

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL WRIT PETITION NO. 81 OF 2020**

1. M/s. Rhydburg Pharmaceuticals Ltd., Office at B-9, Commercial Complex, Dr. Mukharjee Nagar, Delhi - 110 009, Represented by Ashok Monga.
 2. Ashok Monga, Major of age, Indian National, Director of M/s Rhydburg Pharmaceuticals Ltd., Office at A-5, 2nd Floor, Model Town I, Delhi - 110 009.
 3. Akshay Monga, Major of Age, Indian National, R/o 120, Vasant Vihar (Phase-I), Dehradun, Uttarakhand - 248 001.
- Petitioners

Versus

Union of India, Ministry of Health and Family Welfare, C/o Drug Controller of Health Services, Through Drugs Inspector Sub zone/ Port Office, 3rd floor, Customs Building, Custom House, Marmagao, Goa - 403 803.

.... Respondent

Shri Shivan Desai with Shri A. Sardessai, Advocates for the Petitioners.

Ms. Susan Linhares, Standing Counsel for the Respondent.

CORAM : M. S. JAWALKAR, J.

RESERVED DATE : 25th AUGUST 2021

PRONOUNCED ON : 7th SEPTEMBER 2021

JUDGMENT

Heard Shri Shivan Desai who appears along with Shri A. Sardessai, the learned Counsel for the petitioners and Ms. Susan Linhares, the learned Standing Counsel for the respondent.

2. Rule. Rule made returnable forthwith at the request and with the consent of the learned Counsel for the parties. Ms. Linhares, the learned Standing Counsel waives notice on behalf of the respondent.

3. The challenge in the present Petition is to the order dated 14.02.2017 passed in Criminal Case No. 37/AOA/D&C/2017/D by the Judicial Magistrate First class at Vasco-Da-Gama. The petitioner no. 1 is a pharmaceutical Company registered under the Companies Act and operating since 1987. Petitoiners no. 2 is a senior citizen and Director of petitioner no. 1. Petitioner no. 3 is presently working as the operational manager in the manufacturing unit. The respondent is the Union of India.

4. Petitioner no. 1 manufactures various pharmaceutical drugs. One such drug manufactured by petitioner no. 1 is Ondansetron, which is branded as Rhydsteron-4 tablet. The said drug is manufacturer in the manufacturing unit situated at Dehradun, Uttarakhand and supplied to various parts of India.

5. On 12.01.2017, the respondent filed a criminal complaint against the petitioners under Section 18(a)(i) r/w Section 32(1) of the Drugs and Cosmetics Act, 1940 (the Act, for short) r/w Section 200 of Code of Criminal Procedure (Cr.P.C.). The criminal complaint was registered before the Judicial Magistrate First class at Vasco-da-Gama as Criminal Case No. 37/AOA/D&C/2017/D. By the impugned order dated 14.02.2017, the learned JMFC was pleased to issue process against the petitioners. The impugned order has been passed by the JMFC in pursuance of the aforementioned complaint lodged by the respondent against the petitioners under Section 18(a)(i) r/w Section 32(1) of the Act r/w Section 200 of Cr.P.C.

6. The petitioners state that although the allegations made against the petitioners and the material on record do not

disclose even *prima facie* case under Section 18(i)(a), 27(d) or Section 18-B of the said Act, yet the JMFC proceeded to issue process/summons against the petitioners for alleged commission of offence under the Act. On perusal of the complaint, it is evident that the same does not contain any material allegations against the petitioners. It is the case of the petitioners that the summons have been issued arbitrarily and in a most perfunctory manner as in the absence of any averments as against the petitioners, no case against the petitioners, punishable under the Act can be stated to be made out.

7. The petitioners state that the complaint is in respect of the batch of the said drug manufactured in the month of November 2012 having date of expiry as October 2014. The complainant has stated that on 20.11.2014, the complainant issued a letter informing petitioner no. 1 that the said drug was “Not of Standard Quality” and further directed to stop the sale of the said drug.

8. The petitioners submit that the respondent has not even followed the procedure established by law in reaching its

conclusion to investigate the issue regarding the drug manufactured by the Company and persons who were incharge of the Company when the subject drug was manufactured in November 2012. It is stated that since the mandatory procedure is not followed, the complaint as well as the summons issued thereon, without warrant or authority of law, are liable to be quashed.

9. The learned Counsel Shri Desai for the petitioners vehemently argued that when intimation was given, expiry date was already over and therefore, there is no opportunity to avail right under Section 25 of the Act. It is stated that the complaint itself is filed after the expiry date.

10. Section 25(4) of the Act runs as under:

25. Reports of Government Analysis -

(1)

(2)

(3)

(4) Unless the sample has already been tested or analysed in the Central Drugs Laboratory, where a person has under sub-section (3) notified his intention of adducing evidence in controversion of a Government Analyst's report, the Court may, of its own motion or in its discretion at the

request either of the complainant or the accused, cause the sample of the drug [or cosmetic] produced before the Magistrate under sub-section (4) of section 23 to be sent for test or analysis to the said Laboratory, which shall make the test or analysis and report in writing signed by, or under the authority of, the Director of the Central Drugs Laboratory the result thereof, and such report shall be conclusive evidence of the facts stated therein.

11. It is contended by the learned Counsel for the petitioners that in view of this, the accused would get an opportunity to send the sample for analysis to the Central Drugs Laboratory and the report thereof shall be conclusive evidence of facts therein.

12. The learned Advocate Shri Desai for the petitioners relied on **State of Haryana Vs. Unique Farmaid (P) Ltd. & Others** (with two other connected Petitions), **(1999) 8 SCC 190**, wherein the Hon'ble Apex Court held thus in para 11:

“Sub-section (1) of Section 30 which appears to be relevant only prescribes in effect that ignorance would be of no defence but that does not mean that if there are contraventions of other mandatory provisions of the Act, the accused have

no remedy. Procedure for testing the sample is prescribed and if it is contravened to the prejudice of the accused, he certainly has right to seek dismissal of the complaint. There cannot be two opinions about that. Then in order to safeguard the right of the accused to have the sample tested from Central Insecticides Laboratory, it is incumbent on the prosecution to file the complaint expeditiously so that the right of the accused is not lost. In the present case, by the time the respondents were asked to appear before the Court, expiry date of the insecticide was already over and sending of sample to the Central Insecticides Laboratory at that late stage would be of no consequence. This issue is no longer res integra. In the State of Punjab v. National Organic Chemical Industries Ltd., JT (1996) 10 SC 480, this Court in somewhat similar circumstances said that the procedure laid down under Section 24 of the Act deprived the accused to have sample tested by the Central Insecticides Laboratory and adduce evidence of the report so given in his defence. This Court stressed the need to lodge the complaint with utmost dispatch so that the accused may opt to avail the statutory defence. The Court held that the accused had been deprived of a valuable right statutorily available to him. On this view of the matter, the court did not allow the criminal complaint to proceed against the accused."

13. It is further submitted by the learned Counsel for the petitioners that the complaint in the present case is filed after the expiry date. It is contended that intimation to stop the use of the referred drugs is dated 30.10.2014, whereas, expiry is on the last day of October, 2014. As such, there was no opportunity to verify the quality of drug as provided under Section 25 of the Act. The learned Counsel relied on the decision of the Hon'ble Apex Court in **Medicamen Biotech Limited & Another Vs. Rubina Bose, Drug Inspector, (2008) 7 SCC 196** wherein the Hon'ble Apex Court held that:

“There is no explanation as to why the complaint itself had been filed about a month before the expiry of the shelf life of the drug and concededly the filing of the complaint had nothing to do with the appearance of the accused in response to the notices which were issued by the Court after the complaint had been filed. Likewise, requests for retesting of drug had been made by the appellant in August/September 2001 and there is absolutely no reason as to why the complaint could not have been filed earlier and fourth samples sent for retesting well within time. The facts of the case suggest that the appellants have been deprived of the valuable right under Section 25(3) and 25(4) of the Act which must necessitate quashing of proceedings against them.”

14. In reply to the preliminary objection that when Revision is maintainable, the Petition is not maintainable, it is submitted by the learned Counsel for the petitioner that even if Revision is maintainable, the Court can exercise inherent powers under Section 482 of Cr.P.C. In support of this, the learned Counsel for the petitioner relied on the decision of the Hon'ble Apex Court in the case of **Vijay & Another Vs. State of Maharashtra & Another, (2017) 13 SCC 317** and **Dhariwal Tobacco Products Ltd. & Others Vs. State of Maharashtra & Another, (2009) 2 SCC 370**. In sum and substance, principle of law emerges that mere availability of alternate remedy cannot be a ground to dis-entitle the relief under Section 482 of Cr.P.C. The inherent power of High Court is not conferred by the statute, but has been merely saved thereunder.

15. It is pointed out by the learned Counsel for the petitioners from the complaint that admittedly, expiry date of the drug was October 2014 and the report of the drug was received on 09.10.2014. The learned Counsel for the petitioners also pointed out Form-2 in order to submit that it clearly shows that the Central Laboratory received samples at around 3:00

p.m. on 31.10.2014 i.e. on the date of expiry and so only the Assay could be carried out within the date of expiry i.e. October 2014 and other tests were carried out after the date of expiry. As such, it is submitted that there is no case for the complainant against the accused to issue process.

16. As against this, the learned Standing Counsel for the respondent Ms. Linhares pointed out Form-13, which is the report of Central Drugs Testing Laboratory, Mumbai, wherein it is stated that the sample received does not conform to IP standard with respect to the test for dissolution. The said report was dated 09.10.2014. The said samples were received by the Lab on 02.07.2014. Thus, it is not the case that at the very end of the expiry, samples were sent. The learned Standing Counsel Ms. Linhares also pointed out that the complaint was filed on 11.01.2017 and the application under Section 25(4) of the Act is filed on 17.10.2014 before the learned JMFC requesting to grant permission to send the samples in question to the Central Drugs Laboratory, Kolkata. It is also pointed out that in view of Section 23(4)(ii) of the Act, the portion of sample is required to be produced to the Court, before which proceedings, if any, are instituted in respect of the drug.

Accordingly, the procedure was adopted i.e. the reference of sending the said sample under Section 25(4) of the Act for analysis to the Central Drugs Laboratory which means the Central Drugs Laboratory of Kolkata.

17. It is submitted by the learned Standing Counsel for the respondent that so far as objection for person responsible is concerned, there is no substance. It is submitted that the Company itself informed the names and addresses of the persons who are responsible for the day to day affairs of the firm. It is pointed out that there are as many as seven deficiencies reported in the investigating report of the petitioner-Company. It is submitted that the complaint is at the instance of the statutory Authority, therefore, the Court need not give a detailed order while issuing process.

18. There is *prima facie* no substance in the contention that there is no opportunity to the respondent-accused to avail right under Section 25(4) of the Act, as it is pointed out by the learned Standing Counsel for the respondent Ms. Linhares that there was an application made to the learned JMFC and samples were sent to the Central Laboratory of Kolkata. It is

just for confirmation. However, there is substance in the contention that the order of issuing process does not reflect independent application of mind by the Magistrate before issuing process.

19. Ms. Linhares relied on the decision of the High Court of Andhra Pradesh at Hyderabad in the case of **Hindustan Lever Ltd. Vs. State through Inspector, 2007 (1) L.S. 295 (DB)** in support of her contention that once a complaint is filed for non-cognizable offence by authorized person under Section 72 of the Standards and Weights and Measures Act, who is a public servant for contravention of provisions of the Act, the Magistrate need not examine him under Section 200 of Cr.P.C. and the Magistrate can straightaway take the complaint on file and issue process. Once that Magistrate decides that he need not examine the complainant and can issue process, he judicially applied his mind, for receiving of complaint and it is deemed to have been taken cognizance of the offence on the date of the presentation of the complaint, if it is filed within the period of limitation. Whenever a complaint is filed by a public servant authorized under Section 72 of the Standards and Weights and Measures Act, the date of filing the complaint will

be deemed to be the date of taking cognizance of the offence.

20. The learned Standing Counsel also relied on **Bhushan Kumar Vs. State, 2012 (2) Supreme 699** wherein it is held by the Hon'ble Apex Court in para 12 as under:

“12. If there is no legal requirement that the trial court should write an order showing the reasons for framing a charge, why should the already burdened trial courts be further burdened with such an extra work. The time has reached to adopt all possible measures to expedite the court procedures and to chalk out measures to avert all roadblocks causing avoidable delays. If a Magistrate is to write detailed orders at different stages merely because the counsel would address arguments at all stages, the snail-paced progress of proceedings in trial courts would further be slowed down. We are coming across interlocutory orders of Magistrates and Sessions Judges running into several pages. We can appreciate if such a detailed order has been passed for culminating the proceedings before them. But it is quite unnecessary to write detailed orders at other stages, such as issuing process, remanding the accused to custody, framing of charges, passing over to next stages in the trial.”

21. It is contended that this being the settled legal position, the order passed by the Magistrate could not be faulted with only on the ground that the summoning order need not be a reasoned order. The learned Standing Counsel also relied on the decision of the Hon'ble Apex Court in **Krishna Kumar Variar Vs. Share Shoppe, (2010) 12 SCC 485**.

22. I have considered the documents on record and the authorities relied on by the parties. It is true that in view of the decision of the Andhra Pradesh High Court in the case of **Hindustan Lever Ltd.** (supra), issuance of process in the matter where the complaint is filed by authorized person under Section 72 of the Standards and Weights and Measures Act, it is deemed to have been taken cognizance of the offence. However, in my considered opinion, the ratio is that there is no need to follow procedure to examine the complainant under Sections 200 to 209 of Cr.P.C., where private complainant files a complaint before the Magistrate. However, the order passed on 14.02.2017 does not reflect any sort of application of judicious mind. The Hon'ble Apex Court has held in **Rajendra Rajoriya Vs. Jagat Narain Thapak & Another, (2018) 17 SCC 234** that:

"Magistrate while taking cognizance has to satisfy himself about the satisfactory grounds to proceed with the complaint and at such stage, the consideration should not be whether there is sufficient ground for conviction. It may not be out of context to state that at the stage of taking cognizance the Magistrate need not elaborate reasons but the order should reflect independent application of mind to the material placed before it."

23. On perusal of the impugned order, it appears that the Magistrate mechanically passed the order as under:

*"Perused the complaint and the documents.
Issue process against the accused."*

24. It is true that the Magistrate at the stage of taking cognizance and issuing process is not required to record elaborate reasons or examine the complainant being authorized person. However, at the same time, it is the duty of the Magistrate to apply his mind to the material placed before it before passing order taking cognizance and issuing process. Applying the principles laid down by the Hon'ble Apex Court to the facts in the present case, the impugned order dated 14.02.2017 will have to be set aside and directions are required to be issued to the learned JMFC for fresh consideration of the

matter without being influenced by the observations made in this judgment, but based on the complaint and the material produced on record by the complainant.

25. Accordingly I proceed to pass the following order:

O R D E R

- (a) The impugned order dated 14.02.2017 passed by the learned JMFC in Criminal Case No. AOA/37/D&C/2017/D is hereby quashed and set aside.
- (b) The learned JMFC to consider the matter afresh, based on the complaint and material produced on record by the complainant.
- (c) The respondent i.e. the complainant to appear before the learned JMFC on 20.09.2021 at 10:00 a.m.
- (d) Rule is made absolute in the aforesaid terms. No order as to costs.

M.S. JAWALKAR, J.