
(2015) 08 AP CK 0005

In the Andhra Pradesh High Court

Case No : Criminal Petition No. 2178 of 2015

Gaba Pharmaceuticals Private Limited and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 14-08-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 190, 193, 200, 209, 226
Drugs and Cosmetics Act, 1940 — Section 13, 13(1)(a), 13(1)(c), 13(2)(a), 16
Penal Code, 1860 (IPC) — Section 320

Citation : (2016) 1 ALT(Cri) 18

Hon'ble Judges : B. Siva Sankara Rao, J

Bench : Single Bench

Advocate : Bharat Babu, for the Appellant; B. Narayana Reddy, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Dr. B. Siva Sankara Rao, J—This is a Criminal Petition filed, under Section 482 Cr.P.C., by the petitioners/A1 to A4 seeking to quash the proceedings initiated against them in Drugs Sessions Case No. 2 of 2013 dated 26.02.2015, consequently discharge the petitioners and sought for stay pending final disposal of the case.

2. The petitioners 1 to 4 are the accused in Drugs Sessions Case No. 2/2013 on the file of I Additional Metropolitan Sessions Judge, Hyderabad. The first respondent is the Union of India, represented by the Drug Inspector, Central Drugs Standard Control Organization, CDSCO Bhavan, Sanjeeva Reddy Nagar, Hyderabad. The second respondent is the State of Telangana, represented by its Public Prosecutor.

3. The first petitioner is the company represented by its Managing Director-third petitioner and besides the third petitioner individually impleaded being the Managing Director, the other petitioners 2 and 4 as Directors, all the four petitioners are shown as accused in the complaint laid by the first respondent-

Drugs Inspector for the offence punishable under Section 16(1)(a) of the Drugs & Cosmetics Act, 1940 (for short, the Act) which contravention is punishable under Section 27 of the Act. The learned VII Additional Chief Metropolitan Magistrate, Hyderabad, where the complaint filed under Section 200 Cr.P.C. read with Section 32(1) of the Act, has taken cognizance under Section 190 Cr.P.C. and in turn committed the case to the Court of Sessions supra, for its in turn taking of cognizance under Section 193 Cr.P.C.

4. The contention of the learned counsel for the petitioners in impugning the pending proceedings supra are that committing of the case by the learned Magistrate and taking of cognizance by the learned Sessions Judge is liable to be quashed being abuse of process, that the procedure contemplated under Sections 23(3) and 23(4) of the Act, for dividing and sealing the sample and restoring one sample with the person from whom the sample taken, is not followed, and the procedure followed in this regard is not mentioned and Form 17 was not addressed, and Rule 57 is contravened in forwarding the sample, that the Directors of the company involved as A2 and A4 not concerned with day-to-day administration to make them liable and the request of petitioners/A1 to A4 on 26.04.2012 for re-analysis by a superior authority is not considered, that takes away the right under law, the case is triable by magistrate and the committal is not correct, and the procedure is mandatory and for not following the same the proceedings vitiate. It is also the contention that the petitioners filed CrI.M.P. No. 1605 of 2014 in seeking discharge of them under Section 227 Cr.P.C., but the learned Sessions Judge dismissed the same by order dated 26.02.2015 and impugning the same CrI.R.C. No. 364 of 2015 is filed and the Court directed to convert as petition under Section 482 Cr.P.C. and there from sought for the reliefs supra.

5. The impugned order of the learned Sessions Judge reads that on perusal of the documents filed with the complaint 12 in number, fourth document, which is Test Report in Form 13 of the Government Analyst at Central Drugs Laboratory, Kolkata, shows the sample is not of standard quality, which is a clear contravention of Section 16(1)(a) read with Section 27(a) of the Act, and, so far as framing of charges is concerned, the standard of test, required to be applied during trial by appreciation of evidence, should not be applied, but for to see whether there is any prima facie accusation to frame charge with no need of conducting any roving enquiry or assessing probative value of the material and with that standard and limited scope from the material of the complaint, once there is a prima facie accusation to frame charge, held no grounds to discharge, and thereby dismissed the application for discharge. In fact, before the learned Sessions Judge, covered by the order supra, there is no ground urged regarding jurisdiction by saying much less by bringing to the notice of the Court, the amended Act, 26 of 2008 of the Act, 1940, much less by contending that the case is triable by Magistrate and not triable by Court of Sessions. Had it been, it can be one of the considerations before the learned Sessions Judge while framing charge under Section 228 Cr.P.C. From the order supra, holding no grounds to

discharge under Section 227 Cr.P.C. from hearing of the prosecution under Section 226 Cr.P.C. and the accused under Section 227 Cr.P.C. in forwarding the case by the Court of Sessions to the Chief Metropolitan/Judicial Magistrate if triable by Magistrate. However, that is not be all and end all and it is one of the grounds urged herein mainly regarding jurisdiction, apart from other contentions impugning the order of the Sessions Judge that can be considered herein.

6. In fact, the three judge Bench expression of the Apex Court in *State of Orissa Vs. Debendra Nath Padhi*, AIR 2005 SC 359 : (2005) 99 CLT 348 : (2005) 1 CTC 134 : (2004) 10 JT 303 : (2004) 10 SCALE 50 : (2005) 1 SCC 568 : (2004) AIRSCW 6813 : (2004) 8 Supreme 568 , it was held categorically referring to the earlier expressions and contradictory views, by clearing the cloud, that the material of the complainant or the prosecution alone to be considered and not any new material of the accused in considering as to whether charges can be framed or discharge can be ordered even under Sections 226 to 228 Cr.P.C. if it is before the Court of Sessions, or under Sections 239 and 240 Cr.P.C. if it is a police warrant case, or under Section 245 Cr.P.C. if it is a private warrant case, or under Section 251 Cr.P.C. if it is a summons case, the same procedure for summary trial. A perusal of the impugned order of the learned Sessions Judge, on the grounds sought, shows there is a prima facie accusation from the case of the complainant placed before the Court in taking cognizance by the learned magistrate while committing to Court of Sessions, that was in turn taken cognizance by the learned Sessions Judge and for framing of charges holding no grounds to discharge. Therefore, there are no grounds to interfere against the impugned order of the learned Sessions Judge of no grounds to discharge.

7. However, here it remains the important point newly raised before this Court to answer on the jurisdictional aspect. At the cost of repetition, it is the contention that for the offence under Section 16(1)(a) of the Act punishable under Section 27 of the Act, it is triable by magistrate and not by the Court of Sessions as a Special Judge. The learned counsel for the petitioners has placed reliance upon the expression of the Kerala High Court in Criminal Revision Petition No. 1477 of 2013 in *Nandani Medical Laboratories Private Limited, Indore and another v. Drug Inspector, Office of the Assistant Drug Controller, Thrissur and another* 2012 (3) KLT 940 [order dated 30.08.2013] referring to the earlier expression in *Udayadivakaran v. State of Kerala* 1999 (3) ALT 533. Both the single judge expressions are by referring to Section 36AB of the amended Act, 26 of 2008.

8. Section 16 as per the amended Act 13 of 1964, which deals with the Standard quality. Sub-section (1) of Section 16 speaks for the purpose of this chapter, the expression standard quality means (a) in relation to a drug, that the drug complies with the standard set out in the second schedule [amended by Act 68 of 1982 (w.e.f. 1-2-1983)] and (b) in relation to a cosmetic, that the cosmetic complies with such standard as may be prescribed. The offence herein is under Section 16(1)(a) regarding the drug and not a cosmetic. The penal provision for said contravention punishable under Section 27 of the Act, reads as under:

"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) any drug deemed to be adulterated under section 17A or spurious under section 17B or which when used by any person for or in the diagnosis, treatment, mitigation, or prevention of any disease or disorder is likely to cause his death or is likely to cause such harm on his body as would amount to grievous hurt within the meaning of section 320 of the Indian Penal Code (45 of 1860), solely on account of such drug being adulterated or spurious or not of standard quality, as the case may be, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to a term of life and with fine which shall not be less than ten thousand rupees:

(b) any drug--

(i) deemed to be adulterated under section 17A, but not being a drug referred to in clause (a), or

(ii) without a valid licence as required under clause (c) of section 18,

shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than five thousand rupees:

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 and of fine of less than five thousand rupees;

(c) any drug deemed to be spurious under section 17B, but not being a drug referred to in clause (a) shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years and with fine which shall not be less than five thousand rupees:

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 three years but not less than one year:

(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 thereunder, 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."

9. Section 17 of the Act deals with either misbranded drugs or adulterated drugs or spurious drugs, likewise either misbranded cosmetics or spurious cosmetics or adulterated cosmetics. Section 18 speaks prohibition of manufacture and sale of

certain drugs or manufacture for sale or for distribution, or stocking, or exhibiting, or distributing any drug which is not of a standard quality, or is misbranded, adulterated or spurious, likewise for cosmetics. Section 27 speaks penalty for manufacture, sale etc., of drugs in contravention of this chapter 4 of the Act. Chapter 4 covers the Section 16 to Section 33A. Chapter 4A covers the Sections 33A to 33O. Section 32 deals with cognizance of offences. Section 32(1) speaks that no prosecution under this chapter shall be instituted except by an Inspector or any Gazetted Officer of the Central/State Government authorized by order in this regard, or aggrieved, or a recognized consumer association. Sub-section (2) of Section 32, incorporated by the amendment as per the Act 26 of 2008, says save as otherwise provided in this Act, no Court inferior to that of a Court of Sessions shall try an offence punishable under this chapter. Section 32(3) speaks besides the offence under this Act, offences under any other law can be tried together. Section 33M(1) speaks no prosecution shall be instituted except by an Inspector with the previous sanction of the authority specified in Section 33G(4). Section 21 speaks about the Central or State Government may by notification in the official gazette, appoint such persons with prescribed qualification as inspectors with duties to be performed, who are within the meaning of public servants. Section 34(1) speaks that where an offence under this Act has been committed by a company, every person who at the time the offence committed, was in-charge of, and was responsible to the company for the conduct of its business, as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. The proviso speaks, if that person proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence, that can save him. Sub-section (2) of Section 34 says notwithstanding anything contained in Section 34(1) where offence committed under this Act by a company and it is proved with the consent or connivance of, or is attributable to any neglect on the part of, any Director, Manager, Secretary or other Officer of the company, such person shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Section 36 of the Act speaks, notwithstanding anything contained in Cr.P.C. it shall be lawful for any Metropolitan Magistrate or any Judicial Magistrate of First Class to pass any sentence authorized by this Act in excess of his powers under Cr.P.C. Section 36A speaks notwithstanding anything contained in Cr.P.C. all offences (except the offences triable by the Special Court under Section 36AB or Court of Sessions) under this Act, punishable with imprisonment for a term not exceeding three years, other than an offence under Section 33I(1)(b), shall be tried in a summary way by a Judicial Magistrate of First Class specially empowered or by a Metropolitan Magistrate and the provisions of Sections 262 to 265 Cr.P.C. shall apply as the case may be to such trial, and it shall be lawful for the magistrate to pass a sentence not exceeding one year, however, if the magistrate feels the sentence to be passed is above one year or not desirable to try the case summarily, after hearing the parties and recording an order to that effect, recall any witness and examine, by

hearing or re-hearing the case as provided in Cr.P.C.

10. Section 36AB, speaks about the Special Courts. Section 36AB(1) says that the Central Government or the State Government, in consultation with the Chief Justice of the High Court, shall, for trial of offences relating to adulterated drugs or spurious drugs and punishable under clauses (a) and (b) of Section 13, Section 22(3), Section 27(a) and 27(c), Section 28, Section 28A, Section 28B and Section 30(1)(b) and other offences relating to adulterated drugs or spurious drugs, by notification, designate one or more Courts of Sessions as a Special Court/Courts for such area/areas or for such case/cases as may be specified in the notification. Sub-section (2) of Section 36AB speaks that while trying an offence under this Act, a Special Court shall also try any offence, under any other law that to be tried, be charged under Cr.P.C. in the same trial.

11. Section 36AC speaks notwithstanding anything contained in Cr.P.C. every offence relating to adulterated or spurious drugs and punishable under Sections 13(1)(a) and 13(1)(c), 13(2)(a), 22(3), 27(a) and 27(c), 28, 28A, 28B and 30(1) and 30(2) and other offences relating to adulterated drugs or spurious drugs, shall be cognizable. Clause (b) of Section 36AB speaks a bail to be granted by the Special Court depends upon propensity of the crime or nature of offence as additional provisions to the bail provisions under Cr.P.C. Section 36AD(1) speaks save as otherwise provided in this Act, the provisions of Cr.P.C. shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Sessions.

12. A perusal of the above provisions nowhere speaks the Special Court can directly take cognizance. Once such is the case, as per Section 4(2) read with Section 5 Cr.P.C., the Cr.P.C. provisions are applicable to the procedure provided under the Special Act also where there is no special procedure provided. As referred supra, from Section 36AD of the amended Act 26 of 2008, so far as the Special Court is concerned, it is to be deemed as the Court of Sessions, save as otherwise provided, the procedure is as per Cr.P.C. If the offence is triable by Special Court, it is only by committal proceedings. Regarding the scope of Sections 4(2) and 5 Cr.P.C. where there is no specific procedure of direct cognizance under any other law, Cr.P.C. applies and once the Court is designated as a Special Court being Court of Sessions, committal proceedings is a must. It is the law in fact laid down by a Division Bench of this Court more than once in dealing with the provisions of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 in Referring Officer Vs. Shekar Nair @ Guru and Others, (1999) 3 ALT 533 : (1999) 1 ALT(Cri) 688 and by reiterating the same by same Bench in Referring Officer v. State of A.P. apart from the same view reiterated by the Apex Court in Gangula Ashok and Another Vs. State of A.P., AIR 2000 SC 740 : (2000) CriLJ 819 : (2000) 1 JT 379 : (2000) 1 SCALE 294 : (2000) 2 SCC 504 : (2000) 1 SCR 468 : (2000) 1 UJ 679 : (2000) AIRSCW 279 : (2000) 1 Supreme 378 leave about another expression in P. Venkata Reddy v. State of A.P. 1999 (2) ALD Cri 840 of a single Judge that is approved by the

Division Bench holding that a Special Court without committal proceedings, if proceeded with trial the trial vitiates. The Division Bench of this Court in the expressions *supra*, has given guidelines of the cases without committal pending before the Special Court to send back to the learned magistrate concerned, who got jurisdiction to commit the case and to proceed there from under Section 209 Cr.P.C. at the post cognizance stage by the magistrate under Section 190 Cr.P.C., for the Sessions Court only to take cognizance under Section 193 Cr.P.C.

13. Coming back to Section 36AB, which speaks about the Special Court for the offence punishable under Section 27(a) and 27(c). Among Section 27(a) to 27(d) only included to say Section 27(b) and 27(d) are triable by magistrate having jurisdiction. The Special Court is not entrusted with these as per Section 36AB *supra*. That what in fact the Kerala High Court in *Nandani Medicals*'s case (referred *supra*) held at paragraph Nos. 4 and 5 that the offence under Section 18(a)(i) of the Act is punishable under Section 27(d) of the Act.

14. Now coming to the complaint filed and cognizance taken by the magistrate is under Section 27 of the Act. The complainant in filing the complaint did not speak whether the offence comes under Sections 27(a) and 27(c) or Sections 27(b) and 27(d) or any of the specific provisions among Section 27(a) to Section 27(d). The learned Magistrate also in the committal order did not speak the same. The learned Sessions Judge after taking cognizance under Section 193 Cr.P.C. at post committal stage in passing the impugned order after hearing of parties also, for the reason no one brought to its notice, did not advert to it.

15. Having regard to the above, it is a fit case to remit the matter back to the learned Sessions Judge for further hearing and pass an order as to the case whether comes under Section 27(a) or Section 27(c) or both for retaining by him as a Special Court being Court of Sessions from the committal made and cognizance under Section 193 Cr.P.C. taken, if not and if comes under Section 27(b) or 27(d) or both, to send back to the magistrate within his power under Section 228 Cr.P.C. while framing charge as triable by magistrate under Section 228(1)(a) Cr.P.C.

16. With the above directions, this Criminal Petition is disposed of. Miscellaneous petitions pending, if any, in the Criminal Petition shall stand closed.