

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

10 CRIMINAL WRIT PETITION NO. 919 OF 2020

1. Ashokkumar S/o. Murarilal Agrawal,
Age. 68 years, Occ. Business,
(Partner- Jenirik Prooduts- 119/C,
Katedan Industrial Estate,
Hyderabad – 500 252
(Andhra Pradesh State),
R/o. 8-2-277/8, Road No.2,
Banjara Hills, Hyderabad – 500 034
(Andhra Pradesh State).
2. Rameshchandra S/o. Murarilal Agrawal,
Age. 71 years, Occu. And R/o. As above.
3. Jenirik Products- 119/C,
Katedan Industrial Estate,
Hyderabad- 500 252,
(Andhra Pradesh State).
[Presently it is closed since 1999] ...Petitioners.

Versus

The State of Maharashtra. ...Respondent.

Advocate for Petitioners : Mr. R.S. Deshmukkh Senior Counsel
i/b. Mr. D.R. Deshmukkh.
APP for Respondent/State : Mr. S.R. Yadav – Lonikar.

**CORAM : MANGESH S. PATIL, J.
DATE : 25.09.2020**

JUDGMENT :

Heard.

2. Rule. The Rule is made returnable forthwith. With the consent of both

the sides, the matter is heard finally at the stage of admission.

3. By this petition, invoking the powers of this Court under Article 227 of the Constitution of India, the petitioners, who are the accused facing the trial in Regular Criminal Case No. 648/1996 from the file of learned Chief Judicial Magistrate, Beed, for the offence punishable under the Drugs and Cosmetics Act, 1940, are impugning the orders passed by the learned Magistrate on their application (Exhibit 38) rejecting their request to continue to try the offence instead of committing it to the Special Court constituted under Section 36- AB of Drugs and Cosmetics Act, 1940 (for short, 'Act') and the subsequent order on the complaint (Exhibit No. 1) purportedly passed under section 209 of the Code of Criminal Procedure, committing the case to the Special Court.

4. The facts leading to the filing of the Writ Petition may be summarized as under:

(i) Petitioner Nos. 1 and 2 are the partners of petitioner No. 3 firm holding a drug manufacturing licence in Form 25 (600/AP) dated 16.11.1984 and in Form 28 (600/AP) dated 02.01.1985, which were renewed from time to time upto the year 1999. Pursuant to such licence, they manufactured a drug with a brand name "Mixin Plus Suspension".

(ii) The complainant who is a Drugs Inspector duly authorized under

the Act and the Rules framed there under, drew samples and got them analyzed from the State Laboratory. As per the report dated 28.02.1996 in Form 13, it was found that the drug was not of prescribed standard quality with the reasons "Contents of Furazolidone is more Schedule - V limits when tested as per manufactures method (248.57 %) of the level amount". On the basis of such report, the complaint was filed for violation of Section 18 (a) (i) read with Section 16 and 34 and punishable under Section 27 (d) of the Act.

(iii) Pursuant to the enabling provision, the petitioners sought analysis of the third sample to be done from the Central Drug Laboratory, Culcutta. Accordingly, the sample was sent to that Laboratory and a report dated 02.01.1996 was received in Form 2 with the remarks that "The sample does not conform to claim with respect to content of Diiodohydroxy quinoline and Furazolidone.

(iv) After receipt of such report of the Central Laboratory, sensing that the offence would not remain merely of manufacturing a 'sub standard' drug but a 'spurious drug' which is a graver offence punishable under Section 27 (c) which is now triable by a Special Court constituted by virtue of the provisions contained in Section 36 AB by virtue of the Drugs and Cosmetics (Amendment) Act, 2008 and the likelihood of the learned Magistrate committing the case to the Special Court, the petitioners submitted the application (Exhibit 38) requesting the Magistrate to try the case himself. The application was opposed by the prosecution and by the impugned order, the learned Magistrate rejected the application (Exhibit 38) and by passing a separate order on

the complaint (Exhibit 1) which is also impugned here in, committed the case to the Special Court. Hence, this petition.

5. The learned Senior Advocate Mr. Deshmukkh for the petitioners vehemently submitted that both the orders passed by the Magistrate are erroneous. As the complaint was filed and the cognizance was taken by the Magistrate for the offence punishable under Section 27 (d), the Magistrate ought to have continued to try the case since even after the amendment of the Act in the year 2008, the offence punishable under that Section continues to be triable by the Magistrate. He would point out that by virtue of the Amendment, a Special Court is constituted but it is only in respect of the graver offences enlisted in Section 36 AB that the jurisdiction to try the cases is conferred upon the Special Courts and the rest of the offences still continue to be triable by Magistrates.

6. The learned Senior Advocate thereafter submitted that it is only because of the subsequent analysis done by the Central Laboratory pursuant to the request made by the petitioners that now the prosecution is seeking to try the petitioners for a graver offence punishable under Section 27 (c) treating the sample to be not only 'sub standard' but 'spurious' as well. Since the report was solicited not by the prosecution but by the defence, it cannot be used

against the petitioners. The learned Senior Advocate also submitted that even this certificate issued by the Central Laboratory does not specifically mention anywhere that the sample was spurious. It is under these circumstances that the Magistrate has merely drawn an inference that the drug is spurious and being an offence punishable under Section 27 (c) which is triable by the Special Court constituted under Section 36 - AB that he has ordered committal of the case to the Special Court. The procedure being adopted is illegal and the impugned orders are not sustainable in law.

7. The learned Senior Advocate further submitted that the learned Magistrate is still to proceed with the trial and consequently, the stage at which the powers under Section 323 of the Cr.P.C. could be invoked has not reached. The inference drawn by the learned Magistrate being premature one, drawn even before the commencement of the trial, is grossly erroneous.

8. Lastly, the learned Senior Advocate submitted that the petitioners are entitled to a protection under Article 20 (1) of the Constitution and cannot be subjected to a greater punishment than what was provided in the Statute prior to the Amendment effected in the year 2008 when the offence has been committed in the year 1996-1997.

9. The learned Senior Advocate also pointed out that in fact, the

predecessor of the present Magistrate had specifically rejected the application (Exhibit 31) filed by the prosecution seeking addition of the charge for the offence punishable under Section 27 (c) read with Section 17 (b) (d) of the Act. Therefore, the successor Magistrate should not have reconsidered the issue and passed the impugned orders.

10. The learned Senior Advocate also placed reliance on following decisions:

(i) M/s. Gaba Pharmaceuticals Private Limited, Hyderabad and others Vs. Union of India rep. by Drugs Inspector and another, 2016 (1) ALT (Cri) 18 (A.P),

(ii) M/s. Medicamen Bio-tech Limited, Rajasthan and others Vs. State of A.P and another, 2016 (2) ALT (Cri) 49 (A.P),

(iii) M/s. RA Chem Pharma Limited rep. by its Managing Director Mr. J. Rajendra Rao and another Vs. State of A.P and others, 2019 (1) ALT (Cri) 152 (T.S. & A.P),

(iv) Zest Pharma and others Vs. Drug Inspector and others, 2014 (2) DRUGS CASES (DC) 121,

(v) C.P Udayadivakaran Vs. State of Kerala, 2012 LawSuit (Ker) 929,

(vi) Mohan Lal Vs. State of Rajasthan, (2015) 6 SCC 222,

(vii) Rajendra Madhav Pate Vs. State of Maharashtra and another, 2016 DGLS (Bom.) 456.

11. Learned APP strongly supported both the impugned orders. He submitted that it is not a matter of punishing the petitioners by applying the amended provision retrospectively, which stage is yet to come. He would submit that though initially the complaint was filed for the offence punishable under Section 27 (d) since the State Laboratory had certified the drug to be sub standard, subsequently, at the instance of the petitioners themselves that the sample was sent to the Central Drug Laboratory which thereafter drew a conclusion about the drug being not the drug which it claims to be which in effect makes it a spurious one as defined under Section 17 - B of the Act. It is in view of such subsequent evidence in the form of certificate of the Central Laboratory, the Magistrate has recorded a *prima facie* opinion about the drug being spurious and the offence, in fact, would be the one punishable under Section 27 (c) read with Section 17 - B. He would then submit that the offence punishable under Section 27 (d) being only a summons case, there was no occasion for the Magistrate to frame any charge. Therefore, when during the course of pendency of the matter before him it transpired to him that some graver offence is committed which is now made triable by a Special

Court by virtue of Amendment of the year 2008, he has rightly exercised the jurisdiction vested in him under Section 323 of the Cr.P.C. and has rightly ordered committal of the case to the Special Court. Therefore, there is no need to cause any interference. Lastly, the learned APP submitted that the decisions cited on behalf of the petitioners are not at all applicable to the fact situation of the matter in hand.

12. There is no dispute about the fact that as the complaint that was originally filed in the year 1996, was based on the report of the State Laboratory in Form 13, whereby, it was found that the sample was sub standard and accordingly, the complaint was filed for the offence punishable under Section 27 (d) read with Section 18 (a) (i), Section 16 and Section 34 of the Act. It is also equally admitted that the petitioners applied for the sample being analyzed by the Central Drugs Laboratory, Culcutta and pursuant to such request, the sample was sent to that Laboratory and the report was received in Form 2, dated 08.01.1997, with the result mentioned herein above. It is also not in dispute that the Drugs and Cosmetics Act was amended in the year 2008 and *inter alia* provided for constitution of Special Courts under Section 36 AB for trial of the offences listed therein. There is also no dispute that even after such amendment and constitution of Special Courts, some lesser offences including the one punishable under Section

27 (d) are still triable by the Magistrates. There is also no dispute about the fact that pursuant to such amendment, the State Government, by virtue of a notification dated 03.02.2015, has established Special Courts. It is in the backdrop of such admitted facts that now I shall advert to the rival stands.

13. There cannot be a debate that a person accused of a crime cannot be subjected to a greater punishment than that is provided under a Statute on the date of commission of the crime. In another words, there cannot be a retrospective operation of a criminal law providing for a greater punishment. The protection under Article 20 of the Constitution is indeed a right vested in an individual and deserves to be enforced. However, suffice for the purpose to note that that stage is still to reach in the matter in hand where the petitioners are still to face the trial. It is only at the end of the trial when they are to be convicted and sentenced that this line of argument could be adopted. It is rather premature to predict anything of the sort.

14. As far as the conclusion drawn by the Central Laboratory, true it is that it does not specifically use the word 'sub standard' or 'spurious' but the remarks noted herein above in that certificate make it abundantly clear that *prima facie* at least, it would be a case of the sample being spurious within the meaning of Section 17 - B of the Act, which defines a spurious drug as under :

“A drug shall be deemed to be spurious –

(a) if it is manufactured under a name which belongs to another drug; or

(b) if it is an imitation of, or is a substitute for, another drug or resembles another drug in a manner likely to deceive or bears upon it or upon its label or container the name of another drug unless it is plainly and conspicuously marked so as to reveal its true character and its lack of identity with such other drug; or

(c) if the label or container bears the name of an individual or company purporting to be the manufacturer of the drug, which individual or company is fictitious or does not exist, or

(d) if it has been substituted wholly or in part by another drug or substance; or

(e) if it purports to be the product of a manufacturer of whom it is not truly a product.”

The remarks clearly mentioned that the sample does not conform to the claim with respect to the contents of specific ingredients. I do not intend to influence the trial Court by indulging in further discussion and the learned trial Court may arrive at its independent conclusion uninfluenced by the observations made herein. The fact remains that the observation of the Magistrate that prima facie it is a case of spurious drug which is an offence

punishable under Section 27 (c) do not seem to be unsustainable.

15. The submission of the learned Senior Advocate Mr. Deshmukkh that it is only the defence which can take the benefit of the result of the subsequent analysis done by the Central Laboratory, in my considered view, is not sound. It is a matter of evidence. Once a piece of evidence comes on record, it would be inconsequential as to at whose instance such a piece of evidence comes on the record. The goal of any judicial scrutiny is to reach at the truth. The argument, therefore, is emotional rather than legal and cannot be accepted. If the accused choose to get a sample analyzed, it is a just possibility that the result may sometimes go against him and it would not be legal to ignore such result when it goes against him but to accept it if it is in his favour. Therefore, there is no substance in this line of argument.

16. Now coming to the next submission of the learned Senior Advocate, Section 323 of the Cr.P.C. clearly lays down that when a Magistrate during the course of enquiry or trial comes to the conclusion that the case ought to be tried by the Sessions Court, he can commit the case accordingly. If such is the legal position, though the trial can only be said to have commenced when the Magistrate for the first time applies his mind, the enquiry begins no sooner he takes cognizance and proceeds with the case. Therefore, it is not that it is

only during the course of trial that a Magistrate can exercise this power. He can exercise it even at an earlier stage as well. An enquiry is a continuous process which commences with taking cognizance. Therefore, after filing of a complaint or the charge sheet, immediately or at some later stage, if the Magistrate comes to a conclusion that some graver offence triable by the Special Court is committed which though not specifically alleged in the complaint or the charge sheet, the Magistrate may invoke the powers under Section 323. This is what has happened in the matter in hand.

17. Admittedly, the complaint as it was filed for the offence punishable under Section 27 (d) being a summons triable case, the stage of enquiry began with the filing of the complaint and taking of the cognizance. There was no occasion for him to frame a charge albeit, in the order passed on the application (Exhibit 31) it was erroneously observed that the matter was to be listed for recording evidence before the charge which clearly indicates that he was treating the case as a warrant case instituted otherwise than on a police report by following a procedure prescribed under Chapter XIX - (B) of the Cr.P.C. Be that as it may, after receipt of a report from the Central Laboratory during pendency of the case, the Magistrate has found that *prima facie*, it is a case which is punishable under Section 27 (c) and by virtue of constitution of a Special Court under Section 36 - AB after the Amendment in the year 2008,

it is only the Special Court which would have a jurisdiction to try it and has accordingly directed its committal by the impugned order. The orders, therefore, are clearly sustainable and can be treated to be one passed under Section 323 of the Cr.P.C.

18. As far as change of forum is concerned, it is a settled law right from the decision of the Constitution Bench in the case of *Rao Shiv Bahadur Singh and another Vs. The State of Vindhya Pradesh, AIR 1953 SC 394*, wherein it has been laid down while dealing with the import of Article 20 (1) of the Constitution by observing that what has been prohibited under that Article is the conviction and sentence in a criminal proceeding under the *ex post facto* law and not the trial thereof. A person accused of a commission of an offence has no fundamental right to trial by a particular Court or by a particular procedure except on the ground of discrimination or violation of any other fundamental right. Suffice for the purpose to observe that this is what has been referred to and followed by the Supreme Court in the case of *Mohan Lal* (supra) cited on behalf of the petitioners.

19. It is precisely for these reasons that I had put a query to the learned Senior Advocate Mr. Deshmukh, as to what kind of prejudice is likely to be caused to the petitioners even if the case is committed to the Special Court

and they are tried by it instead of by a Magistrate. The learned Senior Advocate could only assert that since it is a case for the offence punishable under Section 27 (d) which is still triable by the Magistrate, the Magistrate could not have committed the case to the Special Court assuming that the offence is, in fact, punishable under Section 27 (c). In my considered view, no prejudice is likely to be caused to the petitioners even if they are tried by the Special Court.

20. The decisions being referred to and relied upon by the learned Senior Advocate for the petitioners (supra) in fact do not specifically advert to the peculiar facts and circumstances of the matter in hand. Rather, in the case of ***M/s. Gaba Pharmaceuticals Pvt. Ltd.*** (supra), there was no reference to any specific penal provision as to if the offence was punishable under Section clause (a) to clause (c) of Section 27 and it is in that context, when the matter was committed by the Magistrate to the Special Court constituted under Section 36 - AB, the Andhra Pradesh High Court had observed that since there was no reference in the complaint as to the specific offence and since even the committal order was silent about it, the Special Court to which the case was committed should hear the parties therein and to pass appropriate order and may send back the case to the Magistrate under Section 228 of the Cr.P.C. In the matter in hand there was a specific request to frame a charge for the

offence punishable under Section 27 (c) after receipt of the report of Central Laboratory. By the speaking orders which are impugned in this petition, the Magistrate after application of mind, has come to the conclusion about the offence *prima facie* being under Section 27 (c) and he has committed the case to the Special Court.

21. Again, in the case of ***M/s. RA Chem Pharma Ltd.*** (supra), the accused were not being charged for selling any spurious or adulterated drug but were charged for manufacturing without obtaining licence which was an offence punishable under Section 27 (b) and 27 (d) which were not triable by Special Court and still the Special Court had assumed jurisdiction and directed a charge to be framed. This is not a fact situation in the matter in hand. The Magistrate having concluded that the offence is punishable under Section 27 (c) which is triable by the Special Court that he has directed its committal.

22. In the case of ***Zest Pharma*** (supra) the offence for which the complaint was filed was punishable under Section 27 (d) and still the Magistrate had committed the case to the Special Court which is not the fact situation in the matter in hand.

23. The decision in the case of ***C.P. Udayadivakaran*** (supra) is favorable to the prosecution rather than the petitioners. The submission on behalf of the

accused to the effect that the Special Court constituted under Section 36 AB had no jurisdiction to try the offences of which cognizance was taken by the Magistrate prior to coming into the force of the Amendment in the year 2008, was not accepted.

24. If it comes to the question of imposing punishment that obviously, as is mentioned herein above the petitioners would have a right under Article 20 (1) of the Constitution but so far as the forum is concerned, when the Special Courts have come into existence by virtue of the Amendment in the year 2008, though the offence in the matter in hand was committed prior thereto, they would have to be tried by the Special Court once it was found by the Magistrate that the offence is punishable under Section 27 (c) of the Act.

25. So far as the decision in the case of *M/s. Medicamen Bio-tech Limited Rajasthan* (supra) is concerned, with respect, it is not relevant and useful to decide the matter in controversy. In that case the Magistrate had adopted a wrong procedure. The offence therein was punishable under Section 27 (d) read with Section 18 (a) (i) of the Act. Since the offence is punishable with imprisonment of a term up to two years and fine, obviously it was a summons case as defined under Section 2 (w) of the Cr.P.C. and still, the Magistrate had

proceeded with the trial as if it was a warrant case. It was, therefore, held that there was no need to frame charge. The successor Magistrate had corrected the error as has happened in the matter in hand, as referred to herein above. It was, therefore, held that the trial up to the stage of such rectification done by the successor Magistrate, was liable to be quashed and set aside. In the matter in hand, that contingency has not arisen since the trial is yet to commence and the Magistrate has already passed the impugned order committing the case to the Special Court.

26. The decision in the case of ***Rajendra Madhav Pate*** (supra) is absolutely irrelevant. It was a case where the police had investigated the matter under the Drugs and Cosmetics Act without obtaining sanction from the Magistrate under Section 155 (2) of the Cr.P.C. It was held by this Court that it was a sheer abuse of the process of Court and the prosecution was struck down.

27. In the result there is no merit in the petition and it is liable to be dismissed.

28. The Writ Petition is dismissed. The trial is expedited. The Special Court shall conclude the trial within a period of six months from today. It is clarified

that the trial Court shall not get influenced by the observations made herein.

(MANGESH S. PATIL, J.)

29. After pronouncement, the learned Senior Advocate, makes a request that the period of six months may not be taken by the Trial Court rigidly because of the current pandemic situation since the petitioners/accused may not be able to attend the trial by coming down to Beed from Hyderabad.

30. It is clarified that the period stipulated herein is only directory and the trial Court may exercise its own discretion depending upon the fact situation of the matter.

(MANGESH S. PATIL, J.)