HONOURABLE JUSTICE G. SRI DEVI

CRIMINAL PETITION No. 8737 of 2015

ORDER:

This Criminal petition is filed under Section 482 Cr.P.C. seeking quashing of proceedings in P.R.C.No.54 of 2013 on the file of the Judicial First Class Magistrate, Parkal, Warangal District. A complaint came to be filed by the second respondent under Section 32 of the Drugs and Cosmetics Act, 1940 (for short "the Act") against the petitioners and others, for contravening the Sections 18 (a) (i) read with Section 34 punishable under Section 27 (d) of the Act.

The gist of the averments in the complaint would show that on 13.04.2011, the second respondent inspected the pharmacy stores of the Community Health Centre, Parkal. He had lifted seven varieties of drugs manufactured by different companies vide Form No.17. Thereafter, on 15.04.2011, the sample portion was sent to the Government Analyst Drugs Control Laboratory, for test. The Government Analyst, issued a report dated 19.06.2012 stating that one of drug "Dilcofenac Sodium I.P. 50 mg." manufactured by the petitioner No.1 firm was "not of standard quality" and opined that the "sample does not comply for test for disintegration for enteric coated tablets as per I.P." On 22.06.2012, a petition under Section 23 (4) (ii) of the Act was filed before the Court, for depositing the second sealed portion of the drug sample for safe custody, which was allowed and the second sample was deposited before the Court vide

C.P.R.No.110/2012. Copy of the said petition was also sent to the petitioner No.1 company (manufacturer) for taking necessary steps as per law. On 22.06.2012, copy of the analytical report along with a notice was sent to the Medical Officer, Community Health Centre, Parkal, as required under Section 25 (2) of the Act and requested to disclose the source of supply of the said drug. On 04.07.2012, a reply was received from the Executive Engineer of CDS, Warangal, stating that they received the said drug from petitioner No.1 firm through the purchase order, dated 26.06.2010. It is stated that accused No.1 firm manufactured and sold illegal "not of standard quality (NSQ) " drug to the innocent general public on behalf of accused No.2 and others, accused No.2, is the active Director and responsible for day-to-day administration of the company, deliberately manufactured, sold illegal NSQ drug in the entire Country. Basing on the above allegations a complaint came to be filed.

Heard learned counsel for the petitioners and Additional Public Prosecutor appearing for the respondents.

The main contention of the learned counsel for the petitioners is that the petitioners have lost their valuable right of sending second sample for analysis. It is also contended that when the sample of a drug in question, could not be sent for second analysis before its expiry date, the accused are deprived of their right under Section 25 (3) of the Act, therefore, the complaint and other proceedings are liable to be

quashed. In support of his contention, learned Counsel for the petitioners/A1 and A2 relied on the following judgments.

1. ***Medicamen Biotech Limited and another v. Rubina Bose, Drug Inspector***[1]
2. ***Johnson and Johnson Limited v. State of Andhra Pradesh***[2]
3. ***M.V.Srinivasa Rao, Prop: M/s. Essel Pharma, Solan v. State of Andhra Pradesh***[3]

Learned Additional Public Prosecutor would submit that the petitioners filed a petition before the Court concerned, to send the second sample to Central Drug Laboratory, Kolcutta. By an order, dated 14.08.2012, the said petition was allowed by the learned Magistrate, directing the petitioner to deposit Demand Draft for Rs.1,000/- in favour of the Director, Central Drug Laboratory, Kolcutta, with a condition that he shall bear any further expenses required for conducting the test and the said D.D. shall be deposited before the said Court, within seven days, otherwise, the order shall stand cancelled. It is stated that the complaint itself shows that a notice was sent to the petitioners on 22.06.2012 by enclosing the analyst report, for taking necessary steps, but the petitioners have not availed the option given to them and therefore, they cannot complain that they have lost valuable right under Section 25 (3) of the Act. He further submits that the petitioners have not made their request to send the second sample for analysis within the period stipulated under Section 25 of the Act, as

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[1] (2008) 3 SCC (Cri) 20
[2] Crl.Petn. No.2277 of 2012
[3] Crl.P.No.3948/2013, dated 18.07.2019 of AP High Court

such, their objection is not tenable and that there are no grounds to quash the proceedings.

It is further contended by the learned Additional Public Prosecutor that all the objections raised on behalf of the petitioners are matter of evidence which have to be considered during trial and these aspects cannot be decided in a quash petition under Section 482 Cr.P.C.

Now, the point that would arise for consideration by this Court in this Criminal Petition is whether the proceedings in P.R.C.No.54 of 2013 on the file of the Judicial First Class Magistrate, Parkal, Warangal District, initiated by the 2nd respondent herein against the petitioners/accused for the offences punishable under Section 27 (d) of the Drugs and Cosmetics Act, 1940, Section 18 (a) (i) read with Section 34 of the Act, can be quashed or not?

According to the prosecution, the petitioners have contravened the provisions of the Act and thereby, liable for punishment under Section 27 (d) of the Act. It is the specific case of the prosecution that during the inspection of the Pharmacy stores of the Community Health Centre, Parkal, Warangal, on 13.04.2011, the 2nd respondent/complainant lifted seven varieties of drug samples manufactured by different companies and the same were sent to the Drugs Control Laboratory for analysis. One of the sample lifted by the 2nd respondent/complainant from the said Pharmacy store is "Dilcofenac Sodium I.P.-50 mg, B.No.EDF-219 M.dt.08/2010 Exp.dt.07/2012", which was manufactured by Accused No.1 firm. The

Analyst Report dated 19.06.2012 along with Laboratory Report, which was received on 22.06.2012, discloses that the drug is not of standard quality.

The main contention of the petitioners is that the mandatory provisions of Section 25 of the Act are not complied with. It is submitted that the sample of drug in question could not be sent for second analysis before its expiry date and it was due to the fault of the 2nd respondent/complainant. Further, the sample was collected on 13.04.2011and was sent to the Government Laboratory on 15.04.2011, which was received by the Laboratory on 06.05.2011. However, the Analyst Report dated 19.06.2012, was received by the 2nd respondent/complainant after more than one year i.e., on 22.06.2012, just before the expiry date of the drug i.e., July, 2012. The 2nd respondent/complainant has not mentioned in the letter addressed to the Medical Officer, CHC, Parkal, Warangal, dated 22.06.2012, that the sample was preserved and stored below 25 C temperature to protect the same from moisture, which is required. Thus, it is submitted that the sample of the drug in question could not be sent for second analysis and the petitioners have lost their valuable right available under Section 25 (3) of the Drugs and Cosmetics Act, 1940 and, therefore, the complaint and other proceedings have to be quashed.

In ***Laborate Pharmaceuticals India Limited and others v. State of Tamil Nadu***[4] the Apex Court in Para Nos.6 and 8 held as under:

[4] (2019) 1 SCC (Cri) 717

"6. A reading of the provisions of Sections 23 (4) and 25 of the Act would indicate that in the present case the sample having been taken from the premises of the retailer had to be divided into four portions; one portion is required to be given to the retailer; one portion is required to be sent to the Government Analyst and one to the Court and the last one to the manufacturer whose name, particulars, etc. is disclosed under Section 18A of the Act. In the present case, admittedly, one part of the sample that was required to be sent to the appellant (manufacturer) under Section 23 (4) (iii) of the Act was not sent. Instead, what was sent on 22nd March, 2012 was only the report of the Government Analyst. When the part of the sample was not sent to the manufacturer, the manufacturer could not have got the same analyzed even if he wanted to do so and, therefore, it was not in a position to contest the findings of the Government Analyst. In the present case, the sample was sent to the Appellant-manufacturer on 10th August, 2012 and on 13th September, 2012 the appellant had indicated its desire to have another part of the sample sent to the Central Laboratory for re-analysis. This was refused on the ground that the aforesaid request was made much after the stipulated period of 28 days provided for in Section 25 (3) of the Act.

8. All the aforesaid facts would go to show that the valuable right of the appellant to have the sample analyzed in the Central Laboratory has been denied by a series of defaults committed by the prosecution; firstly, in not sending to the appellant-manufacturer part of the sample as required under Section 23 (4) (iii) of the Act; and secondly, on the part of the Court in taking cognizance of the complaint on 4th March, 2015 though the same was filed on 28th November, 2012. The delay on both counts is not attributable to the Appellants and, therefore, the consequences thereof cannot work adversely to the interest of the Appellants. As the valuable right of the accused for re-analysis vested under the Act appears to have been violated and having regard to the possible shelf life of the

> drug, we are of the view that as on date the prosecution, if allowed to continue, would be a lame prosecution. Consequently and for the reasons alluded we are of the view that the present would be a fit case to interdict the criminal trial against the accused appellants. We order accordingly. Therefore, C.C.No.263 of 2015 pending on the file of the XV Metropolitan Magistrate, George Town, Chennai is hereby quashed. The appeal is allowed and the orders of the High Court is set aside."

In ***M.V.Srinivasa Rao, Prop: M/s. Essel Pharma, Solan v. State of Andhra Pradesh***[5] a learned Single Judge of Andhra Pradesh High Court held as under:

> "It is significant to note that, in the instant case, even though the date of manufacture of the drug is October, 2007 and the expiry date of the said drug is September, 2009, the State Analyst report was furnished to the accused on 26.10.2010 i.e. long after the date of expiry of the drug. Almost one year after the date of expiry of the drug, the report was furnished to the accused. So, even if the accused exercises his right conferred on him under Section 25(3) of the Act, to request the Court to send the drug for test or analysis by the Central Drug Laboratory, no useful purpose would be served as the drug already expired by then. So, the accused has no opportunity to test the correctness or genuineness of the report of the State Analyst. It is well settled law that the right conferred on the accused to have the drug tested by the Central Drug Laboratory is a valuable right conferred on him and if such a valuable right is defeated for any reason, the proceedings initiated against the accused on the basis of the said State Analyst report, which is not tested as per choice of the accused by the Central Drug Laboratory, stands vitiated."

[5] Crl.P.No.3948/2013, dated 18.07.2019 of AP High Court

In the instant case, the petitioners/accused filed an application before the Judicial Magistrate of First Class, Parkal, Warangal District, under Section 25 (3) (4) of Drugs and Cosmetics Act, 1940 and Section 45 of the Indian Evidence Act seeking to send the sample of the drug to the Central Drug Laboratory, Kolkata, for further analysis and that the trial Court, by an order, dated 14.08.2012, allowed the said application directing the petitioners to deposit a Demand Draft for an amount of Rs.1,000/- infavour of the Director, Central Drug Laboratory, Kolkata, before the Court within seven days. It is further directed that the petitioners shall bear any further expenses required for conducting the test. A perusal of the letter addressed by the Director In charge, Central Drugs Laboratory, Kolkata, to the Judicial Magistrate of First Class, Parkal, Warangal District, would reveal that the sample, sent by the Court vide Memorandum dated 01.09.2012, has been received by the Laboratory on 06.09.2012 and on opening of the parcel, it was found that the sample has already got expired in the month of July, 2012. It was further stated that since the sample has been received after the date of expiry. The test result will be communicated to the Court after completion of testing. Further, vide letter dated 28.09.2012, the Director In charge, Central Drugs Laboratory, Kolkata, after analysis, opined that the reasons for declaring the sample as not of standard quality. The sample does not conform to I.P. with respect to the test for 'Disintegration' only and that the sample was received and tested after the date of expiry. According to the petitioners/A1 and A2, the date of manufacture of the drug is August, 2010 and expiry

date of the drug is July, 2012 and the second sample was received by Central Drug Laboratory on 06.09.2012. Therefore, no useful purpose would be served as the drug was already expired by then. So, the petitioners/A1 and A2 have no opportunity to test the correctness or genuineness of the report of the State Analyst. Therefore, having regard to the aforesaid facts and circumstances of the case, continuation of the proceedings against the petitioners/A1 and A2 is nothing but an abuse of process of law.

Accordingly, the Criminal Petition is allowed and the proceedings against the petitioners/A1 and A2 in P.R.C.No.54 of 2013 on the file of the Judicial Magistrate of First Class, Parakal, are hereby quashed.

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

JUSTICE G.SRI DEVI

20.02.2020
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