IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.11. 2024

CORAM:

THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

CRL.OP No. 6003 of 2021

1.M/s. J.B.Khokhani & Co
Rep by its parners
2.Mahesh Ch.Khokhani
3.Dinesh Ch.Khokhani
4.Mehul Ch. Khokhani
5.Ashit Dani

...Petitioners

Vs.

The Union of India,
Rep by Drug Inspector,
Office of the Deputy Drugs Controller (India)
Central Drugs Standard Control Organisation
South Zone, 2nd Floor Shastri Bhawan,
Chennai - 600 006.

...Respondent

PRAYER : This petition has been filed under Section 482 of Cr.P.C, to call for the records relating to the C.C No. 72 of 2016 pending on the file of the learned Hon'ble III Additional Sessions Judge, Chennai and quash the same by allowing this Criminal Original Petition.

For Petitioners : Mr.K.P.Anantha Krishna
For Respondent : Mrs. Saraswathy,
Special Public Prosecutor.

ORDER

This petition has been filed to to call for the records relating to the C.C No. 72 of 2016 pending on the file of the learned III Additional Sessions Judge, Chennai and quash the same.

The learned counsel for the petitioners submitted that the petitioners herein are arrayed as Accused No.1 to 5, who are partners in first accused company/M/s. J.B. Khokhani & Co, it is alleged that they were imported 400 kgs of progesterone bearing Batch No. 0904003, D/M:03/2009, D/E:03/2014, claimed to have been manufactured by M/s. Zhejiang Shenzhou Pharmaceutical Co. Ltd., China and supplied by M/s. Hongkong Tiangao International Economic Development Corporation Ltd, Hongkong by the Bill of Entry number 220583 dated 21.05.2009 under invoice No. TG09D0068 dated 17.04.2009, the above details were also claimed in the manufacturer's certificate of Analysis, Batch release certificate and label on the drums. Those documents were referred to M/s. Zhejiang Shenzhou Pharmaceutical Co. Ltd., China for verification of their authenticity and they declared that the referred materials were not manufactured by them or supplied to M/s. Hongkong Tiangao International Economic Development Corporation Ltd, Hongkong and it was confirmed that all the documents referred by the accused were forged and fake. Hence, the imported drugs were deemed spurious under Section 9 B of the Drugs and Cosmetics Act. Thereafter, the respondent referred the matter to its head office the Drugs and Controller General (India) New Delhi, who has issued the Form 10 to take appropriate action against the petitioners. Further, the Drugs Controller (India) New Delhi referred the issue to CBI New Delhi for investigation. The CBI by virtue of the Notification No. 228/5/65 dated 26/06/1965 are competent and authorized person to investigate offence arising under the Drugs and Cosmetics Act also. Thus, based on the complaint dated 02.09.2009 received from the respondent, the CBI registered RC No. 13/E/2009/CBI/EOW/Chennai. Investigation on this complaint culminated in a final report on 15.12.2010 of which the learned Additional Chief Metropolitan Magistrate, CBI Cases took cognizance in CC No. 5271 of 2009 for various offences under Section 120B r/w 420, 471, 482 IPC, Section 13(1)(a)(b) r/w 9B(e), 10(a) (bb)(c) of Drugs and Cosmetics Act and Section 132 & 135 of Customs Act and substantive offence thereof and thereafter CBI filed Crl.MP. No. 1279 of 2012 to close the FIR stating that offence under Section IPC are not attracted. Thereafter, Court ordered for the appearance of the defacto complainant to file any protest if any. Accordingly, defacto complainant/Shanty Gunasekaran appeared before the Court and examined as CW1, who deposed that she had no objection to close the case against the first accused company and others. Accordingly, the court below accepted the CBI Closure report. Therefore, the respondent did not file objection for the closure report. Accordingly, FIR was closed.

3. But, while calling the respondent for the above statement, they did not utter anything about the present complaint which was filed supposedly in August 2012. Thus, the respondent is estopped from filing a separate complaint against the petitioners by virtue of a judicial order wherein the respondent has accepted the closure report. The statement made by the respondent before the CBI court has been suppressed before the magistrate while taking cognizance. This is a clear malafide act by the respondent and being vindictive against the petitioners. It is established law by way of judicial precedents that there cannot be two trials for the same offence. Further, he submitted that the second complaint by the respondent under the Drugs and Cosmetics act is under the same sections as in the CBI Case, which has come to a logical end. Therefore, for a second complaint to be maintained, there ought to be further fresh materials/evidence by the Court.

In the present case, there is no fresh evidence or fact has come to light and therefore the complaint filed by the respondent is not maintainable in law. Further, he submitted that the magistrate has failed to carry out any enquiry or ordered investigation as contemplated under Section 202 Cr.P.C with reference to the present complaint filed by the respondent. Since it is an admitted fact as in the cause title of the complaint that the accused is residing outside the jurisdiction of the XV Metropolitan Magistrate, George Town. The Trial Court has issued summons even without an enquiry under Section 202 Cr.P.C as envisaged in law. The requirement of inquiry under Section 202 Cr.P.C is mandatory when the accused is residing outside the jurisdiction of the Court. The petitioners have filed a discharge petition before the XV Metropolitan Magistrate Court, George Town, Chennai and counter also filed by the respondent and the same was pending. However, the case was wrongly transferred on the basis of notification that was notified only after the alleged offence was completed. The respondent has prior to the transfer itself commenced proceedings and therefore the subsequent amendment would not have any effect once the remedy has already been availed by the respondent. Accordingly all later proceedings before the learned III Additional Sessions Court, Chennai, is non est in law and ought to be quashed.

4. Further, he submitted that the respondent not followed the due procedure in respect of taking the sample which is clear violation of the Act and also the occurrence, which has taken place in the year 2009 but the complaint was filed in the year 2012 which is barred by limitation. In order to harass the petitioners the respondent filed this present complaint which is abuse of process of law. Hence, he prayed to allow this petition.

5. By way of reply, the learned public prosecutor submitted that the documents submitted by the the importer for the import of the subject drug were scrutinized and the invoice number TG09D0068 dated 17.04.2009 & manufacture batch release certificate dated 9th April were referred to M/s. Zhejiang Shenzhou Pharmeceutical co. Ltd, China for verification of their authenticity. After scrutiny they had informed that referred material of progesterone bearing batch number 0904003, D/M:03/2009, D/E:03/2014 is not manufactured by them and they had not supplied any progesterone to M/s. Hongkong Tiangao International Economic Development Corporation Ltd, Hongkong. They have also stated that above referred documents are not theirs and hence counterfeit.

6. Further, submitted that on further physical verification of the imported consignment drum it was observed that the outer label on the drums were easily peelable and when pealed, below it marks of a smaller

label pasted and removed were visible. Thus the original label of the unregistered manufacturer must have been removed and in its place a bigger label resembling that of the registered manufacturer M/s. Zhejian Shenzhou Pharmaceutical co. Ltd., china affixed to make the goods appeared.

7. Further, he submitted that the drugs manufacture read by the accused are not manufactured by the said M/s.Zhejian Shenzhou Pharmaceutical co. Ltd., hence it deemed to be spurious drugs as defined under Section 9(B)(e). Section 10(bb) of the Drugs and Cosmetics Act 1940, which prohibits the import of the spurious drug and the accused is punishable under Section 13 (1)(a) of the said Act. Thereafter, CBI:EOW, Chennai has addressed to the Deputy Drugs Controller(I), O/o ADC(I), CDSCO, Customs House, Chennai Vide reference letter No. DPME12011/3147/RC/13/E/2009 dated 26.12.2011 wherein it is stated that a case in RC13/E/2009 was registered on 02.09.2009 by this office on the complaint of Smt. Shanty Gunasekaran, ADC(I), Customs House, Chennai, on the allegations that spurious and substandard drugs were imported to India by some Indian Importers in connivance with some exporters in China and Hong Kong and unknown others fraudulently imported spurious drugs based on the fabricated manufacture's certificate, certificate of analysis, batch release certificate etc, in the name of the registered firms and imported

bulk drugs from the unregistered firms. Thereafter, CBI, concluded the investigation and recommended to prosecute the M/s.J.B.Khokhani and Co. Mumbai, M/s. Envee Drugs Pvt. Ltd., Keda Gujara, M/s. Sheetal Pharma, Mumbai for their import of spurious drugs under section 13(1)(a) (b) r/ 9-B(e), 10(bb)(c) of Drugs and Cosmetics Act 1940 by the respective Drug control authority and also suggested that instructions to be issued reiterating that the importers are bound legally and procedurally to import only through the registered agents. Therefore, as per the recommendation of the CBI/EOW/Chennai, the case has been filed against the accused and other companies in CC No. 1028 of 2014 before the XV MM, George Town, Chennai, by the Union of India represented by Drugs Inspector. The power to launch proceedings under Section 32 of Drugs and Cosmetics Act, 1940 is given to Drugs Inspector. Whereas, the CBI filed the case under IPC, but they closed the FIR as there is no offence made out under IPC. Accordingly, the Additional Chief Metropolitan Magistrate ordered that this case against the accused and other companies is closed vide order dated 25.03.2013 but previously the case was dealt by CBI, Chennai and subsequently the case pertaining to Drugs and Cosmetics Act, 1940, the same transferred to the Deputy Drugs Controller (I), O/o. Asst. Drugs Controller (I_) CDSCO, Customs House, Chennai - 1 and subsequently on 16.04.2012 the office of the Drugs Controller General (India), New Delhi, granted permission to launch prosecution in the appropriate court of Chennai by their letter No. File No. DCG/(I)/Misc.37/2011 (part) dated 03.04.2012. Based on the said permission the complaint was filed before the XV Metropolitan Magistrate, George Town, Chennai, dated 16.08.2012 by the Drugs Inspector of this office and CC No. 1028/2014 dated 01.03.2014 was allotted for the above case. Therefore, all the accused involved in the import of spurious drugs and A5 is authorized signatory of A1, A1 is the firm involved in import of spurious drug, A2, A3, A4 are partners in the A1 company. Hence they are severely and commonly liable for the same act, as per Section 34 of the Drugs and Cosmetics Act 1940. Further, he pointed out there is no documentary evidence on the petitioner to show that the CBI is the competent authority to investigate the offence under Drugs and Cosmetics Act. Hence, he prays to dismiss this petition.

8. Heard both sides.

9. Based on the complaint given by the Additional Director Controller, Customs House, Chennai, CBI conducted the enquiry against the petitioners and closed the same. Thereafter, permission was granted by the Drugs Controller General, Delhi. Accordingly, DCG - I, Chenna and filed

the present complaint before the Trial Court against the petitioners herein alleged that they committed offence for their import of spurious drugs under Section 13(1)(a) (b) r/ 9-B(e), 10(bb)(c) of Drugs and Cosmetics Act 1940. According to the petitioners, for the same offence CBI conducted enquiry and filed the closure report before the Trial Court, for which, the complainant not raised any objection, under such circumstances, against the same fact the respondent filed the present complaint. But, as per the submission of the learned counsel for the respondent, the petitioners has not produced any documentary evidence to show that the CBI is the competent authority to investigate the offence under Drugs and Cosmetics Act, 1940. Admittedly, there is no prime facie document on the side of the petitioners, and also another objection is that the CBI closed the complaint since because the offence under Section IPC is not made out. Admittedly, special enactment confer right upon the respondents' official to prosecute the offence made out under the said Act. Further, the permission was granted by the Drugs Controller General, New Delhi, to launch prosecution against these petitioners, based on that present complaint was filed.

10. Prime facie entire facts reveal that accused were imported 400 kgs of progesterone bearing bath No. 0904003, D/M:3/2009, D/E:03/2014, claimed to have been manufactured by M/s. Zhejiang Shenzhou

Pharmaceutical, co. Ltd, China and supplied by M/s.Hongkong Tiango International Economic Development Corporation Ltd, Hongkong. But, on verification of the authenticity of the documents, it was found that all were fake documents and not manufactured by the concerned manufacturer and it was observed that outer label on the drums were easily peelable and when pealed, it below it marks of a smaller label pasted and removed were visible. Hence, the drugs was deemed as spurious as per Section 9(B)(e) Section 10 (bb) of the Drugs and Cosmetics Act 1940 and punishable under Section 13(1)(a) of the said Act, which needs detailed investigation. According to the petitioners, they disputed the procedures followed by the respondent and it is barred by limitation, also not accompanied with the sanction procedures, and also for the same facts CBI Close the FIR but all these facts are mixed questions of law and facts. The petitioners are bound to prove the same before the Trial Court. On seeing the gravity of the offence levelled against the petitioners this Court is not inclined to allow this petition and they are entitled to take all defence before the Trial Court. The objection raised by the petitioners needs detailed evidence, mere averments is not sufficient to quash the Charge sheet. Therefore, I am not find any reason to allow this petition. However, considering the age of the petitioners 2 and 3, their appearance is ordered to be dispensed with and shall appear as and when required.

11. Accordingly, this petition is dismissed. Consequentially, connected miscellaneous petition (s), if any, is/are closed.

19.11.2024

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To
The Public Prosecutor,
High Court, Madras.

T.V.THAMILSELVI, J.

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CRL.OP No. 6003 of 2021

& CMP Nos. 3926 & 3928 of 2021

19.11.2024