
(1999) 02 BOM CK 0062

In the Bombay High Court

Case No : Criminal Writ Petition No. 117 of 1998

M/s. Zim Laboratories Ltd. and others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 03-02-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Drugs and Cosmetics Act, 1940 — Section 16, 18, 23, 25(3), 25(4)

Citation : (2000) 5 BomCR 282 : (1999) CriLJ 2903 : (1999) 3 MhLj 132

Hon'ble Judges : D.D. Sinha, J

Bench : Single Bench

Advocate : Anand Parchure, for the Appellant; V.M. Deshpande, Assistant Public Prosecutor, for the Respondent

Judgement

D.D. Sinha, J.—Heard Shri Parchure, learned Counsel of the petitioners and Shri Deshpande, learned Additional Public Prosecutor for the respondent-State.

2. The present criminal writ petition is directed against the order dated 3-2-1998 passed by the 3rd Additional Sessions Judge, Nagpur in Criminal Revision Application No. 1806 of 1995, whereby the Revisional Court dismissed the revision preferred by the complainant and confirmed the order dated 24-10-1994 passed by the Additional Chief Judicial Magistrate, Nagpur below Ex. 4 in Complaint (Cr.) Case No. 21 of 1994.

3. It will be appropriate to consider few relevant facts which have given rise to the controversy in question. Petitioner No. 1 is the Public Limited Company engaged in manufacture and supply of drugs and medicines. It is a licensed manufacturer of medicines. The complainant is the Drug Inspector, who was serving at the relevant time in the office of the Joint Commissioner, Food and Drugs Administration, Nagpur and is empowered to enforce the provisions of the Drugs and Cosmetics Act and Rules. Petitioner No. 1 is manufacturing Ampicillin and Cloxacillin capsules under the Brand name "Zimlox". The said medicine manufactured by petitioner No. 1 company is usually marketed through M/s.

Universal Medikit Private Limited, Nagpur, who is the principal distributor appointed for the purpose.

4. On 26-5-1994, the Drugs Inspector, Chandrapur visited the factory of petitioner No. 1 and handed over the copy of the report and test of Analysis of the drug "Zimlox" sent by the Government Analyst, Bombay, declaring the sample of said drug sent to him for analysis, "as not of Standard quality as the quantity of its principal ingredients in the sample was found to be less than the limit prescribed". A portion of the sample of the said drug was also delivered by the said Drug Inspector to the Technical Director of the Company i.e. present petitioner No. 11. After the receipt of the above referred report of the Government Analyst, petitioner No. 1 sent a letter to the Drug Inspector on 18-6-1994 informing him that the report of the Government Analyst declaring the sample of the above referred drug as not of standard quality was not acceptable to petitioner No. 1 and he intended to lead evidence in controversion of the said Government Analyst report. Petitioner No. 1 further requested to send a portion of the sample of the drug to the Central Drugs Laboratory for re-analysis and the petitioner was ready to bear the cost involved in respect of the same.

5. The Drug Inspector after the receipt of the above referred letter dated 18-6-1994 sent by petitioner No. 1 Company, handed over the case papers with the remaining portion of the sample to the office of the Joint Commissioner (Nagpur Division), Food & Drugs Administration (M.S.), Nagpur. The said authority by its letter dated 13-7-1994 acknowledged the receipt of the letter dated 18-6-1994 and informed petitioner No. 1 Company to approach the Court concerned for obtaining the necessary direction to send the sample of the drug for re-analysis to the Central Drugs Laboratory at Calcutta. The petitioner received the said letter dated 13-7-1994 on 19-7-1994.

6. Petitioner No. 1 presented an application before the Additional Chief Judicial Magistrate, Nagpur on 28-7-1994 requesting to direct the respondent-complainant to deposit the portion of sample for sending it to Central Drugs Laboratory, Calcutta for re-analysis. The said application was registered as Criminal Application No. 12 of 1994. The Additional Chief Judicial Magistrate, Nagpur issued notice to the respondent-complainant for submission of sample of the drug in question in the Court for sending it for re-analysis to the Central Drugs Laboratory, Calcutta. The said notice was served on respondent-complainant in the first week of August 1994 and was made returnable by the Court on 30-9-1994. The drug in question was due to expiry in the month of August 1994. However, the Drug Inspector did not submit the sample immediately upon the receipt of the notice issued by the Court. The respondent-complainant thereafter on 31-8-1994 lodged a criminal complaint against the petitioners and the offence u/s 8(a)(i) read with section 16 and punishable u/s 27 of the Drugs and Cosmetics Act before the Additional Chief Judicial Magistrate, Nagpur.

7. The petitioners filed an application for dismissal of the complaint and discharge of the accused persons before the Additional Chief Judicial Magistrate, Nagpur mainly on the ground that the complainant failed to follow the relevant provisions of Drugs and Cosmetics Act and also delayed the lodging of the prosecution against the petitioners which has deprived them of availing their available right to get the re-analysis of the sample done from the Central Drugs Laboratory, Calcutta. The Additional Chief Judicial Magistrate, Nagpur vide order dated 24-10-1994 rejected the application for dismissal of the complaint and discharge of the accused. The said order was thereafter came to be confirmed by the 3rd Additional Sessions Judge, Nagpur vide order dated 3-2-1998 by dismissing the Revision preferred by the petitioners. Hence the present writ petition.

8. Shri Parchure, the learned Counsel for the petitioners contended that because of failure on the part of the Drug Inspector to follow and comply with the provisions of section 25(3)(4) of the Drugs and Cosmetics Act, 1940, the entire prosecution in the instant case is vitiated and complaint is liable to be dismissed. The learned Counsel contended that in the instant case the report of the Government Analyst in respect of the sample in question was delivered to the petitioners by the complainant on 26-5-1994. The petitioners within 28 days from the date of the receipt of the said report informed the complainant-Drug Inspector vide letter dated 18-6-1994 that the portion of the sample obtained by him be sent to the Central Drugs Laboratory, Calcutta for re-analysis of the said sample. It is further contended that similar request was also made to the Court while presenting the application dated 28-7-1994. It is further submitted that under sub-section (3) of section 25 of the Act, the petitioners were required to complete the above referred formality and thereafter the complainant-Inspector ought to have taken necessary steps immediately to get the re-analysis done of the sample through the Central Drugs Laboratory, Calcutta. It is further submitted that the Additional Chief Judicial Magistrate also could have issued directions to arrange to send the sample to the Central Drugs Laboratory, Calcutta for the purposes of re-analysis. However, the learned Counsel contended that neither the Drug Inspector nor the Additional Chief Judicial Magistrate had taken prompt steps in the matter and allowed the time to lapse which in fact deprived the petitioners of their valuable legitimate right to get the re-analysis done through the Central Drugs Laboratory, Calcutta. The learned Counsel, therefore, submitted that the entire prosecution in the instant case is vitiated and not maintainable.

9. The learned Counsel for the petitioners in order to substantiate the contentions raised by him, placed reliance on the judgment *Ramanbhai v. S.R. Sharma*, reported in 1997(2) M.L.J. 629; judgment of the Punjab & Haryana High Court *State of Haryana v. A. Kumar Bansal*, reported in 1995 DC 72 and decision of the Apex Court *Municipal Corporation of Delhi Vs. Ghisa Ram*, .

10 Shri Deshpande the learned Additional Public Prosecutor appearing on behalf

of the State supported the impugned order. The learned Counsel contended that there is a wilful delay caused by the petitioners in approaching the Court for necessary direction regarding sending of sample to the Central Drugs Laboratory, Calcutta. It is contended that the report of Government Analyst was received by the complainant on 8-2-1994. The said report was supplied to the accused on 26-5-1994. Petitioner No. 1 on 18-6-1994 gave intimation in writing to the Drug Inspector that they challenge the report of the Government Analyst. On 28-7-1994, the petitioners moved the Misc. Criminal Application No. 12 of 1994 before the Additional Chief Judicial Magistrate, Nagpur for sending the part of the sample to the Central Drugs Laboratory Calcutta. The learned A.P.P for the State submitted that there was an unreasonable unexplained delay on the part of the petitioners to move the Court for necessary orders. It is further contended that the petitioners were supplied a copy of the report of the Government Analyst on 26-5-1994. There was no need for the petitioners to wait till 28-7-1994 and they could have immediately approached the Court for obtaining necessary directions regarding sending part of the sample to the Central Drugs Laboratory, Calcutta. The learned A.P.P. contended that the delay caused by the petitioners is deliberate and a wilful and with a view to allow the time to lapse since the drug in question was due to expire in the month of August 1994. The learned A.P.P., therefore, submitted that in the given set of circumstances, the petitioners are not entitled to get the benefit of the right conferred u/s 25(3) & (4) of the Drugs & Cosmetics Act, 1940, and the impugned order is just and proper.

11. In order to appreciate the contentions raised by the learned Counsel for the petitioners, it will be appropriate to take into consideration certain undisputed facts, such as the sample in question was drawn on 26-10-1993. The drug in question was due to expire in the month of August 1994. The report of the Government Analyst was received by the complainant-Drug Inspector on 8-2-1994. The copy of the said report was supplied to the accused on 26-5-1994. The accused-Company on 18-6-1994 gave intimation in writing to the Drug Inspector that they challenge the report of the Public Analyst and on 28-7-1994, the accused Company presented the Misc. Criminal Application No. 12 of 1994 for sending the part of the sample to the Central Drugs Laboratory, Calcutta. On the back drop of the above referred undisputed facts, it will be appropriate to consider the relevant provisions of law. Section 25 of the Act deals with the Reports of Government Analysts. Sub-section (3) of section 25 reads thus:

"(3) Any document purporting to be a report signed by a Government Analyst under this Chapter shall be evidence of the facts stated therein, and such evidence shall be conclusive unless the person from whom the sample was taken (or the person whose name, address and other particulars have been disclosed u/s 18-A) has, within twenty-eight days of the receipt of a copy of the report, notified in writing the Inspector or the Court before which any proceedings in respect of the sample are pending that he intends to adduce evidence in controversion of the report."

Sub-section (3) of section 25 contemplates that the report signed by the Government Analyst shall be evidence of the facts stated therein and such evidence shall be conclusive unless the person from whom the sample was taken, within 28 days of the receipt of a copy of the report notified in writing the Inspector or the Court before which any proceedings in respect of the sample are pending, his intention to adduce evidence in controversion of the report.

12. The plain reading of the above referred sub-section (3) of section 25 of the Act makes it clear that after the receipt of the report of the Government Analyst by the accused, in case the accused is intending to adduce evidence in controversion of the said report, he is required to notify in writing the Inspector or the Court before which any proceedings in respect of the sample are pending, within 28 days from the date of receipt of such report.

13. Sub-section (4) of section 25 of the Act contemplates that where a person has under sub-section (3) notified his intention of adducing evidence in controversion of a Government Analyst's report, the Court may, of its own motion or in its discretion at the request either of the complainant or the accused cause the sample of the drug produced before the Magistrate under sub-section (4) of section 23 to be sent for test or analysis to the said Laboratory, which shall make the test or analysis and report in writing signed by, under the authority of, the Director of the Central Drugs Laboratory, the result thereof, and such report shall be conclusive evidence of the facts stated therein.

14. In the instant case, it is not disputed that within 28 days from the receipt of the report of the Government Analyst, the accused Company gave intimation by letter dated 18-6-1994 to the complainant-Drug Inspector conveying their intention to adduce evidence in controversion of the report of the Government Analyst. The requirement as per sub-section (3) of section 25 of the Act is that the accused is required to notify in writing to the Inspector or the Court before which any proceedings in respect of the sample are pending, within 28 days from the receipt of the copy of the report of the Government Analyst, his intention to adduce evidence in controversion of the said report. It is, therefore, clear that if the accused conveys his above referred intention to the Inspector within 28 days from the receipt of a copy of the report of the Government Analyst, in my opinion, the requirement of the section is complete. Hence, in the instant case, the finding arrived at by the trial Court that there was a wilful delay on the part of the accused is not only misconceived but the same is unsustainable in law. It is to be noted that sub-section (3) of section 25 contemplated two forum to be approached by the accused within 28 days from the receipt of a copy of the report of the Government Analyst. First, the Inspector and the second is the Court before whom the proceedings in respect of the sample are pending. The accused is entitled to approach any one of the above referred authorities within the stipulated period of 28 days and since in the instant case, the accused has approached the Inspector within 28 days, as contemplated by sub-section (3) of section 25 of the Act, it cannot be said that there was any delay whatsoever on

the part of the accused to move the authority concerned as contemplated under sub-section (3) of section 25 of the Act.

15. Sub-section (4) of section 25 contemplates the procedure to be adopted by the Court when the accused notifies in writing his intention to adduce evidence in controversion of the report of the Government Analyst. The Court in such a situation on its own motion or in its discretion at the request either of the complainant or the accused cause the sample of the drug produced before it under sub-section (4) of section 23 to be sent for the necessary test or analysis.

16. In the instant case, as stated above, the Drug Inspector was notified by the accused-company on 18-6-1994 i.e. within the stipulated period of 28 days about their intention to adduce evidence in controversion of the report. Therefore, it was not only necessary but incumbent upon the Drug Inspector to immediately move the Magistrate, as contemplated under sub-section (4) of section 25 of the Act, for necessary direction. However, in the instant case, it is really surprising that the Drug Inspector did not do anything inspite of the intimation by letter dated 18-6-1994. It is really unfortunate that the Government servants, entrusted with the public duty, are so casual and callous in discharging their statutory duties which, in fact, results in causing grave injustice to the society at large. The inaction on the part of the concerned officer also results in depriving the citizens from exercising their available statutory rights which ultimately adversely affects the prosecution and the courts are required to quash the same.

17. The present controversy in question is clearly covered by the observations made by the Apex Court, particularly in para 7 of its judgment *Municipal Corporation of Delhi Vs. Ghisa Ram*, Those are:

"It appears to us that when a valuable right is conferred by section 13(2) of the Act on the vendor to have the sample given to him analysed by the Director of Central Food Laboratory, it is to be expected that the prosecution will proceed in such a manner that right will not be denied to him. The right is a valuable one, because the certificate of the Director supersedes the report of the Public Analyst and is treated as conclusive evidence of its contents. Obviously, the right has been given to the vendor in order that, for his satisfaction and proper defence, he should be able to have the sample kept in his charge analysed by a greater expert whose certificate is to be accepted by Court as a conclusive evidence. In a case where there is denial of this right on account of the deliberate conduct of the prosecution, we think that the vendor, in his trial, is so seriously prejudiced that it would not be proper to uphold his conviction on the basis of the report of the Public Analyst, even though that report continues to be evidence in the case of the facts contained therein."

18. In the present case, the petitioner-accused in view of the provisions of sub-section (3) of section 25, informed the complainant within 28 days from the date of receipt of the report his intention to adduce evidence in controversion of the

said report of the Government Analyst. However, because of the failure on the part of the complainant to take prompt appropriate steps in this regard, the petitioner was deprived of his valuable statutory right which has affected the prosecution adversely.

19. In the instant case, the Drug Inspector inspite of the receipt of the intimation from the petitioner Company 011 18-6-1994, did not do anything at all and allowed the time to lapse which ultimately resulted in denial of opportunity to the petitioners for getting the part of the sample of the drug reanalysed from the Central Drugs Laboratory, Calcutta which, in fact, has further resulted in depriving the petitioners from exercising their valuable statutory right which, in my opinion, goes to the root of the matter and adversely affects the prosecution. It is no doubt true that the report of the Government Analyst continues to be the evidence in a case of the facts contained therein. However, the right of the accused to get the sample analysed from the Central Drugs Laboratory, Calcutta is a valuable right since the certificate of Central Drugs Laboratory supersedes the report of the Government Analyst and is treated as conclusive evidence of its contents. In that view of the matter, in my opinion, the impugned order is not just and proper and the same is devoid of substance and misconceived.

20. In the result, the impugned order dated 24-10-1994 passed by the Additional Chief Judicial Magistrate, Nagpur is hereby quashed and set aside and the Complaint (Criminal) Case No. 21 of 1994 instituted on the complaint of the respondent complainant is dismissed.

21. Petition allowed.