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42-WP-1043-2022

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

42 CRIMINAL WRIT PETITION NO. 1043 OF 2022

Vijay Kumar Uppal S/o. Shri Dhram Chand And Others

VERSUS

The State Of Maharashtra, Through, Drug Inspector, R. M. Bajaj

...

Ms. Rashmi Kulkarni a/w Ms. Namita Thole h/f Mr. Sanket S. Kulkarni,
Advocate for the Petitioners.

Mr. S. B. Jadhav, APP for Respondent-State.

CORAM : KISHORE C. SANT, J.

DATE : 10th JULY 2025.

PC :-

1. Heard the parties.
2. The petitioners have approached this Court with a prayer to quash and set aside the criminal prosecution initiated against them, bearing RCC No.494/2007 pending before the learned Judicial Magistrate First Class, Parbhani.
3. The original accused No.3, 5 and 6 in the said complaint have approached this Court. The complaint is filed under Section 18(a)(i) r/w 16(1)(a) and Section 34 punishable under Section 27(d) and Section

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18B r/w 22(cca) punishable under Section 28-A of the Drugs and Cosmetics Act, 1940 (hereinafter referred to as “the said Act”).)

4. The complaint is filed on 23rd August 2007. Material, events and dates are as follows:-

the Inspector appointed under the said Act seized a drugs sample namely, “GENTOSON” Gentamicin Eye/Ear Drops, on 2nd January 2006. The expiry date of the said medicine was October 2007. After the seizure, sample was sent for analysis on 4th January 2006, and the report was received from the lab on 16th June 2006. On receiving the report, the sanction was sought from the Commissioner. The Commissioner granted sanctioned on 7th July 2006. It is thereafter the complaint came to be lodged on 23rd August 2007 by complainant i.e. Inspector appointed under Section 21 of the Drugs and Cosmetics Act.

5. The learned JMFC, by order dated 4th February 2015, directly issued a proclamation. By order dated 5th November 2019, he also issued Non-bailable Warrant to the accused Nos. 1 and 2. He observed that accused No.3 to 6 were also absent and proceeded further.

6. The petitioners have, therefor, approached this Court mainly on two grounds: firstly, that the expiry of the drugs was October 2007 and they could not get an opportunity under Rule 45 of the said Act and Rules, which mandatorily requires that the accused be given an opportunity to re-analyze the sample. Section 25(3) read with Rule 45 requires the analysis to be done within 60 days from the date of report from Government analyst. In the present case, the report was received long before the date of filing of complaint itself i.e. on 16th June 2006. By the time, the complaint was presented, the period of 60 days had already over. The second ground is that the complaint was lodged by one R. M. Bajaj. From the document annexed to the complaint showing authorization, it is seen that Mr. R. M. Bajaj was appointed as an authorized person for District of Osmanabad, whereas the complaint was lodged in the Court at Parbhani. For Parbhani district, another Inspector was authorized to lodge a complaint. The ground is thus raised that the person who filed a complaint was not duly authorized by the Government.

7. The learned Advocate for the petitioner strenuously submits that continuation of the proceeding on the above ground would be totally in defiance of the principles of natural justice and fair play. It would also be against the mandatory requirement under Rule 45 and Section 25(3) of the said Act and Rule. He, therefore, prays that petition be allowed by quashing and setting aside the proceeding.

8. The learned APP, on the basis of affidavit-in-reply filed by the State, submits that in the present case, there is a legal presumption created under Section 25 of the Drugs and Cosmetics Act. The report received under Section 25(1) is conclusive evidence. There is no statutory intimation by the accused of intention showing disagreement with the report of Government analyst. By relying on Sections 18 and 16, he submits that, the drug was found not to be conforming to the standard quality. No drug can be manufactured which is not of standard quality or is misbranded, adulterated, or spurious. In the present case, drug was found not to be of standard quality. The report of the test shows that the tests for sterility of droppers and the sample do not

comply with IP 96 requirement for “Tests for sterility of droppers”. The observation in the report shows that there is evidence of growth in the tubes inoculated for sterility test as per IP 96 method when tested on ten droppers. Microscopic examination shows presence of gram positive bacilli in both the media tubes. There is clear report showing that the sample does not comply with IP 96 requirements for “PH” and thus it was concluded that sample was not of standard quality.

9. The learned APP thus submits that the report of the lab itself assumes character of a conclusive evidence. The prosecution must get an opportunity to prove the offence. He thus prays for rejection of the writ petition.

10. During the course of argument, the learned Advocate for the petitioner relied upon the judgment in the case of ***Lalankumar Singh and Ors. Vs. State of Maharashtra***¹. Paragraph No.36 of the said judgment reads as under:

“36. Perusal of the order passed by the learned Single Judge of the High Court would itself reveal that the learned CJM has not even cared to pass a formal order of issuance of process. It will be relevant to refer to the

¹ 2022 SCC OnLine SC 1383

following part of the judgment and order of the learned Single Judge of the High Court:

“....Though, it is true that on the certified copy produced by the petitioners there is no such formal order but copy of Roznama (daily notings of the proceeding) shows that such order was made on 30.03.2009. The Roznama dated 30.03.2009 reads as follows :

(i) Complaint filed by Vilas Vishwanath Dusane.

(ii) Copy of list of documents containing 44 document.

Order was made on Exhibit 1 (of issue process). Take entry in register of criminal cases and issue summons against accused. List the matter for appearance of accused on 18.06.2009.

This record is sufficient to infer that the order of issue process was made and after that summons were issued against accused to ask them to appear in the Court.”

11. Learned Advocate for the petitioners further relied on the judgment of this Court in the case of ***M/s. Quixotic Healthcare and Ors. Vs. The State of Maharashtra and Anr.***². Paragraph Nos. 9 and 10 of the said judgment reads as under:

“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. [2011 ALL MR (Cri) 2889 (SC)]* 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 27 of the Constitution of India should be exercised.

12. This Court has heard the arguments and gone through the record available with the petition and the judgments cited. In the present case, it is seen that no formal order of issuance of process was passed. Only a summons was issued on 14th August 2013, and prior to that NBW was issued against accused No.1 as he was absent on 21st April 2012. Subsequently, the proclamation was directed to be issued on 4th February 2015. This Court finds that the Hon'ble Apex Court in the case of ***Lalankumar Singh Vs. State of Maharashtra*** (supra) has dealt with this aspect and that appeal was allowed. The order of issuance of process was quashed and set aside. In the case of ***M/s. Quixotic Healthcare*** (supra), this Court considered Rule 45 of the Drugs and Cosmetics Rule, and it was observed that testing of the sample has to be done within 60 days. In that case, the testing was found to be beyond statutory period prescribed under Rule 45. The sample was tested after 60 days, which naturally showed it to be not of standard quality. In that view, this Court

quashed and set aside the proceeding. The Court noted the dates and observed that when the complainant had knowledge about the standards of the drugs, he still filed the complaint. Looking to the dates, it was observed that the accused could not get an opportunity to get the sample re-tested or re-analysed. In the present case also, this Court is convinced that when the report was received on 16th June 2006, the complaint was filed on 23rd August 2007, which is clearly after 60 days, and no time could be given to the accused to get the sample re-tested or re-analysed. Even the order of proclamation itself was issued without a proper order of issuance of process in the year 2015.

13. Considering all above, this Court is convinced that the proceeding of the complaint would clearly be an abuse of process of law. Writ petition is, therefore, allowed in terms of prayer clause (A). Petition stands disposed off.

[KISHORE C. SANT, J.]