a person holding such an important post as a Drug Inspector, especially in the interest of public health, obviously will have to be notified in the official Gazette and that the said notification should indicate the area in which the said Drug Inspector can exercise his powers. In fact, S.21 does not say that the publication of notification in official Gazette is discretionary. Thus the appointment of Drug Inspector can only be through an official Gazette Notification and not otherwise. Drug Inspector can operate and exercise his powers,

and the same should not be left to conjectures and surmises of the public. In the present case, there is no official Gazette Notification appointing a person as a Drug Inspector for particular area and as such person cannot claim to be a Drug Inspector for that particular area at least up to the date the said notification was published."

11. The Supreme Court in a decision in State of Maharashtra Vs. Shri.Vithoba Maruti Ghadge and Another reported in (2018 SCC Online Bom 4035), has held as follows:-

"4. The Drugs and Cosmetics Act, 1940 (hereinafter referred to as 'Said Act') defines expression 'Inspector' in Section 3(3)(e)(ii) thus, "3(3)(e)(ii) in relation to any other drug or cosmetic, an Inspector appointed by the Central Government or a State Government under Section 21;"

5. Section 21 of the said Act empowers the Central or a State Government to appoint such persons as it thinks fit, having the prescribed qualifications, to be Inspectors for such areas as may be assigned to them by issuing notification in the Official Gazette."

12. Thus, in sum and substance, the date on which the respondent had conducted the raid and searched the premises, he was not Inspector within the meaning of Section 21 of the Act and the Drug Inspector was not duly appointed and therefore, not authorized to exercise the power under the provisions of the Act. (Drugs and Cosmetics Act)

13. In the light of the above discussions and materials on record, and particularly, in view of the decisions cited supra, prosecution has miserably failed to produce the Notification under Sections 20 & 21 of the said Act, and the above failure of prosecution is sufficient to cut the very root of the prosecution case itself.

14. In the result, this Criminal Original Petition is allowed and the proceedings in C.C.No.3697 of 2011, on the file of the Learned X Metropolitan Magistrate Court, Egmore, Chennai, is hereby quashed. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

MPK

To

1. The X Metropolitan Magistrate Court,
Egmore, Chennai,
2. - do - Through The Chief Metropolitan Magistrate,
Egmore, Chennai
3. The Drugs Inspector,
O/o. Of Deputy Drugs Controller (India),
Central Drugs Standard Organization,
South Zone, 2nd Floor,
Shastri Bhawan Annex,
Chennai - 600 006
4. Public Prosecutor,
Madrash High Court,
Madras

+1 cc to Ms.Meena Kumari, Advocate, S.R.No.5434

Order made in
Crl.O.P.No.28921 of 2011

GJ(CO)
SSM(21/02/2019)

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