

(2012) 10 AP CK 0023

In the Andhra Pradesh High Court

Case No : Criminal Petition No"s. 6760, 6817, 6818, 6819, 6820, 6821, 6822, 6823, 6824, 6825, 6826, 6827, 6828, 6829, 6830, 6861, 6862, 6863, 6864 and 6865 of 2012

M/s. Fizikem Laboratories Pvt. Ltd. and Another

APPELLANT

Vs

The Drugs Inspector and Another

RESPONDENT

Date of Decision : 03-10-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482

Drugs and Cosmetics Act, 1940 — Section 17(b), 17(B)(d), 18(a), 18(a)(i), 18(c)

Citation : (2012) 2 ALD 937 : (2012) 2 ALD(Cri) 937 : (2013) 1 ALT(Cri) 128

Hon'ble Judges : Samudrala Govindarajulu, J

Bench : Single Bench

Advocate : P. Gangaiah Naidu for Mr. Ambadipudi Satyanarayana, for the Appellant;

Final Decision : Dismissed

Judgement

Honourable Sri Justice Samudrala Govindarajulu

1. The petitioners 1 and 2/A-1 and A-2 in these batch of criminal petitions are accused of offences punishable under Sections 27(b)(ii), 27(c), 27(d) and 28-B of the Drugs and Cosmetics Act, 1940(in short, the Act) for violation of Sections 18(c), 18(a)(i)/17(B)(d), 17(b) of the Act and Section 26-A read with S.No.56 of notification No. GSR 578(E) dated 23.07.1983. A-1 is Fizikem Laboratories Private Limited, Tadigadapa and A-2 is its Managing Director. Subject matter of these criminal prosecutions is manufacture and sale of capsules of Ozomen, Ozomen Forte and Rapid Forte by the accused through various dealers in the State. After obtaining samples of the said drugs from the retail dealers when they kept the same for sale, in accordance with the procedure prescribed, one of the samples in each case was sent to Government analyst for analysis. In all these cases, Government analyst sent analytical report. Accordingly the respective drugs inspectors filed complaints before the respective Magistrates

alleging that A-1 had manufactured the said drugs containing Sildenafil citrate without valid drug licence and that Sildenafil Citrate is an Allopathic drug and that labels of the subject drugs claim that they are Ayurvedic proprietary medicines which is a false claim and therefore they are not labelled in the prescribed manner and that they are spurious drugs with reference to their respective labels and that Ayurvedic drugs have been substituted in part with Allopathy drug and that it is in contravention of the notification No. GSR 578(E) dated 23.07.1983 published in the Gazette of India Part II. There is no dispute that A-1 has been manufacturing capsules of Ozomen, Ozomen Forte and Rapid Forte which are trade names as Ayurvedic drugs after obtaining Ayurvedic Drug licence. The allegation is that those three drug capsules contained various potencies of Sildenafil Citrate which is an Allopathic drug. In these petitions, it is not disputed that Sildenafil Citrate is an Allopathic drug. It is contended by senior counsel for the petitioners that since the drugs are being manufactured by the accused as Ayurvedic drugs and in case some other substance or drug which is not an Ayurvedic Drug is found in the samples, then the prosecution should have been for the offences prescribed under Chapter-IVA of the Act for contravention of the provisions under that chapter and that in a case of this nature, the prosecutions should not have been launched and should not be allowed to continue for offences under Chapter-IV of the Act for contraventions of the provisions under the same chapter. Sections 33A and 33B of the Act are pointed out by the senior counsel in this regard.

Section 33A of the Act which occurs in Chapter IV reads as follows:

33A. Chapter not to apply to Ayurvedic, Siddha or Unani drugs: Save as otherwise provided in this Act, nothing contained in this Chapter shall apply to Ayurvedic, Siddha or Unani drugs.

Section 33B of the Act which occurs in Chapter IVA reads as follows:

33B. Application of Chapter IVA:- This Chapter shall apply only to Ayurvedic, Siddha and Unani drugs.

From the above provisions, it is contended that prosecutions of the accused for the above offences under Chapter IV for contravention of the above provisions under chapter IV of the Act are not maintainable as they are contrary to law.

2. At this stage it may be noted that previously the petitioners filed Criminal Petition Nos.4475, 4476, 4477, 4479, 4480, 4481, 4482, 4565, 4566, 4567, 4568, 4569, 4570, 4571, 4572, 4573, 4574 of 2005 and 942, 943, 944, 946, 947, 948 of 2006 u/s 482 Cr.P.C in this High Court on the same grounds which are urged herein. By common order dated 17.04.2006, this High Court allowed the said criminal petitions and quashed proceedings in all the calendar cases pending on the files of the respective Magistrate Courts against the petitioners. As against the said common order dated 17.04.2006 passed by this Court, the complainants/Drugs Inspectors filed Criminal Appeal No. 533 of 2008 in the Supreme Court of India after obtaining leave. The Supreme Court by judgment

dated 24.03.2008 allowed the Criminal Appeal and set aside the common order passed by this Court directing the trial Courts to proceed with trial of the matters. After lapse of more than 4 years of judgment of the Supreme Court, again the petitioners have come up with these criminal petitions u/s 482 Cr.P.C for quashing the respective prosecutions on the same grounds as before.

3. It is contended by senior counsel for the petitioners that previously this High Court allowed the criminal petitions on the ground of incurable jurisdictional deficiency for want of proper previous sanction for launching the prosecution and that the Supreme Court without going into that question, erroneously allowed the Criminal Appeal filed against previous common order of this High Court on the ground that the Inspector appointed u/s 21 occurring in Chapter IV is competent to launch prosecutions for the above penal sections against the accused. In the present criminal petitions, this High Court may not scrutinise the alleged error in Judgment of the Supreme Court and make a comment on it. In case the petitioners felt that there was an error apparent on face of Judgment of the Supreme Court, then the petitioners' remedy is only by way of seeking review of the Judgment before the Supreme Court and not by way of making comments on Judgment of the Supreme Court before this High Court.

4. When this Court questioned as to maintainability of the present criminal petitions u/s 482 Cr.P.C after the previous litigation u/s 482 Cr.P.C ending against the petitioners in the Supreme Court, senior counsel for the petitioners placed reliance on *Dasari Narayana Rao V. B.V.S. Lakshmi* 1995(2) Crimes 869 of this Court. It was held therein:

In so far as the argument with regard to bar of this Court to entertain second or successive applications u/s 482 Cr.P.C even after the dismissal of the petition at the first Instance is concerned, it is true that there is no legal embargo to entertain subsequent applications in view of the fact that what is conferred u/s 482 Cr.P.C is inherent power. But, propriety requires that once on one set of facts a petition u/s 482 Cr.P.C has not been entertained, no second or successive applications should be entertained, unless there are changed circumstances.

5. In the present criminal petitions, the petitioners did not put forth any change of circumstances after dismissal of their previous criminal petitions by the Supreme Court ultimately, except passage of time. Senior Counsel for the petitioners contended that long lapse of time after dismissal of the previous criminal petitions by the Supreme Court constitutes changed circumstance in these cases. Reliance is placed on *Superintendent and Remembrancer of Legal Affairs, West Bengal Vs. Mohan Singh and Others*, of the Supreme Court wherein the Supreme Court upheld entertainment of second criminal petition u/s 561A of old Cr.P.C (corresponding to Section 482 of the Code of criminal Procedure, 1973) after lapse of one and half years of dismissal of previous petition u/s 561A of old Cr.P.C by the Calcutta High Court. It was a case where previous order u/s 561A of old Cr.P.C was rendered by the Calcutta High Court not on merits, but on the ground that evidence was to be let in and it was not desirable to interfere with

the proceedings at that stage. But, in the case on hand, previously both this Court as well as the Supreme Court decided the issues raised by the accused on merits and gave findings thereon. Therefore, in these circumstances, the present criminal petitions which are in the nature of review petitions for reviewing the earlier common order of this Court which was reversed by the Supreme Court, are not maintainable in law.

6. Be that as it may, coming to merits of the case, there is no dispute that Sildenafil Citrate is an Allopathic drug. The accused have no drug manufacture licence for preparation of Allopathic drug. They have drug manufacturing licence for preparation of Ayurvedic drugs only. In spite of it, the accused are alleged to have manufactured drugs titled Ozomen, Ozomen Forte and Rapid Forte containing Allopathic drug also as one of its components or constituents. This activity of the accused attracted liabilities and penalties under Chapter IV of the Act relating to Allopathic drugs other than Ayurvedic, Siddha and Unani drugs.

7. The Supreme Court in the judgment dated 24.03.2008 in Criminal Appeal No. 533 of 2008 observed:

The accused has used sildenafil citrate which is an allopathic drug. Sildenafil citrate is a white to off-white crystalline powder with a solubility of 3.5 mg/ml in water and molecular weight of 666.7. Viagra (sildenafil citrate) is formulated as blue, film-coated, rounded diamond-shaped tablets equivalent to 25 mg, 50 mg and 100 mg of sildenafil for oral administration. In addition to the active ingredient, sildenafil citrate, each tablet contains the following inactive ingredients: microcrystalline cellulose, anhydrous dibasic calcium phosphate, croscarmellose sodium, magnesium stearate, hypromellose, titanium dioxide, lactose, triacetin and FD & C Blue No. 2, Aluminium Lake. The brand name is Viagra and generic name is sildenafil citrate. This is an allopathic drug and by no stretch of imagination can it be said as an ayurvedic drug. Therefore, learned counsel for the appellants appears to be justified that since it is an allopathic drug and it cannot be used by anybody else unless (sic except) a person who holds the licence for it. It is an admitted position that the accused does not possess the licence. Therefore, the very fact of selling this drug as one of the ingredients in Ozomen capsule and not displaying the name in the prescribed manner in the drugs will also constitute an offence under Sections 18(a), (b) and (c) punishable u/s 27(b)(ii).

Since the sample drug happened to be an Allopathic drug also, the prosecutions launched by the respective Drugs Inspectors in the lower Court against the accused for contraventions of provisions under Chapter IV attracting penalty for offences under Chapter IV of the Act, are legally justified and tenable. For launching prosecution for the offences under Chapter IV of the Act, no prior sanction for prosecution is necessary for taking cognizance of the offences u/s 32 of the Act. It is only in case of prosecution for offences punishable under Chapter IVA, prior sanction of the authority specified u/s 33G (4) of the Act is necessary. For the same reasons, the Inspector appointed u/s 21 occurring under Chapter

IV of the Act is competent to launch prosecutions in these cases.

8. It is finally pointed out by senior counsel for the petitioners that another case was launched by the Drugs Inspector appointed u/s 33G of the Act for offences punishable under Chapter IVA of the Act and it is pending and that since the sample drugs are Ayurvedic drugs, the petitioners are prepared to face prosecution in that case and that therefore, the present prosecutions of the accused for the offences under Chapter IV of the Act are not sustainable in law. Since the sample drugs in these cases are manufactured under drugs manufacturing licence relating to Ayurvedic drugs, the other prosecution of the accused for the offences under Chapter IVA of the Act by the Drugs Inspector appointed u/s 33G of the Act is maintainable. The Supreme Court in the Judgment dated 24.03.2008 took note of this fact also in the last paragraph and observed:

We have also been informed in the alternative that prosecution has also been launched against the accused under Chapter IV-A. Both the prosecution can be tagged together and the learned trial court should proceed with the matter.

Therefore, this submission of the petitioners/accused does not hold water.

In the result, all the criminal petitions are dismissed.