

**(1998) 03 PAT CK 0027**

**In the Patna High Court**

**Case No :** Criminal Miscellaneous No. 1876 of 1990 (R)

S.B. Ganguly @ Satya Brata Ganguly

APPELLANT

Vs

State of Bihar and Another

RESPONDENT

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**Date of Decision :** 06-03-1998

**Acts Referred:**

Constitution of India, 1950 — Article 227  
Criminal Procedure Code, 1973 (CrPC) — Section 195, 200, 482  
Drugs and Cosmetics Act, 1940 — Section 17A, 17B, 18A, 22, 23  
Penal Code, 1860 (IPC) — Section 21  
Prevention of Food Adulteration Act, 1954 — Section 1, 16

**Citation :** (1998) 2 ALT(Cri) 2 : (1998) 2 BLJR 1483

**Hon'ble Judges :** S.K. Chattopadhyaya, J

**Bench :** Single Bench

**Final Decision :** Allowed

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## **Judgement**

S.K. Chattopadhyaya, J.—In this application u/s 482 of the Code of Criminal Procedure the petitioner has prayed for quashing the entire criminal proceeding including the order taking cognizance dated 9.4.90 for an offence u/s 27 of the Drugs and Cosmetics Act, 1940.

2. The facts of the case lie in a narrow compass : One Dr. S.K. Ghosh, a Medical Practitioner, purchased Wymox (Amoxycillin) mixture from one Sinha Pharmacy and sold the same to one of his patients. The said patient returned the phial on the ground that bottle of the mixture contained one insect. On 30.10.89 Dr. Ghosh informed the matter to the Managing Director of the Company and on receipt of the same the representative of the Company met the doctor from time to time to enquire into the matter and to get the bottle examined but Dr. Ghosh did not oblige him by handing over the bottle. After some correspondences, it appears, when Dr. Ghosh could not get any relief at the Company's end, he complained to the Prime Minister of India on 4.3.90 with a copy of the same to the Minister of Health and Family Welfare, Govt. of India. That letter of complaint was sent to Dr. Prem Kumar Gupta, Drugs Controller (India) who directed Dr. S.

C. Srivastava, Deputy Drugs Controller (India), East Zone to depute a Drugs Inspector to file a petition of complaint. Accordingly, the Drugs Inspector, Central Drugs Standard Control Organization (East Zone), Calcutta filed a complaint in the Court of the Chief Judicial Magistrate Ranchi adding the Company, its Chairman and the Director (Sales) as accused. Along with the complaint, copies of letter of Dr. Ghosh to the Prime Minister, Managing Director of the Company, the petitioner as well as reply of the petitioner to Dr. Ghosh's letter and the bill dated 23.10.89 were annexed. The bottles of mixture said to have been purchased by Dr. Ghosh from Sinha Pharmacy was produced by him in the Court and from a perusal of records and said bottles the learned Chief Judicial Magistrate was, prima facie, satisfied that a case u/s 27 of the Drugs and Cosmetics Act, 1940 (the Act) is made out against the accused person and thus cognizance u/s 27 of the Act was taken.

3. Mr. Bajaj, learned Counsel for the petitioner has contended that the allegation made in the complaint petition does not make out any case of criminal liability of the petitioner inasmuch as the same does not constitute any offence. According to him, for prosecuting a person u/s 27 of the Act, the allegation must be specific that the medicine was adulterated and . without there being any report from the Government analyst, the complaint petition could not have been entertained by the Magistrate. The complainant has not stated any where that on being directed by the Deputy Drugs Controller to file a petition of complaint,-he personally got the bottle examined by the analyst. Merely because a direction was given by the higher authorities, without verifying the truthfulness or otherwise, the same complaint was filed. Referring to various correspondences annexed with the complaint petition Mr. Bajaj has urged that Mr. Ghosh, in order to settle his score with the Company and its officers, maliciously filed the complaint without even mentioning as to how the petitioner being the Director of Sales, was responsible in manufacturing the said medicine or to fill up the said bottle which allegedly contained some insects. When the said bottle was alleged to have been purchased from Sinha Pharmacy, learned Counsel continues, Dr. Ghosh should have made allegation against the said Pharmacy making him an accused and this having not been done, the very intention of Dr. Ghosh is apparent.

4. Mrs. Sheela Prasad, learned Counsel appearing on behalf of the Central Government, countering the argument of Mr. Bajaj, has submitted that the provisions of the Act do not contemplate that before filing of the complaint petition the Drug Inspector must be satisfied with the allegations made to him by a person. Referring to paras 4 and 5 of the complaint petition she has contended that the allegation made therein clearly indicate that the bottle of Wymox manufactured by the Company, which was purchased from Sinha Pharmacy, contained insect for which the Company as well as its officers were responsible for manufacturing adulterated medicine and at this stage the High Court will not interfere with the order taking cognizance in exercise of its powers u/s 482 of the Code of Criminal Procedure.

5. I have already noticed above the allegations made in the complaint petition and at this juncture the documents which have been annexed with the complaint petition in support of the allegation are required to be looked into. First letter of Dr. Ghosh to the Managing Director of the Company is dated 30.10.89 through which he has informed that the product of the company, namely, Wymox alleged to have been sold to the patient, was returned to him and a threat of life was given to him by the said patient. This has not only tarnished the image and reputation of the Company but it caused serious repercussion on the profession of Dr. Ghosh. Requiring immediate attention Dr. Ghosh requested the Managing Director to visit his clinic within seven days with an information that the phial of the Wymox was kept in tact in his custody for further action. On receipt of the said letter the petitioners, being the Managing Director, Sales, of the Company wrote to Dr. Ghosh on 21st of December, 1989. From this letter it appears that Dr. Ghosh had discussion on the subject with the representative of the Company Mr. T.B. Choudhary on 2.11.89. From his report it was learnt that the bottle of Wymox DP 30 ml was bought from the local wholesalers M/s. Sinha Pharmacy on 23.10.89, The Field Manager, A. Gupta was called on by Dr. Ghosh and he requested to give the said bottle of medicine for examination by Company's Quality Control Department. Dr. Ghosh, however, did not give the bottle to Mr. A. Gupta and even when Mr. J. Mookerjee, Area Sales Manager, went to Dr. Ghosh and requested him to give the bottle for proper analysis, the same was refused. The petitioner personally met Dr. Ghosh on 6th of December, 1989 and discussed the issue in detail. He tried to convince Dr. Ghosh that in greater interest of the patients the bottle should be given for proper investigation but Dr. Ghosh did not oblige the petitioner by handing over the bottle. It was specifically mentioned in the letter that unless and until the bottle is examined by Quality Control Department, no comment can be made. Once again request was made to Dr. Ghosh to send the bottle for proper investigation. The next letter of Dr. Ghosh to the petitioner is dated 18.1.90. This letter is a detailed one in which Dr. Ghosh has indicated as to how his reputation as a doctor was at stake. The relevant portion of the said letter can be looked into which reads thus:

The virulent in sent admixed with the medicine within the bottle in question, although much prominently conspicuous, nonetheless, it is extremely disappointing that a renowned, noted and well thought of multinational company like yours, have so carelessly, negligently and recklessly acted which is not only culpable but the consequences of such Act has inflicted injuries in my reputation, practice, income and excessively I have been defamed, and the degree of which is so extensive that, I am afraid, whether or how far are those reparable. I am being stigmatized by a considerable number of persons and patients owing to the said bottle of medicine supplied by your company, that I have started prescribing and dispensing the medicine manufactured by ignoble and subject companies and I gain through illegal path from your company. This not is only damaging my practice and earnings but at the same time all these, by and by, piling up my mental disturbances anxieties, worries, discomfort and agonies, consequent to

which I have been failing to remain in the possession of the field and getting across smear words from many persons even from some of my confreres. This perilous juncture leaves no alternative for me than to claim damages and compensation from the company as the losses I am incurring, mental torments I am suffering and struggling tooth and nail with the adverse situations, for my survival and for which the sole cause is the contaminant Wymox under discussion, so my only remedy lies to enforce my claim of compensation and damage what I am directly doing hereby, leaving open the quantum or amount of offer from your company.

6. From this assertion of Dr. Ghosh it appears that he was interested merely in getting damages and compensation from the company than to protect the image of the Company. At the end, he informed the petitioner that if he gets a suitable compensation from him, he may consider the question whether it would be proper and lawful to hand over the bottle of medicine to the representative of the company. He, however, agreed that on being co-operated in the manner indicated above, two persons of the Company should visit him who would be fully authorized in writing by competent person of the company and on furnishing proper receipt under the seal of the company, they can take the bottle from him. Lastly he cautioned the petitioner that if no reply is received within a fortnight, it would be taken as granted that the company is not interested to settle down the matter.

7. It appears that, thereafter, Dr. Ghosh addressed a letter to the Prime Minister of India with a copy to the Minister of Health and Family Welfare, New Delhi. This letter is dated 4.3.90 in which Dr. Ghosh has complained to the said high dignitaries about the conduct of the Managing Director of the Company. He complained that the Managing Director neither cared to visit him nor did he see that even the bottle was taken back. According to Dr. Ghosh the company tried to some how pick up the said bottle from his possession but he did not allow them to do so and always insisted on sending at least two well authorized representation of the company who can take the bottle after giving proper receipt under the seal of the company. But the company did not do so and always tried to persist on Dr. Ghosh to wait for some time. Referring to his letter dated 18 90 he also indicated the act of recklessness and negligence on part of the company. However, Dr. Ghosh admitted in his letter to the Prime Minister that several representatives of the company, had visited him with a request to hand over the bottle for analysing by the Quality Control Department of the Company.

8. Thus, from the aforesaid letters it is abundantly clear that Dr. Ghosh, in order to get some compensation and damages, was insisting upon the company and its officers to settle down the matter across the table on the threat of prosecuting the officers and the company. There is no denial of the fact that Dr. Ghosh did not care to get the bottle analysed by an authorized analyst and even did not hand over the same to the representative of the company in spite of repeated requests.

9. It is also an admitted fact that till the complaint was filed before the Magistrate the bottle in question was with Dr. Ghosh and complaint petition nowhere discloses that Dr. D. Roy, Drug Inspector who filled the complaint, had any occasion to see the bottle which was lying with Dr. Ghosh. From the complaint petition itself it is crystal clear that merely on the direction of Dr. S.C. Srivastava, Dy. Durgs Controller (India), complaint was filed and this direction of Dr. Srivastava was obviously on the basis of a letter written by Dr. Ghosh to the Prime Minister as well as the Health Department of the Central Government. In the complaint petition, apart from Dr. Ghosh the sales man of M/s. Sinha Pharmacy and two others were made witnesses. The said bottle was purchased from Sinha Pharmacy by Dr. Ghosh on 23.10.89 and it is alleged that the same bottle was sold by Dr. Ghosh to P.K. Gupta, witness No. 2 shortly after Dr. Ghosh purchased the said bottle. The date of sale of the said bottle by Dr. Ghosh to Sri Gupta is conspicuously absent in the complaint petition. Thereafter, the complainant has reiterated the same facts which were alleged by Dr. Ghosh in his several letters, mentioned earlier. Para 13 of the complaint petition reads thus:

That witness No. 1 is present in the Court with the bottle of the said Durg which is being produced before your honour and the prosecution prays that the same may be kept in a sealed cover and the physical appearance may kindly be noted down.

10. On such complaint being filed, the Magistrate perused the bottle as produced before him and came to a conclusion that prima facie an offence u/s 27 of the Act is made out. Therefore, cognizance was taken u/s 27 of the Act and non-bailable warrant of arrest was issued against the petitioner. The Magistrate directed to keep the medicine bottle in sealed cover.

11. In this background the question which falls for consideration is as to whether merely on the basis of a letter written to the Prime Minister by Dr. Ghosh and on being directed by higher authority the complainant could have filed a complaint against the petitioner without himself being satisfied about the genuineness of the allegations made by Dr. Ghosh and that too without getting the bottle analysed by a Govt. analyst.

12. If we look to the Act and the Rules, the primary duty for enforcement of the provisions of the Act is on the Drug Inspector and the public analyst appointed under the Act. The powers of Drug Inspector and procedures to be followed by him are prescribed. Section 21 relates to appointment of Inspector and the powers which can be exercised by such Inspector. In Sub-section (4) of Section 21 every Inspector shall be deemed to be a public servant within the meaning of Section 21 of the Penal Code. Section 22 contemplates power of Inspector for inspecting any premises where drug or cosmetic is being manufactured or the same are being sold and stocked or exhibited or offered for sale or distributed. He can also take sample of any drug or cosmetic which is being manufactured/sold etc. He can also take sample from any person who is in the course of conveying, delivering or preparing to deliver such drug or cosmetic to a

purchaser or a consignee. Similarly, powers of search and seizure has been given to him under Clause (c) of Sub-section (1) of Section 22 of the Act which reads as follows:

(C) at all reasonable times, with such assistance, if any, as he considers necessary:

(i) search any person, who, he has reason to believe, has secreted about his person, any drug or cosmetic has been, or is being, committed, or.

(ii) enter and search any place in which he has reason to believe that an offence under this chapter has been, or is being, committed; or

(iii) stop and search any vehicle, vessel or other conveyance which, he has reason to believe, is being used for carrying any drug or cosmetic in respect of which an offence under this chapter has been, or is being committed.

13. Similarly, in Inspector can require any person to produce any record, register or other document relating to the manufacture for sale or for distribution, stocking, exhibition for sale, offered for sale or distribution of any drug or cosmetic in respect of which he has reason to believe that an offence under this Chapter has been or is being committed. Section 23(1) provides that where an Inspector takes any sample or a drug or cosmetic under this Chapter he shall tender the fair price thereof and may require a writer acknowledgement therefore. Sub-section (4) of Section 23 reads thus:

The Inspector shall restore one portion of a sample so divided or one container, as the case may be, to the person from whom he takes it, and shall retain the remainder and dispose of the same as follows:

(i) One portion of container he shall forthwith send to the Government Analyst for test or analysis;

(ii) the second he shall produce to the Court before which proceedings, if any, are instituted in respect of the drug or cosmetic; and

(iii) the third, where taken, he shall send to the person, if any whose name, address and other particulars have been disclosed u/s 18A.

14. Thus from the perusal of the provisions it is clear that before the Drug Inspector proceeds to initiate a proceeding he shall take sample of drug or cosmetic, as the case may be, as the sample would be divided into four parts and containers will be sealed and marked and then he will permit such person to put his own seal and mark to all or any of the portion so sealed and marked. Thereafter, one portion of container will be sent to the Government analyst forthwith for test and analysis and the second portion will be produced before the Court before which proceedings, if any, are instituted in respect of that drug or cosmetic and the third will be sent to the person whose name and address and other particulars have been disclosed u/s 18A.

15. Section 25 deals with Government analyst. It requires the analyst to submit a signed report in triplicate in the prescribed form to the Inspector and on receipt of the same the Inspector will deliver a copy of the same to the person from whom the sample was taken, the second one to the person, if any, whose name and address and other particulars have been disclosed u/s 18A and shall retain the third copy for use in any prosecution in respect of the sample. In Sub-section (3) of Section 25 such report of the Government analyst shall be the evidence of the fact stated therein and shall be a conclusive one unless the person from whom the sample was taken has within 28 days of the receipt of a copy of the report, informed in writing the Inspector or the Court before which any proceeding is pending about his intention to adduce evidence in controversion of the report.

16. Thus it appears that the provisions laid down in Section 25 are mandatory and strick observance of the provisions is imperative. Analysis report is conclusive of its contents and, therefore, it is absolutely necessary to observe the corresponding security and safeguards. This right, it cannot be denied, is very valuable right because within 28 days of the receipt of a copy of the report the accused can notify in writing to the Inspector or to the Court that he intends to adduce evidence in controversion of the report.

17. In this context Rule 46 of the Durgs and Cosmetics Rules 1945 is also necessary to be looked into which contemplates that on receipt of package from the Inspector containing sample for test or analysis, the Government analyst shall compare and sea" on the package with the specimen impression received separately and small note the condition of the sale on the package. After test and analysis has been completed, he shall forthwith supply to the Inspector a report in triplicate in form 13 of the result of the test or analysis together with full protocols of the tests or analysis applied.

18. From the aforesaid discussion it is clear that before the Drug Inspector proceeds to launch a prosecution against a person under this Act, he has to comply with some mandatory provisions laid down in the Act-itself. Admittedly in the instant case, none of the procedures, as mentioned above, was followed by the Drug Inspector and merely on the basis of direction of his superior he filed the complaint against the petitioner and other accused persons.

19. Another important provision which is laid down u/s 26 of the Act may not be lost sight of. This Section empowers any person to get any drug or cosmetic purchased by him to be analysed by a Government analyst on making an application in the prescribed form and manner and on payment of the prescribed fee. He is entitled to receive the report of such test or analysis signed by the Government analyst.

20. Thus, Dr. Ghosh, in the instant case, could have easily got the bottle of Wymox analysed by the Government analyst and obtained a report. Admittedly, he has not done so. Therefore, necessary point which arises for consideration is

as to what was the basis for the Drug Inspector to be satisfied that the medicine kept in the bottle alleged to have been purchased by Dr. Ghosh was adulterated for having an insect therein. There is no explanation as to why, after receipt of the direction from the Deputy Drug Controller, East Zone, the Drug Inspector before filing the complaint, did not get the medicine tested/analysed as required under the law. It appears that Dr. Ghosh as a witness, produced the bottle of the medicine and not the Drug Inspector himself.

21. The Code of Criminal Procedure provides procedures as to how a complaint can be filed and how the Court will proceed in the matter. Since for an offence under Sections 17A and 17B sentence/punishment u/s 27 is for imprisonment for a term not less than five years but may extend for a term of life imprisonment and with fine which shall not be less than ten thousand rupees which would be a case tried as warrant case. One of the modes by which the Court can take cognizance of an offence is of filing of a complaint containing the facts which constitute such offence. The Magistrate taking cognizance of an offence on complaint shall examine on oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and witnesses and also by the Magistrate. If in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding with the case and the case appears to be a warrant case, he may issue warrant of arrest or he thinks fit, summons for causing the accused to be brought or to appear before him on a date fixed by him.

22. Thus it appears that before taking cognizance the Court must be prima facie satisfied that the allegations made in the complaint petition do constitute an offence and for that the Magistrate is required to exercise his judicial discretion. In the instant case the learned Magistrate, after perusing the records and medicine bottle produced before him, came to the conclusion that a prima facie case u/s 27 of the Act is made out. In my considered opinion this conclusion arrived by the learned Magistrate cannot be said to be an application of judicial mind. As stated earlier, he had no report of Government analyst before him which could reveal that the medicine contained in the bottle was adulterate. If from a mere perusal of the medicine bottle the learned Magistrate was satisfied that the medicine was adulterated and, as such, offence has been made out, then there would be no reason for him to proceed with the trial any further. Whether the bottle was actually containing the insect or not for which the medicine became adulterated, was to be analysed by a Government analyst and the Magistrate was required to be satisfied prima facie on the basis of the said report. Under this circumstance it cannot be said that the learned Magistrate was competent to form an opinion about the commission of offence by the petitioner before issuance of summons. The order taking cognizance by the Magistrate also cannot be sustained in law on the ground that before taking cognizance and issuance of warrant of arrest neither the complainant nor the witness present in Court were examined. Even if it is presumed that the Drug Inspector was a public servant in view of the mandatory provision laid down u/s 200 of the Cr.P.C. It

was incumbent on the Magistrate to examine the complainant and the witnesses present in Court.

23. In the case of Shyama Prasanna Das Gupta Vs. The State, , the Calcutta High Court held that where the police officer investigated a private complaint and, thereafter, submitted a petition of complaint, he did so not as a public servant but as a complainant and, as such, his examination u/s 200 Cr.P.C. was essential. Similarly, the Assam High Court in the case of Smt. Rangamoyee Choudhury and Another Vs. Sudhir Kumar Bhowmik Kabiraj, , has held that if the complaint by a Magistrate was not covered by the provisions of Section 195 of the Code, it could not be said to be a complaint filed either by a Court or by a public servant in discharge of his official duty and thus the proviso to Section 200 Cr.P.C. could not be attracted. Same view has been taken by the Kerala High Court in the case of K. Krishna Warriar Vs. T.R. Velunni, . Even our own High Court in the case of Ramashray Singh v. Dr. Anand Mohan reported in 1997 CrI. L.J. 1024 has taken the same view. In the aforesaid background it must be held that the order taking cognizance is vitiated in law and, as such, cannot be sustained.

24. The argument of Mrs. Sheela Prasad that the learned Magistrate has merely taken cognizance of the offence and issued warrant of arrest against the petitioner and other accused for their appearance in Court and, he may discharge them at any stage of the trial if he considers the charge to be groundless and, therefore, the High Court should not exercise its jurisdiction u/s 482 Cr.P.C. by quashing the complaint and the impugned order, in my view, cannot be accepted. In this context a recent view of the Supreme Court in the case of Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others, may be looked into. In the reported case also the facts and circumstances are more or less similar where a complaint was filed under Sections 1 and 16 of the Prevention of Food Adulteration Act. In para 28 their lordships have observed as follows:

Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.

Their lordships were of the view that when the complaint does not make out any case, the accused can approach the High Court u/s 482 Cr.P.C. or Article 227 of

the Constitution of have the proceeding quashed against him. It was held that when the complaint does not constitute any offence, the accused cannot be allowed to undergo the agony of a criminal trial.

25. That apart, I have already indicated the conduct of Dr. Ghosh in approaching the Prime Minister by sending a letter which reveals that having failed to get compensation from the Company Dr. Ghosh took extreme step against the petitioner and immediately the Drug Inspector without observing the mandatory provisions of the Act and the Rules, filed the complaint. It is well settled that criminal law is not to be enforced as an instrument of wreaking vengeance by an aggrieved party against a person who caused injury to it.

26. Having considered the prose and cons of the allegations made in the complaint petition I am of the view that the criminal proceeding initiated against the petitioner cannot be allowed to continue and, accordingly, the order taking cognizance must be quashed.

27. In the result, this application is allowed and the order taking cognizance dated 9.4.90 is hereby quashed so far the petitioner is concerned.