
(2008) 01 RAJ CK 0110
In the Rajasthan High Court

Nikson Pharmaceuticals and Others

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 28-01-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 245, 468, 482
Drugs and Cosmetics Act, 1940 — Section 25, 30
Insecticides Act, 1968 — Section 24

Citation : (2009) 5 RCR(Criminal) 204 : (2008) 3 RLW 2498

Hon'ble Judges : Prakash Tatia, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Prakash Tatia, J.—Heard learned Counsel for the parties.

2. The petitioners are aggrieved against the orders passed by the two courts below dated 23rd Nov., 2002, which were passed by the Chief Judicial Magistrate, Udaipur in Cr. Complaint No. 2/2995- State of Rajasthan v. Nikson Pharmaceuticals and Ors. whereby the learned Magistrate dismissed the petitioners' application filed u/s 245(2) Cr.P.C. read with Section 468(2) of the Limitation Act and against the order of the revisional court dated 8.1.2003 by which the petitioners' revision petition No. 2/2003 was dismissed, which was preferred against the order of the trial court dated 23rd Nov., 2002.

3. Brief facts/of the case are that petitioner No. 1 M/s. Nikson Pharmaceuticals of Mumbai is alleged manufacturer of the drug in question i.e., Tab. Co-Trimozazole Ped. B.P.C. The petitioners Nos. 2, 3 and 4 have been shown as partners of petitioner No. 1 firm and petitioner No. 5 - firm M/s. S.S. Distributors is distributor firm of petitioner No. 1. Petitioner No. 6 is proprietor of petitioner No. 5 firm.

4. The Drug Inspector, from the premises of the petitioner No. 5 - M/s. S.S. Distributors, on 18th July, 1991 took the sample of the above said drug. That

drug was manufactured in Dec, 1990 and its expiry date was Nov., 1992. Four samples were taken and one of the sample was given to the accused - petitioner No. 6 - the proprietor of petitioner No. 5. One sample was sent for its analysis to the Government Analyst who examined the drug and gave report u/s 25(1) of the Act of 1940 that "the sample does not confirm to the requirement of B.P.C.73, in respect of the content of Sulpham ethoxazole." This report is dated 12th Dec, 1991. The test report was sent to the accused on 25.1.1992. On receipt of the said report, the accused vide letter dated 10.2.1992 after disclosing its stand with respect to the allegation of commission of offence informed the Drug Inspector that the manufacturer will like to get the sealed portion of the sample duly tested by the Appellate Lab. This request was made by the accused persons to show their intention to controvert the report and to adduce the evidence in contravention of the report, which could have been done by the accused persons under Sub-section (3) of Section 25 of the Drugs and Cosmetics Act, 1940 (hereinafter referred to as the Act of 1940). However, no action was taken by the Drug Inspector on the request made by the accused persons vide their letter dated 10.2.1992. Ultimately, after almost three years from the time of receipt of report from State Analyst and more than two and half years from petitioner's request for sending the sample for test, a complaint was submitted in court by the Drug Inspector on 5th Dec, 1994. By this time,, the expiry date of the drug in question which was Nov., 1992 already was over. In view of the above, the complainant submitted application u/s 245(2) Cr. P.C. read with Section 468(2) of the Cr.P.C. for dismissal of complaint because of non-compliance of provision of Section 25(3) of the Act of 1940 and as complaint became barred by time.

5. According to the petitioners the Drug Inspector did not send the sample for testing to the Central Drug Laboratory inspite of written request of petitioners and by the time, the accused received the summons from the court, the expiry date of drug was already over and, therefore, a valuable right of the petitioners have been taken away by the lapse, committed by the complainant. According to the petitioners both the courts below committed serious error of law in observing that after submitting letter of request by the accused persons to the Drug Inspector since the accused persons have not taken any steps, therefore, the complaint cannot be dismissed or rejected.

6. Learned Counsel for the petitioner relied upon the judgment" of the Hon"ble Supreme Court delivered in the case of State of Haryana Vs. Unique Farmaid P. Ltd. Ors., . According to learned Counsel for the petitioner the language used in Section 24 of the Insecticides Act, 1968 (hereinafter referred to as the Act of 1968) is pari-materia rather say verbatim same to Section 25 of the Act of 1940 and in view of the above judgment this petition filed u/s 482 Cr.P.C. deserves to be allowed as the said judgment of the Hon"ble Apex Court applies to the facts of the present case.

7. Learned Public Prosecutor vehemently submitted that the petitioners"

application was dismissed by the trial court by reasoned order and, thereafter, the revision against the said order was dismissed by the revisional court and, therefore, this Court may not interfere u/s 482 Cr.P.C. as this will amount to entertaining the revision against the revisional order. It is also submitted that the two courts below construed the letter dated 10.2.1992 not as a request for sending the sample to the Central Drugs Laboratory and both the courts below clearly held that the petitioners did not take any steps in furtherance to their said letter of obtaining report by their own names and, therefore, the impugned orders are legally correct.

8. I considered the submissions of learned Counsel for the parties and perused the record.

9. Facts may be recapitulated in brief here again. The sample of the drug in question was taken on 18th July, 1991 of a drug having expiry date Nov., 1992. The testing report was received by the prosecution on 16.1.1992 well before the expiry date of the drug. This report was supplied to the accused on 25.1.1992 and accused within very short time as within 15 days on 10.2.1992 requested the Drug Inspector in writing that sample may be again tested obviously from the Central Drug Laboratory as the accused have mentioned clearly that they want to get the sample tested from appellate laboratory. Admittedly, no action was taken by the Drug Inspector in response to the letter of the accused dated 10.2.1992 given under Sub-section (3) of Section 25 of the Act of 1940. Not only this even the complaint, was submitted in the court as late as on 5th Dec, 1994, by that time, the expiry date of the drug in question was already over. The sample taken by the Drug Inspector and which was submitted in the court, could not have been sent to the Central Drug Laboratory by that time because of plain and simple reason that by that time, the expiry period of the drug was already over. Exactly in identical facts and circumstances where a request was made to the Inspector under the Act of 1968 and no action was taken by the Inspector under impression that request could have been made" only to the court and by the time when matter reached to the court, the expiry date of the commodity in question under the Act of 1968 in said case was already over, the Hon"ble Apex Court considered specific questions that (i) the request for retesting of the sample ought to have been made to the court and not to the Insecticide Inspector; (ii) that no defence other than prescribed u/s 30 of the Act could be allowed to be raised in the prosecution filed under the Act, and (iii) that the shelf life of the sample was not relevant as the Act did not prescribe any expiry date. After considering all these pleas, the Hon"ble Apex Court held that the expiry date of sample is relevant and in order to safeguard the rights of the accused to have sample tested from Central Insecticide Laboratory, it is incumbent on the prosecution to file the complaint expeditiously so that the right of the accused is not lost, obviously of making of request for sending the sample for testing to the Central Laboratory as could have been done under Sub-section (3) and (4) of Section 24 of the Insecticides Act of 1968 and in the case under the Drugs and Cosmetics Act of 1940, Sub-section (3) and (4) of Section 25. As happened in

the case of Unique Farmaid (P) Ltd., (supra) in the present case also, by the time petitioners were asked to appear before the court, the expiry date of drug was already over and sending of sample to the Central Drugs Laboratory at that late stage would be of no consequence. In view of the above Section 25(3) and 25(4) of the Act of 1940, the report of analyst as obtained by the Drug Inspector was not conclusive and a valuable right of the accused to have sample tested from the Central Drugs Laboratory has been denied to the accused causing prejudice to the defence to the petitioners. In view of the above reasons, the petition of the petitioners deserves to be allowed, hence, allowed, The orders passed by the courts below dated 8.1.2003 and 23.11.2002 are set aside. The application filed by the petitioners is allowed and the proceedings in pursuance of the complaint in. question is quashed. The accused persons are discharged and the bail bonds submitted by them are cancelled.