

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

CRIMINAL WRIT PETITION NO. 1659 OF 2022

M/s. G. G. Nutritions
and others

.. Petitioners

Versus

The State of Maharashtra and another

.. Respondents

Smt. Rashmi S. Kulkarni, Advocate a/w Mr. Sanket S. Kulkarni,
Advocate and Mr. Sanjaykumar Jain, Advocate for the Petitioners.
Mr. S. R. Yadav-Lonikar, APP for Respondent Nos. 1 and 2.

CORAM : KISHORE C. SANT, J.

DATED : 24th MARCH, 2023.

P. C. :-

. Heard. Taken up for final disposal by consent of the parties.

2. This petition is filed by the company and its two partners for quashing and setting aside an order of issuance of process dated 22.06.2021 passed by the learned J.M.F.C., Court No. 2, Shahada in S.T.C.C. No. 117/2019 and for quashing of the proceedings. The complaint is lodged by the Drugs Inspector, Food and Drugs Administration, Dhule, for the offences punishable under Section 18 (a) (i), 18 (a) (vi) r/w Section 16 punishable under Section 27 (d) r/w Section 34 of the Drugs and Cosmetics Act, 1940 (hereinafter referred to as “the said Act”).

3. The petitioner-company is a pharmaceutical company engaged in production of drugs having its office at Solan, State - Himachal Pradesh. The Drug Inspector collected sample of one of the drugs manufactured by the company namely Moxileb-CV Dry Syrup containing Amoxycillin & Potassium. The said sample was drawn on 29.08.2017 and was sent to the laboratory for analyzing on 05.09.2017. The report of the Analyst from the Government Laboratory dated 27.04.2018 was received wherein, it is reported that, it is not as per the standard. In the report itself the date of manufacturing is given as February 2017 and the date of expiry is given as July 2018. After receipt of notice a complaint came to be lodged on 21.01.2019 whereas, summons came to be issued on 22.06.2021. Thus, dates are not disputed by the parties. On this premise, the petitioners have approached this Court mainly on the point that, there is no compliance of Section 25 sub section 2 of the said Act as notice along with report of the Analyst was given on 25.06.2018 that is just five days before expiry date and therefore, the petitioners' could not get an opportunity to get the sample reanalyzed. Though in the reply now the Government has come with the say that the complaint is filed belatedly even after receipt of sample and report, it is submitted that, now by way of affidavit the State has taken a stand that, in the process of getting the details of manufacture etc. the time was consumed. It is

submitted that, in fact, when the sample was collected from the market, on the label itself, the Drugs Inspector knows the details as those are printed on the drug itself. The second ground agitated is that Section 18 (b) of the said Act stipulates that when the Analyst received the sample on 05.09.2017 it was his duty to test the sample before 60 days of receipt of the sample. However, in this case, he analyzed the sample on 27.04.2018 that is much after period of 60 days and thus, there is contravention of Rule 45 of the Drugs and Cosmetics Rules, 1945. If for some reason it is not done within 60 days, then he has to seek extension of time from the Government giving specific reasons for delay in such testing or analysis. It is a specific case that, on receipt of report the notice was given on 25.06.2018. It is submitted that, on receipt of notice dated 25.06.2018 the petitioners immediately replied on the said notice on 13.07.2018 that is within statutory period of 28 days as per section 25 (2) of the said Act by way of abundant precaution. Though petitioner was not duty bound still the report of controlled sample was given that matches with the quality. Opportunity to controvert the report had already lost. It was made clear that, the report of the Government Analyst is not acceptable. It is further submission that, though the report was received much prior, still the complaint was lodged on 21.01.2019 without any justification and on that count also the filing of the complaint is assailed. Second

ground of argument is that, in the entire complaint no role of petitioner Nos. 2 and 3 is mentioned. There is no sufficient averment to show as to how petitioner Nos. 2 and 3 are liable and are responsible for the day to day business of the company. Only averment that, they are the partners of the company is not sufficient to attract their liability. Mere giving designation is not sufficient. Learned advocate for the petitioners further submits that since opportunity to get the drug reanalyzed is already lost, conducting of trial would be an empty formality.

4. As against this, learned A.P.P. vehemently opposes the petition stating that, order of issuance of process was passed in the month of June 2021, however, the petition is filed in November 2022 and thus, the petition suffers from delay and laches. From the reply, he submits that, in the complaint itself it is mentioned that, the petitioner No. 2 is a partner and petitioner No. 3 is a managing partner. Since the petitioner is a partnership firm, it is looked after only by the partners and therefore, no further averment is necessary unlike in a case of company. So far as delay in filing complaint, it is justified by stating that sometime time was consumed for obtaining consent and for collecting details of all the accused persons such as dealer, retailers and other chain of suppliers etc. He further submits that, the report of the

petitioners appears to be manipulated as the controlled sample report was obtained after expiry period. He submits that, the report of the Government Laboratory has presumptive value and is conclusive proof and it is to be accepted as it is. Though he fairly accepts that specific averment is absent about the role, however, he submits, with the aid of Section 34 (1), the petitioner Nos. 2 and 3 are clearly liable for the action.

5. In rejoinder, learned advocate for the petitioners submits from record that, it is clear from the complaint itself that the copy of Government Laboratory Analyzer was forwarded by communication dated 08.05.2018 which clearly shows that the report was received prior to that particular date. So far as delay and laches, she submits that the certified copy of the order was obtained on 15.07.2022 and thereafter since there were Covid-19 restrictions and in view of the same the Hon'ble Apex Court has also granted exemption. In this view, it cannot be said that the petition is suffering from delay and laches. She relied upon the judgments in support of her case. The first judgment she relied upon is in the case of **Parenteral Drugs (India) Ltd. and ors. Vs. The State of Maharashtra** reported in **2019 ALL MR (Cri.) 4910** wherein, this Court has held that, mere expressing intention to controvert the report is sufficient. In the said case, there was a dispute

as regards language used in the letter given in response to the notice under Section 18 (a) of the said Act as the wording in the letter was not specific, however it clearly conveyed that the accused wanted to adduce evidence in contraversion of the report. For the wording, it was clear that the accused disagreed with the report and they wanted to go for re-testing of other samples collected by them. In this case also, in report to the notice by the authority under Section 18 (a) of the said Act, the petitioners had made it clear that, their sample complies with the requirement submitting the report of controlled sample.

6. The next judgment is in the case of **M. Sea Pharmaceuticals Pvt. Ltd. & anr. Vs. The State of Maharashtra and anr.** reported in **2018 ALL MR (Cri.) 3946**. In that case also, the accused had replied the notice issued by the authority. The sanction obtained by the complainant was not legal. It was contended that the report of the Analyst was received by the complainant on 20.07.2015 and reply was given on 31.08.2015 and complaint was filed on 04.03.2016. When there was knowledge that the sample was to expire in May 2016 whereas, process was issued on 31.03.2016 and the summons was made returnable on 29.06.2016 that is after date of expiry of the sample. Though the accused were not served on the first date and they were served after the returnable date and they were required to appear before the Court on 03.07.2017, it is

held that, by that time, the vital right of the accused to get sample re-analyzed and to challenge the report of the Government Analyst was lost. In this view, it was held that, continuance of complaint would be an abuse of process of law and the proceeding was quashed.

7. Learned advocate for the petitioner further relied upon the judgment delivered by this Court in the case of M/s. Quixotic Healthcare & Ors. Vs. State of Maharashtra & Anr. reported in 2020 ALL MR (Cri) 1880 wherein, there is violation of Rule 45 and in that view of the matter the proceeding of the complainant was quashed. In that case, the sample was taken just before when the same was to expire on 31.08.2010. The report was received on 02.02.2010 by the complainant. The accused wanted to get the sample re-checked, however, the complainant lodged the report only on 30.08.2010. There was no averment in respect of this time period. It was also held in the said judgment that, the main point was agitated was that the sample was drawn on 17.11.2009 and the same was sent for analysis on 18.11.2009. The report was received on 02.02.2010. However, the testing of the sample was beyond statutory period prescribed under Rule 45 which is required to be decided within 60 days. For non compliance of this the proceeding was quashed.

8. After considering the submissions and the judgments cited above, this Court finds that, the valuable right to controvert the test report of the Chemical Analyst is lost. There is also violation of Rule 45 that the sample was not tested within 60 days from the date it was drawn. By the time, the summons was received, the drug had already expired and under such circumstances now proceeding with the complaint would be a futile exercise and therefore, continuance of proceeding would clearly be an abuse of process of law. Therefore, this Court finds that, the petition deserves to be allowed.

9. The criminal writ petition is allowed in terms of prayer clauses (B) and (C).

10. The criminal writ petition stands disposed off.

(KISHORE C. SANT, J.)

PS.B.