

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

CRIMINAL WRIT PETITION NO.878 OF 2019

- 1] M/s Quixotic Healthcare,
situated at 88-A, EPIP, Phase-II,
Thana, Baddi District: Solan
173-205 (Himachal Pradesh)
- 2] Shri. Satish Singhal s/o Shri Badri Prashad
Age : 50 years, Occu: Business
R/o House No.1102, Sector 44B,
Chandigarh.
- 3] Shri. Sanjeev Singh s/o Shri. Hari Chand,
Age: 40 years, Occu: Business,
R/o House No.831, Phase-XI, Mohali
- 4] Shri Harpreet Singh s/o Shri. Jasbir Singh Karla,
Age: 42 years, Occu: Business,
R/o House No.2611, Phase-XI, Mohali.
- 5] Mrs. Himjyoti Dhir D/o Shri. Mohinder Singh,
Age: 39 years, Occu: Business
R/o House No.-1042 Sector 36C,
Chandigarh.

... PETITIONERS

VERSUS

- 1] State of Maharashtra through
Drug Inspector Beed,
Shri. Vilas Vishwanath Dusane,
Age: Major, Occu: Drug Inspector,
R/o Food & Drug Administration,
Maharashtra State
Shahu Nagar Pangari Road,
Beed, District: Beed.

2] Commissioner, Food & Drug Administration
M.S. Survey No.34, Bandra, Mumbai ... **RESPONDENTS**

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Mrs. Rashmi S. Kulkarni h/f Mr. S.S. Kulkarni, Advocate for petitioners.
Mr. A.R. Kale, APP for respondents-State.

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CORAM : SMT. VIBHA KANKANWADI, J.

JUDGMENT RESERVED ON : 18th December, 2019.

JUDGMENT PRONOUNCED ON : 12th February, 2020.

JUDGMENT

. Present petition has been filed by original accused persons thereby praying for quashing and setting aside the order of issuance of process dated 30-08-2010 passed in R.C.C. No.257 of 2010 filed before the learned Judicial Magistrate, First Class, Georai, Dist. Beed. The petitioners are also praying for the entire quashment of the proceedings by invoking the constitutional powers of this Court under Article 227 of the Constitution of India.

2. The factual matrix leading to the present petition are that :-

The State, through Drug Inspector Vilas Dusane, filed the said complaint on 30-08-2010 before the learned Magistrate. It was contended

that accused No.1 is a partnership firm, doing business of manufacture for sale of pharmaceutical formulations, drugs and medicines. Accused No.1 is holding drug manufacturing licence which was valid on the date of the complaint. Accused Nos.2 to 5 are the partners of accused No.1. Accused No.6 is working as FDA approved manufacturing chemist of accused No.1. Accused No.7 is FDA approved analytical chemist in accused No.1. It was contended that the Drug Inspector along with Assistant Commissioner, Food and Drugs Administration Maharashtra State, Beed, visited and inspected the premises of M/s Mahaveer Agencies at Georai on 17-11-2009. One Mrs. Seema Kala, proprietor of the said firm, was present at the time of inspection. The complainant had drawn sample of 4 x 1 x 200 ml. Utizyme syrup Digestive Enzymes pineapple flavour manufactured by accused No.1 and marketed by M/s. Medley Pharmaceutical Limited, Mumbai along with other drug samples from the premises of said M/s Mahaveer Agencies. The price of the samples Rs.973/- was paid by the office of the Assistant Commissioner. Complainant had sent one sealed part of the sample on 18-11-2009 to the Government Analyst, Maharashtra State, for testing and analysing. He had sent a duplicate copy of memorandum in form No.18 and specimen seal impression on the same day. He received certificate of test/analysis by Government Analyst on 02-02-2010. It was opined that the

sample Utizyme syrup Digestive Enzymes pineapple flavour mfg. Lic No.MB/06/327 Batch No.MUE-022, mfg dt.03/2009 Exp. dt.08/2010 mfg by Quixotic Healthcare, 88A, EPIP, phase-II, Thana Baddi. Dist. Solan(H.P) 173205 marketed by Medley pharmaceutical, Ltd. Medley House, D2, MIDC Area, Andheri (East) Mumbai-400097 is not of standard quality. After the said certificate was received, notice was issued by the complainant on the same day to accused No.1. The said notice was received by the accused No.1 on 15-02-2010 where accused No.1 had requested for rechecking the sample. The complainant, vide letter dated 15-03-2010, informed accused No.1 that the rechecking is not permissible from their end and valid according to law but it was informed that if they are interested to send the sample to the Director Central Drugs Laboratory, Kolkata for reanalysis, then they can do it by giving it in writing. On 02-02-2010 itself, another communication was given by the complainant to M/s. Mahaveer Agencies calling upon the details/particulars. Accordingly, the details were given on 04-03-2010. It is further stated that the complainant along with two independent witnesses visited and inspected the premises of M/s. Mahaveer Agencies on 21-05-2010, and seized the unsold balance stock of the said drugs. The complainant filed Miscellaneous Criminal Application No.251 of 2010 On 21-05-2010, before the learned Judicial Magistrate

First Class, Georai, Dist. Beed for the safe custody of drugs. Accordingly, the applicant was directed to keep the custody of the seized stock. Copy of the certificate was also sent to M/s Appolo Pharma and enquiry was made with that institution. Thereafter, the complainant visited the office of the licensing authority on 23-03-2010 and handed over the letter dated 22-03-2010 for investigation of the matter at Nava Yugha Pharma Pvt. Ltd. at Indore in Madhya Pradesh. Copy of the test/analysis by Government Analyst, Maharashtra State dated 23-03-2010 was given to Shri. Prashant Namdeo of M/s Nava Yugha Pharma Pvt. Ltd. During inquiry, it was revealed that they have purchased 1800 bottles of 200 ml. Utizyme syrup Digestive Enzymes pineapple flavour. The complainant had then given copy of certificate dated 18-03-2010 to M/s Medley Pharmaceutical Ltd. So also, the copy of the certificate of test/analysis by the Government Analyst Maharashtra State dated 30-03-2010 was sent to said M/s Medley Pharmaceutical Ltd. Enquiry was made with M/s Medley Pharmaceutical Ltd. on 20-04-2010 and the details were taken. The complainant visited the premises of accused No.1 on 27-03-2010, and during enquiry, it was revealed that accused Nos.1 to 7 manufactured the drugs which has been then declared as not of standard quality. Hence, after completion of all the legal requirements, the Drug Inspector filed the complaint before learned

Judicial Magistrate First Class, Georai, Dist. Beed.

3. Taking into consideration the complaint, learned Magistrate, issued process against all the accused persons on 30-08-2010. The said complaint as well as the order is under challenge in this criminal writ petition.

4. Heard learned Advocate Mrs. Rashmi S. Kulkarni holding for Mr. S.S. Kulkarni for petitioners and learned APP Mr. A.R. Kale for respondents-State.

5. It has been vehemently submitted on behalf of the petitioners that the sample was collected by the drug inspector on 17-11-2009 and it was sent for chemical analysis to Government Analyst, Maharashtra State Drugs Control Laboratory, Mumbai on 18-11-2009 i.e. the next day after the seizure. As per Rule 45 of the Drugs and Cosmetics Rules, 1945 the sample should be tested within 60 days. Rule 45 reads thus :-

“45. Duties of Government Analysts. - (1) The Government Analyst shall cause to be analysed or tested such samples of drugs [and cosmetics] as may be sent to him by Inspectors or other persons under the provisions of Chapter IV of the Act and shall furnish reports of the results of test or analysis in

accordance with these rules [within a period of sixty days of the receipt of the sample:

Provided that where it is not possible to test or analyse the sample within the specified period, the Government Analyst shall seek extension of time from the Government giving specific reasons for delay in such testing or analysis.]

(2) A Government Analyst shall from time to time forward to the Government reports giving the result of analytical work and research with a view to their publication at the discretion of Government.”

However, in this case, the testing is beyond the said period. The sample was received by the laboratory on 27-11-2009, yet, the laboratory had conducted the test and signed the report on 27-01-2010. The delay in testing has not been explained at all in the report. Further, there is delay in lodging the complaint also. The complainant had the knowledge that the shelf life of the drug was to expire on 31-08-2010. The complainant had also the knowledge that the petitioners have right under Section 25 of the Drugs and Cosmetics Act, 1940 to request the Court to send the sample for analysis to the central laboratory. In spite of knowledge of these facts, the complaint has been filed on 30-08-2010. Now, the vital right of the accused to get the sample tested has been denied by the

complainant and therefore, there cannot be a fair trial. Reliance has been placed on the decisions in **M. Sea Pharmaceuticals Pvt. Ltd. and another Vs. The state of Maharashtra and another**, [2018 ALL MR (Cri) 3946, wherein this Court had considered similar circumstances and held that due to the expiry of the drug, vital right of the applicants to get the sample analysed is violated and therefore, it was taken as a fit case to invoke the powers of this Court under Section 482 of the Criminal Procedure Code. Similar view was also taken in **Parenteral Drugs (India) Ltd. and Ors. Vs. The State of Maharashtra**, [MANU/MH/0996/2019], wherein it has been further stated that summoning of accused in criminal case is serious matter. Criminal law cannot be set into motion as a matter of course. The order of issuing process should reflect that the Court had applied its mind to the facts of the case. The Court is suppose to examine the nature of the allegations made in the complaint and supporting evidence. The material on record should *prima facie* constitute an offence complained of, then only the process can be issued against the accused persons. When all these factors are absent, the impugned order deserves to be quashed and set aside. The Hon'ble Apex Court in **M/s. Medicamen Biotech Ltd. and Anr. Vs. High Court of Delhi** [AIR 2008 SC 1939] has also held that "if the right to get sample analysed by Central Drugs Laboratory is deprived and when the accused is

disputing the report; complainant filing the complaint just few days before expiry of sample drug, then the valuable right to get the sample retested is lost. Hence, the complaint is liable to be quashed. Similar view was further taken in **M.S. Theivendran and Ors. Vs. State of Maharashtra and Ors.**[2015 ALL MR (Cri) 1394].

6. Per contra, the learned APP vehemently submitted that the petitioners are challenging the order of issuance of process. They had the right to challenge it by resorting to the provisions of Section 397 of the Code of Criminal Procedure before the learned Sessions Court. When alternative efficacious remedy is available, then the powers of this Court under Article 226 of the Constitution of India should not be exercised. He placed reliance on the decisions in **Chetan R. Nagda Vs. N.D. Pawar and another**, [2006(1) AIR Bom. R 733] and **Floyd D. Auiar Vs. Bronwyn D. Aguiar and another**, [2007(1) Bom.C.R.(Cri.)912]. He further submitted that letter given by accused No.1 dated 02-03-2010 does not spell their intention to get the sample examined. In other words, it can be said that there was no intention which can be spelt out from the letter dated 02-03-2010 given by accused No.1 that, they wanted to exercise any such right given under Section 25 of the Drugs and Cosmetics Act, 1940; when the

law requires that the dispute to be raised in a prescribed form and that too by payment of requisite fees. The original complainant has filed affidavit-in-reply and submitted that mere submission by the accused that “we do not agree with the report of Government Analyst and we request your honour to kindly recheck the sample at your end” will not automatically empower the accused for re-submission of samples to the Central Drugs Laboratory. Further Section 25(3) of the Drugs and Cosmetics Act, 1940 specifically provides for the limitations for agitating the provisions against the Government Analyst report. It prescribes the period of 28 days from the receipt of the report. No such step was taken by the accused in this case. It is also stated in the affidavit that when the petitioners had not responded and had not requested him in writing to send the sample for retesting at Central Drugs Laboratory, Kolkata, he had visited the factory of accused No.1 personally for further investigation on 27-03-2010. He says that he had handed over one sealed counter part of the sample of said drug containing 1 x 200 ml. of the said drug in sealed condition. This fact has not been denied by the accused and therefore, they cannot now agitate that their vital right has been taken away. Reliance has been placed by the learned APP on the decision in **GlaxoSmithKline Pharmaceuticals Ltd. and another Vs. State of Madhya Pradesh [Criminal Appeal No.1489 of 2011**

(arising out of SLP (Cri.)No.3 of 2011)] decided by Hon'ble Apex Court on 28-07-2011, wherein it has been held that "when the appellant i.e. accused and co-accused did not give any option to adduce evidence in contravention of the analyst's report within statutory limitation period, then even if there is inordinate delay in launching the criminal prosecution or filing the complaint, it has no consequence.

7. Learned Advocate appearing for the petitioner in reply to the maintainability of the petition submitted that merely because an alternative efficacious remedy is available that does not mean that the powers of the Court under writ petition and also under Section 482 of the Code of Criminal Procedure are taken away. Reliance has been placed by her on **Dhariwal Tobacco Products Ltd. and Ors. Vs. State of Maharashtra and Anr. [2009 AIR (SC) 1032]**, wherein it has been held in paragraph No.11 that :-

"11. Taking into consideration the facts and circumstances of those cases the learned judge has observed in V. K. Jain and Saket Gore (Supra) that it would be appropriate for the parties to file revision application against the order of issuance of process. There is nothing mentioned and/or even observed that there is total bar to file petition under Section 482 of Criminal Procedure Code and/or petition under Article 227 of the Constitution of India."

The Hon'ble Apex Court has taken note of this Court's judgment in **Vishwanaath Ramkrishna Patil and another Vs. Ashok Murlidhar Sonar and another** [2006 (5) Mh.L.J. 671] wherein it has been held that "nowhere prohibited or expressly barred to invoke Section 482 Criminal Procedure Code or Article 227 of the Constitution of India against the order of issuance of process." Further it was held that the decision in **V. K. Jain and others Vs. Pratap V. Padode and another**, [2005(30) Mh.L.J. 778] does not lay down good law and it was over ruled. Further reliance has been placed on the decision in **Prabhu Chawla Vs. State of Rajasthan and another** [2016 AIR (SC) 4245] wherein it has been held that "availability of alternative remedy of criminal revision under Section 397 of the Code of Criminal Procedure by itself cannot be a good ground to dismiss an application under Section 482 of Criminal Procedure Code."

8. It would be appropriate to deal with the maintainability point at the first place. In view of the decisions by Supreme Court in **Prabhu Chawla's** case (Supra) as well as **Dhariwal Tobacco Products Ltd.** (Supra); there is no room for taking note of the decisions cited by the learned APP, which were of this Court into consideration. Further as aforesaid in

Dhariwal Tobacco Products Ltd. (Supra), the view taken by this Court in **Vishwanath Patil** (Supra) which was rendered by this Bench of the Bombay High Court, was upheld. Though it has been stated that, there is no bar for this Court to invoke its power under Section 482 of Criminal Procedure Code for quashing the proceedings and though this petition for quashing the entire proceedings has been filed under Article 227 of the Constitution of India, yet, taking into consideration **Dhariwal Tobacco Products Ltd.'s** judgment (Supra) even the powers of this Court under Article 227 of the Constitution of India can be exercised for quashing the proceedings and the alternative efficacious remedy under Section 397 of the Code of Criminal Procedure will not be a bar.

9. Turning towards the main point that has been agitated on behalf of the petitioners, it is to be noted that the complainant had visited Mahaveer Stores to draw samples on 17-11-2019. He sent the sample for analysis on 18-11-2009. The report was received on 02-02-2010 after the laboratory had conducted the test on 27-01-2020. This testing of the sample is beyond the statutory period prescribed under Rule 45 (supra). When the sample was tested after the expiry period, the the result is bond to be 'not of standard quality'. There is no explanation by the Laboratory

about the delayed testing. Such report can not be considered at all. Benefit of such lapse on the part of the Laboratory should go to accused. Further, as per the complainant himself, he had made various communications on 02-02-2010 including the letter sent to the present petitioners. It is not in dispute that the accused No.1 gave letter dated 15-02-2010, in which, it has been specifically stated that they are not agreeing with the report and would like to have rechecking. They might have not given it in the form prescribed or along with the fees that was required to be paid, but that cannot be the ground to refuse. There was no question of limitation as the said right and intention to get the sample rechecked was exercised within limitation i.e. within 28 days from the knowledge of the report. Therefore, the ratio laid down in **GlaxoSmithKline Pharmaceuticals Ltd.** (Supra) cannot be made applicable as the facts differ. Another point to be noted is that when the complainant had knowledge that the accused want to dispute the report and the wordings given in paragraph No.6 in the affidavit-in-reply filed on behalf of respondent No.3 were very much clear about the said intention, then the complainant ought to have taken steps. Surprisingly, since he says that when he had visited the factory of accused No.1 personally, he had handed over one sealed counter part of the sample. He has not produced any acknowledgment regarding handing over of the

sample to accused No.1 and under which provisions of law, he had done that act has also not been explained by him. Surprising part to be noted is that even before the accused had received notice dated 02-02-2010; the sanction to prosecution was granted by the competent authority on 15-02-2010. In fact, on that day, the petitioner had received the notice dated 02-02-2010.

10. The most important point to be noted is that since beginning, the complainant had the knowledge that the shelf life of the drug, of which the sample has been taken, would expire on 31-08-2010. When he had received the report on 02-02-2010 and got the knowledge that the accused want to get the sample rechecked as expressed in their letter dated 02-03-2010, so also, the sanction for prosecution was taken on 15-02-2010 itself, then why he was required to wait till 30-08-2010 to lodge the report is a question and the entire contents of the complaint are silent on this point. The learned Magistrate totally erred in passing the order of issuance of process as he did not consider that on the next day of the presentation of complaint, the drug was to expire. Even after the order of issuance of process has been passed on the same day of the presentation of complaint i.e. 30-08-2010, the summons would not have been served immediately.

Learned Magistrate failed to consider that testing of the sample was not done with the mandatory period by the Laboratory. There is total non application of mind by the learned Magistrate while passing the impugned order. Therefore, definitely, the observations by this Court in **Parenteral Drugs (India) Ltd.** (Supra) are applicable here. Further the ratio in **M. Sea Pharmaceutical Pvt. Ltd.** (Supra) and **M.S. Medicamen Biotech Ltd.** (Supra) are also applicable. When the vital right of the accused to get the sample rechecked under Section 25(3) and 25(4) of the Drugs and Cosmetics Act, 1940 have been violated because of belated filing of the complaint, then this is a fit case where the constitutional powers of this Court under Article 227 of the Constitution of India should be exercised.

11. In the result, the writ petition is allowed. The proceedings in R.C.C. No.257 of 2010 filed before learned Judicial Magistrate First Class, Georai, Dist. Beed are hereby quashed and set aside.

[SMT. VIBHA KANKANWADI, J.]

SCM