
(2016) 03 J&K CK 0025

In the Jammu And Kashmir High Court

Case No : Petition u/s 561-A No. 249 of 2015 and Cr. MP No. 01 of 2015

Biocon Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 09-03-2016

Acts Referred:

Drugs and Cosmetics Act, 1940 — Section 18(a)(i), Section 18-A, Section 27(d)
Jammu and Kashmir Criminal Procedure Code, 1989 — Section 561-A

Citation : (2016) 4 JKJ 251

Hon'ble Judges : Mr. B.S. Walia, J.

Bench : Single Bench

Advocate : Mr. S.A. Makroo, ASGI, for the Respondents; Mr. Ashish Verma, Advocate, for the Appellant/Petitioner

Final Decision : Allowed

Judgement

Mr. B.S. Walia, J. - Instant petition seeks quashing of complaint Annexure P-4, dated 04.06.2014 where under prosecution of accused was

sought u/s 18(a)(i) read with Section 27(d) of the Drugs and Cosmetics Act, 1940 (hereinafter referred to as the Act) for manufacturing for sale

and distributing a drug which was not of standard quality. While contents of Paragraph Nos. 14 to, 17, 19 & 20 of the complaint reveal that

prosecution of the petitioners was sought for violation of Section 18-A of the Act on allegations of non-disclosure of the name/address and other

particulars of the person/firm from which the petitioner company obtained the drug in question, contents of Paragraph Nos. 17 to 20 reveal that

prosecution of other accused i.e. manufacturer/ partner/persons responsible for the affairs of the manufacturer and distribution of the drug was

sought under Section 18(a)(i) read with Section 27(d) on ground of the drug manufactured by the manufacturer being ""Not of Standard Quality"".

However, in the concluding part of the complaint, in Paragraph No. 21, prosecution of all accused was sought under Section 18(a)(i) read with

Section 27(d) of the Act for manufacturing for sale and distributing the drug in question which had been declared to be not of standard quality.

2. Contents of Paragraph No. 14 of the complaint reveals disclosure by M/s Extensor Pharmaceutical Distributors, Srinagar of its having

purchased the sampled drugs from the petitioner i.e. M/s Biocon Limited, CFA, Zirakpur while as per Paragraph No. 15 of the complaint, notice

was issued to M/s Biocon Limited, CFA, Zirakpur requiring it to disclose the name, address and other particulars of the person/firm from whom

the sampled drugs had been acquired. Paragraph No. 16, apart from containing averments that Petitioner No. 1 never replied to the said notice

also mentions that reply of the company was in transit and the complainant had verbally been told that the drug in question had been purchased by

the accused company but that due to in-house administrative procedure, company could not give prompt reply, that in the circumstances, M/s

Biocon Limited, CFA, Zirakpur was liable to be prosecuted under Section 18-A for violation of statutory provision. In Paragraph No. 17 it is

mentioned that the manufacturing premises of M/s Swiss Garnier Life Sciences were visited by the complainant on 30.05.2014 for investigation

and it was found that the drug in question had been manufactured by the said company and further sales record were collected from the premises

of the said accused company to dispel the impression of the drug being spurious. In Paragraph Nos. 19 and 20 it has been mentioned that

Accused No. 4 i.e. M/s Swiss Garnier Life Sciences had manufactured the drug in question, Accused No. 1 to 3 were partners, were also

responsible for the affairs and conduct of the accused firm, had active control over the financial affairs, sales, manufacturing, distribution affairs of

the company and were jointly managing the affairs of the company/accused firm which had manufactured and distributed the drug in question which

was declared to be not of standard quality as such were liable to be punished u/s 18(i)(a) read with Section 27(d) of the Act and Rules there

under, that Accused No. 5 was VP operations, Accused No. 6 was DGM quality assurance and Act used No. 7 was DGM quality control of the

accused company and all the accused persons with common intention manufactured the drug in question which had been declared not of standard

quality. Qua Accused Nos. 8 & 9 i.e. petitioners, it was averred that they were liable to be prosecuted under Section 18-A. However, in

Paragraph No 21 of the complaint, prosecution of all accused was sought under Section 18(a)(i) read with Section 27(d) of the Act for

manufacturing for sale and distributing the drug in question which had been declared to be not of standard quality.

3. Reply dated 17.12.2015 filed on behalf of Respondent No. 1 is as terse as it could be. The only semblance of what can be said to be a stand in

the said reply is in Paragraph No. 7(f). Paragraph No. 7(F) of the reply reads as under:

7(F). As per the directions of Honâ??ble Jammu and Kashmir High Court, Srinagar all cases pertaining to the drug samples drawn under special

drive from the State of Jammu and Kashmir and declared as Not of Standard Quality need to be filed before 06.06.2014. The reply stated by the

firm in question was under transit and not received by the office. However, the reply was received on 06.06.2004 after the date of filing complaint

at Honâ??ble CJM Court, Jammu. Hence stated as no information provided.

4. In affidavit dated 22.02.2016 filed by the complainant it has been mentioned that in terms of Section 18-A, notices were issued to the distributor

requiring it to disclose the name of the manufacturer but no communication was received from the distributor i.e. petitioners, consequentially

complaint was filed under Section 18(a)(i) read with Section 27(d) of the Act before the CJM, Jammu, that u/s 18-A every person who deals with

a drug is liable to disclose the name of the manufacturer, but the petitioners failed to respond to the notice therefore the same prompted the

department to file a complaint against the petitioners.

5. Submission is that complaint against the petitioners is basically on account of non submission of information sought whereas similar notice

seeking similar information was also sought from M/s Extensor Pharmaceutical Distributors, Srinagar by Respondent No. 1 and said distributor

had given the name of the petitioner as the person from whom the drug had been obtained. However, said distributor has had not been arrayed as

accused, likewise others through whom the drug had been distributed by the manufacturer/those responsible for the manufacturing and managing

affairs of the manufacturing company, on such distributors giving details of the

person from whom they had obtained the drug for sale were not

arrayed as accused in the complaint i.e. M/s Effy AAY Traders Pharmaceutical Distributors and its owner Mr. All-U-Din Bhat, M/s Extensor

Pharmaceutical Distributors, that at best, the violation by the petitioners was of Section 18-A which was punishable under Section 28 but even the

offence under Section 18-A was not made out.

6. That the relevant provisions of the Act namely Section 18-A, Section 28, Section 18(a)(i) and Section 27(d) are reproduced hereunder:

Section 18-A Disclosure of the name of the manufacturer, etc.

Every person, not being the manufacturer of a drug or cosmetic or his agent for the distribution thereof, shall, if so required, disclose to the

Inspector the name, address and other particulars of the person from whom he acquired the drug or cosmetic.

28. Penalty for non-disclosure of the name of the manufacturer, etc.

Whoever contravenes the provisions of Section 18-A or section 24 shall be punishable with imprisonment for a term which may extend to one

year, or with fine which may extend to one thousand rupees, or with both.

18. Prohibition of manufacture and sale of certain drugs and cosmetics

From such date as may be fixed by the State Government by notification in the Official Gazette in this behalf, no person shall himself or by any

other person on his behalf-

(a) [manufacture for sale or for distribution, or sell, or stock or exhibit or offer for sale,] or distribute-

(i) any drug which is not of a standard quality, or is misbranded, adulterated or spurious;

xxx

27. Penalty for manufacture, sale, etc., of drugs in contravention of this Chapter

Whoever, himself or by any other person on his behalf, manufactures for sale or for distribution, or sells, or stocks or exhibits or offers for sale or

distributes,-

(a) xxx (c)

(d) any drug, other than a drug referred to in clause (a) or clause (b) or clause (c), in contravention of any other provision of this Chapter or any

rule made there under, shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to two years

and with fine:

Provided that the Court may for any adequate and special reasons to be recorded in the judgment impose a sentence, of imprisonment for a term

of less than one year.

7. Thus the question is as to whether the petitioners are liable under Section 18-A read with Section 28 or u/s 18(a)(i) read with Sections 27(d) or

under Section 18(a)(i) read with Sections 27(d) as well as Section 18-A read with Section 28 of the Drugs and Cosmetics Act, 1940.

8. Learned counsel states that notice dated 27th May 2014 (wrongly mentioned as 27th May, 2013 in the complaint) issued by the Drug Inspector

requiring the petitioner to disclose the name/address and other particulars of the person/firm from which the drug in question was obtained was

received by Petitioner No. 1 on 29th May, 2014, that as per the averments in Paragraph No. 16 of the complaint, Petitioner No. 1 never replied

to the said notice but complainant was verbally told that reply of the company was in transit and that the drug in question had been purchased by

the accused company and that due to in-house administrative procedure, company could not give prompt reply.

9. It is contended that the aforementioned stand of the Drug Inspector of the company not having given the information sought was patently false

since the petitioner company had not only disclosed the information verbally, but had also sent email (page 98-A) to the complainant Sushant

Sharma, Drug Inspector at email id sushansharma@gmail.com at 11:59 HRS on 4th June 2014 reflecting subject, Zargo 50 Test report, response

from Biocon QR Swiss Garnier Chandigarh.pdf. mentioning therein that hardcopy would be sent by courier on same day and that in pursuance

thereto communication dated 3rd June 2014 Annexure P-5 (page No. 83 of tire paper book) was sent vide courier dated 4th June 2014 (receipt

at page No. 98 of the paper book) along with documents, disclosing the information sought.

10. Learned counsel states that the requisite information having been sent not only by email and courier but intimation also having been given

verbally to the Drug Inspector, lead the Drug Inspector to mention in Paragraph

No. 16 of the complaint that reply of the company was in transit and that he had been verbally told that the drug in question had been purchased by the accused company. Faced with the aforementioned position, learned counsel for Respondent No. 1 sought time to file an affidavit of the concerned Drug Inspector as to on what basis the notice at Page No. 56 of the paper book dated 30th May 2014 was issued to the manufacturer of the drug in question and why in the aforesaid circumstances, proceedings were initiated against the petitioners.

11. Learned Counsel further states that no period of time is stipulated u/s 18-A for submission of information, that the complaint filed by Respondent No. 1 at Jammu on 4th June, 2014 was returned by the Chief Judicial Magistrate, Jammu on 9th June, 2014 on account of lack of territorial jurisdiction for being presented before the Court having jurisdiction whereupon the complaint was presented at Srinagar on 21st August, 2014 and in the meantime, information sought by Respondent No. 1 had been submitted on 4th June 2014 whereas as per Respondent No. 1 the same was received on 6th June, 2014.

12. On the basis of the aforementioned position, learned counsel for the petitioners states that there is no violation by the petitioners of the provisions of Section 18-A much less Section 18(a)(i) read with Section 27(d) of the Act and that in the circumstances the complaint and resultant proceedings in respect thereto were a misuse of the process of law and the same were accordingly liable to be quashed with exemplary costs.

13. While noticing that there was no Paragraph 7(h) in the objections filed by Respondent No. 1 contesting the stand taken by the petitioner of intimation sought having been given to Respondent No. 1 on 04.06.20.14 on its e-mail id, this Court vide order dated 29th February, 2016 directed filing of an affidavit specifically dealing with the averments of Paragraph No. 7(h) of the petition regarding e-mail alleged to have been sent by the petitioner and whether the same was received by Respondent No. 1 or not and if received, the action taken on the same. However, no reply was filed to the contents of Paragraph No. 7(h) of the petition.

14. Perusal of Paragraph No. 17 of the complaint reveals that notice dated 30th May, 2014 at Page No. 56 of the paper book was hence issued to the manufacturer. The words ""hence issued"" used in Paragraph No. 17 have

to be read in conjunction with the averments in Paragraph No. 16

of the complaint wherein it is averred ""however the reply of the company is in transit and it was verbally told to the complainant that drug in

question has been purchased by the accused company"" Thus, whether notice was issued to the manufacturer on receipt of details from the

petitioner or otherwise is irrelevant for the purpose of deciding the controversy in issue for the reasons mentioned hereunder.

15. On 4th March, 2016 affidavit of one Amit Kumar S/o Shri Om Parkash as also of Sureh S/o Shri Srikantacharya, along with annexures and

copies thereof were filed before this Court with copy to learned counsel for the respondents and the case was adjourned for arguments for 9th

March, 2016. No objections were filed by the respondents to the affidavits of said Amit Kumar and Sureh nor was any affidavit filed to controvert

the contents of Paragraph No. 7(h) of the petition in terms of order of this Court dated 29th February, 2016 to specifically deal with the averments

contained therein i.e. e-mail alleged to have been sent by the petitioner on 4th June 2016 to Respondent No. 1.

16. Perusal of Paragraph No. 2 of affidavit of Shri Amit Kumar dated 3rd March, 2016 reveals that he was posted as CFA Manager with M/s

Accord Enterprises which in turn was the CFA Agent of the petitioner Company at Zirakpur in May, 2014 and on 29.05.2014 he had received

letter dated 27.05.2014 from Respondent No. 1 by way of registered post A/D. Copy of the letter along with envelope was placed on record

along with the affidavit as Annexure-A. As per Paragraph No. 3 of the affidavit, a scanned copy of the letter, Annexure-B was forwarded by said

Amit Kumar on 29th May, 2014 itself to the officials of M/s Biocon Ltd., for further necessary action. A perusal of the photo copy of the envelope

at Page No. 5 of the affidavit reveals that M/s Biocon Limited received communication from the Assistant Drugs Controller (India) with stamp

showing date of receipt as 29th May, 2014 while the postal dispatch receipt at Page No. 6 of the affidavit reveals the postal article having been

booked on 27th May, 2014 at 2:28 P.M. with a round postal seal franking postal stamps on the envelope reflecting date 28th May, 2014. No

reply has been filed qua position as reflected in the affidavits referred to above controverting the stand in Paragraph No. 2 & 3 of the affidavit of

Amit Kumar of letter dated 27th May, 2014 having been received from Respondent No. 1 on 29th May, 2014 at Zirakpur. In the circumstances,

there is no reason to disbelieve the said stand or the affidavit filed in respect thereto. Consequentially, the plea that notice at Page No. 55 of the

paper book dated 27th May, 2014 was received by the petitioner on 29th May, 2014 stands established.

17. In the light of aforementioned position, learned counsel for the petitioner contended that although no period was prescribed under law for

supply of information under Section 18-A of the Act yet the period granted to the petitioner vide aforementioned notice for supply of requisite

information was seven days from date of receipt of notice, consequentially period of seven days computed from 29th May, 2014 was to expire on

5th June, 2014, whereas admittedly, the complaint was instituted before the Chief Judicial Magistrate, Jammu, on 4th June, 2014 i.e. before the

expiry of the time granted to the petitioner and was returned on 9th June 2014 and thereafter was presented at Srinagar on 21st August 2014 and

in the meantime information sought had admittedly been received by the respondents on 6th June 2014. Learned counsel contends that the

complaint was liable to be quashed as not only was the complaint filed on 4th June before the expiry of the time granted for submitting the

information but also on account of the fact that the complaint filed on 4th June 2014 at Jammu was not presented to the Court having jurisdiction,

consequentially was returned on 9th June 2014 for being presented at the Court having jurisdiction i.e. Srinagar and the same was presented at

Srinagar on 21st August, 2014 and in the meantime as noticed above Respondent No. 1 admittedly received the, information from the petitioners

on 6th June 2014.

18. On query Mr. Makroo, learned ASGI admitted complaint having been filed on 4th June 2014 i.e. prior to 5th June 2014 i.e. expiry of time

granted vide notice dated 27th May, 2014 which was served on 29th May, 2014 and of the complaint having been returned on 9th June, 2014 by

the Chief Judicial Magistrate, Jammu, to Respondent No. 1 for being presented before the court having jurisdiction i.e. Chief Judicial Magistrate,

Srinagar, and in the meantime, the information sought admittedly having been received by the respondents on 6th June, 2014.

19. I have given my thoughtful consideration to the matter and am of the considered view that no period of time is stipulated under Section 18-A of the Act for supply of information as was sought vide notice to the petitioner. Be as it may, time of seven days was granted to the petitioner to supply the information from the date of receipt of notice i.e. Annexure-C, dated 27th May, 2014 which was served on the petitioner on 29th May, 2014. Calculating the period of seven days granted to the petitioner for submitting the information sought in terms of Section 18-A of the Drugs and Cosmetics Act, the period of seven days was to expire on 5th June, 2014 whereas the complaint, as per the showing of Respondent No. 1 was filed before the Chief Judicial Magistrate, Jammu, on 4th June, 2014 i.e., before the expiry of the stipulated period of time granted by Respondent No. 1 to the petitioner. Moreover, the complaint was not entertained by the learned Chief Judicial Magistrate, Jammu, on account of lack of territorial jurisdiction and was returned on 9th June, 2014 for being presented before the court having jurisdiction i.e. Chief Judicial Magistrate, Srinagar. In the meantime, the information sought vide notice, Annexure-C, dated 27th May, 2014 was admittedly received by Respondent No. 1 on 6th June, 2014. It also needs mention that Paragraph No. 7(h) of the petition categorically mentions that Petitioner No. 1 had vide letter dated 3rd June, 2014 forwarded to the respondents on 4th June, 2014 all documents to satisfy the information sought vide notice issued by Respondent No. 1. Besides, Petitioner No. 1 had on 4th June, 2014, sent its response vide e-mail to Respondent No. 2 but the said fact was not disclosed by Respondent No. 1 in the complaint filed before the Chief Judicial Magistrate, Jammu and further even as per averments in Paragraph No. 16 of the complaint, information sought by Respondent No. 1 had been verbally communicated to Respondent No. 1 by Petitioner No. 1. Once information sought had been supplied by the petitioner to Respondent No. 1 and at best the same having been received by Respondent No. 1 on June 6, 2014, the petitioners in view of the circumstances noted above could not be stated to have acted in contravention of Section 18-A of the Act. Contents of Paragraph No. 7(h) of the petition have not been controverted in the reply dated 26th November, 2015 filed on 17th December, 2015 nor in the additional affidavit of Sh. Manish Kakar, Drugs Inspector, CDSCO, Sub-Zone, Chandigarh dated 22nd

February, 2016 and neither there is any denial with regard to contents of Paragraph No. 7(h) in the aforementioned affidavits.

20. Be as it may, the fact remains that no period of time is stipulated in Section 18-A of the Act for supply of the information. The information

sought vide communication dated 27th May, 2014 within seven days of receipt of the communication expired on 5th June, 2014 in view of the

communication having been served on Petitioner No. 1 on 29th May, 2014. However, the complaint was filed even prior to the expiry of the time

granted by the respondents i.e. on 4th June, 2014 before the CJM, Jammu and the said complaint was returned by the CJM, Jammu, on 9th June,

2014 on ground of lack of territorial jurisdiction for being presented before the court having jurisdiction i.e. CJM, Srinagar and was presented at

Srinagar on 21st August 2014. Information sought was in the meantime received by Respondent No. 1 on 6th June, 2014. Reference is made to

the decision of the Honâ??ble Supreme Court, in Econ Antri Ltd. v. Rom Industries Ltd., (2014) 11 SCC 769 for calculating the period

within which details as sought were required to be submitted i.e. by 5th June, 2014. Same is reproduced hereunder.

37. The relevant extracts from Halsburyâ??s Laws of England were quoted. They read as under: (Vasantlal Ranchhoddas Patel case, AIR p.

142, Para 11)

11. ... â??168. Exclusion of first day.

- The general rule in cases in which a period is fixed within which a person must act or take the consequences is that the day of the act or event

from which the period runs should not be counted against him.

This general rule applies irrespective of whether the limitation of time is imposed by the act of a party or by statute; thus, where a period is fixed

within which a criminal prosecution or a civil action may be commenced, the day on which the offence is committed or the cause of action arises is

excluded in the computation."â??

38. In the circumstances, it was held in Vasantlal Ranchhoddas Patel case that the day on which the goods were seized has to be excluded in

computing the period of limitation contemplated under sub-section (2) of Section 110 and therefore the notice was issued within the period of

limitation. It is pertinent to note that under Section 110(2) of the Customs Act,

notice had to be given within six months of the seizure of the goods.

Similarly, under Section 142(b) of the NI Act, the complaint has to be made within one month of the date on which cause of action arose. The

view taken in Vasantlal Ranchhoddas Patel meets with our approval.

21. Moreover, it is settled law that there cannot be a penalty for mere technical or venial breach of law. Reference is made to the decision of the

Hon'ble Supreme Court in the case of Hindustan Steel Ltd. v. State of Orissa, (1969) 2 SCC 627 in which it was held that penalty is not to be

imposed merely because it is lawful to do so and whether penalty should be imposed for failure to perform a statutory obligation is a matter of

discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is

prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach

of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by

statute. In the instant case the petitioners submitted the details sought within the stipulated period of time via email. Details having been sent vide

email at 11.59 HRS on 4th June 2014 at the email id of the complainant has not been denied. In any case the details as per Respondent No. 1

were available on 6th June 2014 whereas complaint was filed on 4th June 2014. Verbal intimation had been given and the same stands

acknowledged though in a round about manner in Paragraph No. 16 of the complaint. The complaint filed on 4th June 2014 was returned by CJM

Jammu on 9th June 2014 for being presented before the court having jurisdiction where after the complaint came to be presented on 21st August,

2014 before the CJM Srinagar. In between, the information as per showing of Respondent No. 1 had been received on 6th June 2014, thus no

offence is made out u/s 18-A of the Act.

22. Coming to the question of liability u/s 18(a)(1) read with Section 27(d) it is clear that the petitioners are not liable for the same for the said

provisions would be attracted in case of there being an averment of the distribution being by the petitioners after coming to know of the drug

manufactured by M/s Swiss Garnier Life Sciences not being of Standard Quality. No such averment has been brought to the notice of the Court,

The arguments as well as objections dated 17th December, 2015 and affidavit dated 22nd February, 2016 reflect only non compliance with

Section 18-A. Had mere distribution by a distributor without knowledge of drug in question being not of Standard Quality been an offence, then

M/s Effy AAY Traders Pharmaceutical Distributors and its owner Mr. All-U-Din Bhat as also M/s Extensor Pharmaceutical Distributors would

also have been arrayed as accused. However, said distributors, despite apparently being similarly situated as the petitioners have not been arrayed

as accused. In the circumstances, the case at best against the petitioners could be of liability u/s 18-A. However, as noticed above violation u/s 18-

A and consequentially liability u/s 28 is also not made out.

23. In the circumstances, I am of the considered view that the complaint against the petitioners i.e. Accused Nos. 8 and 9 is a misuse of the

process of law. Resultantly the petition is allowed, complaint qua petitioners i.e. Accused Nos. 8 and 9 (in the complaint) as also all proceedings

connected thereto are quashed. No order as to costs.