
(2006) 02 MP CK 0109

In the Madhya Pradesh High Court

Case No : Miscellaneous Cri. Case No. 995 of 2004

Smith Kline Beecham Asia Pvt. Ltd. (Glaxo Smith Kline Asia Pvt. Ltd.) and others **APPELLANT**

Vs

State of M.P. **RESPONDENT**

Date of Decision : 07-02-2006

Acts Referred:

Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 482
Drugs and Cosmetics Act, 1940 — Section 17A, 17B, 18(a)(vi), 18(c), 18A

Citation : (2006) 2 MPLJ 472 : (2006) 3 RCR(Criminal) 477

Hon'ble Judges : Subhash Chandra Vyas, J

Bench : Single Bench

Advocate : Satish Chandra Bagadiya assisted by D.K. Chhabra, for the Appellant; G.S. Chouhan, Government Advocate for State, for the Respondent

Final Decision : Allowed

Judgement

S.C. Vyas, J.

Petitioner has filed the instant petition u/s 482, Criminal Procedure Code, invoking the extraordinary jurisdiction of this Court seeking quashment of complaint alleging commission of offences punishable u/s 17A, 17B, 18(a)(vi), 18(c) 18B read with section 27(b)(c)(d) and 28A of the Drugs and Cosmetics Act, 1940 (hereinafter for short referred as the Act).

Short facts of the case in Cr. C. No. 662/2003 pending before Chief Judicial Magistrate, Jhabua are that accused No. 1 Auchhavlal Jain proprietor of M/s Sharda Jain Store, Alirajpur is a retail drug shopkeeper whose shop was inspected by Drug Inspector Nilamber Seth on 12-10-1998. During inspection one sealed bottle of Crocin Syrup batch No. 8021, date of manufacturing June, 1998 and date of expiry May, 2001 was found kept for sale at the shop. Drug Inspector had seen from naked eyes that one suspected black colour article was there in the syrup, therefore, feeling that the medicine is sub-standard and

spurious, he took that bottle of Crocin Syrup from that shop and asked the shopkeeper to give information regarding purchase of that syrup. Information regarding purchase was given by the shopkeeper, thereafter Drug Inspector obtained information regarding other persons also. Petitioner No. 1 Company is the manufacturer of the drug Crocin Syrup and petitioner No. 2 Company is said to be engaged in business of manufacturing pharmaceuticals and consumer goods. In the present petition it has also been stated that petitioner No. 2 Company has have now merged with Glaxo India Limited and pursuant to the merger, the entity is now known as Glaxo Smith Kline Pharmaceuticals Limited. Notice regarding the complaint filed by Drug Inspector was received by petitioner No. 2, who has already informed petitioner No. 1 Company, therefore they filed the present petition.

In the complaint filed by Drug Inspector it has been stated that both the petitioners as well as all other persons who were engaged in manufacturing, distributing and selling of this medicine Crocin Syrup were responsible for selling this sub-standard spurious Crocin Syrup and are required to be punished under different provisions of the Drugs Act. Complaint was filed before learned CJM, Jhabua by Drug Inspector, R. S. Varandani on 8-8-2003. Learned Magistrate after registering the complaint against all accused persons, ordered to issue notices to them, thereafter petitioner rushed to this Court and filed this petition for quashment of the proceedings in the case pending before CJM, Jhabua against them bearing Cr. C. No. 662/2003.

Learned Sr. counsel for the petitioners Shri Satish Chandra Bagadiya assisted by Shri D. K. Chhabra Advocate submitted that even if facts stated in the complaint are believed, it discloses no offence against the present applicant. Learned Sr. Counsel submitted that the date of manufacturing of medicine was June, 1998 and the Drug Inspector took sample from the shop at Alirajpur on 12-10-1998. As per the averments made in the complaint itself information relating distributors and manufacturers was received by the Drug Inspector on 3-9-1999 and the date of expiry of the medicine was May, 1999 but thereafter the drugs inspector kept mum in the matter and waited for date of expiry. Even after date of expiry of the medicine the matter was kept pending till August, 2003 and all of a sudden in the month of August, 2003 complaint against present petitioners was filed before learned CJM, Jhabua which clearly shows mala fide intention and abuse of process of law, particularly when it was an important matter regarding popular drug like Crocin.

Learned Sr. Advocate Shri Bagadiya further submitted that the act provides a particular procedure for taking sample of drugs. He has drawn attention of this Court towards section 23 of the Act and submitted that the Drug Inspector was required to intimate in writing in prescribed form person from whom he takes sample that he is taking sample for the purpose of test or analysis and such sample is required to be divided into four portion and effectively sealed and suitably marked. Seal and marks of the person who sold the sample should also

be required to be taken on such portion of sample and if the drug is made up in container of small volumes then Drug Inspector may take 3-4 such container as sample and is required to mark them suitably. Learned Sr. Advocate further submitted that it was also required that Drug Inspector should have given one portion of such sample or one such sealed container to the person whom the sample was taken and thereafter to forward second portion of the sample to the Government Analyst for test or analysis.

Learned Sr. Counsel further submitted that provisions of section 25(2) and (3) of the Act, the petitioners have got a right to adduce the evidence in contravention of the report of Government Analyst. They have also got the right to get sample analyzed by Central Drugs Laboratory. In the facts of the present case Drug Inspector has not followed the procedure prescribed in section 23 of the Act. He has also not sent the bottle of the sample for analysis to Government Analyst and no opportunity was afforded to the petitioner and other accused persons to adduce the evidence in contravention of the fact of sub-standard quality of the sample or other allegations in the complaint and, therefore, it has been argued by learned Sr. Counsel that Drug Inspector deliberately not followed the procedure prescribed by the Act and deprived the petitioners from their fundamental rights to defend themselves in criminal prosecution, so the prosecution lodged against them is unsustainable and is required to be quashed.

Per contra, learned Government Advocate submitted that the sample of the drug Crocin is containing a black portion of some foreign substance, which can be seen by anyone. He has drawn attention of this Court towards photograph of the bottle of the drug which have been filed along with complainant before the trial Court demonstrating that some black suspended particle portion is visible from naked eyes. Learned Government Advocate submitted that having such foreign substance in the suspended form in the medicine there is a clear cut breach of the provisions of Schedule V (4) (1) of the Drugs and Cosmetics Rules 1945 which provides that patent and proprietary of medicine shall comply with general requirements which shall include compliance with colour consistency, clarity and stability freedom from contamination with foreign matter or fungal growth etc. Learned Government Advocate submitted that as foreign matter was found in the bottle of Crocin Syrup so it was violation of this Rule so the offence punishable u/s 27A is clearly made out.

The arguments advanced by learned Sr. Advocate who appeared for the petitioners have got sufficient force. When Drug Inspector who wants to take sample of the medicine from any person visited a shop then it was his duty to follow procedure prescribed in section 23 of the Act, so that a reasonable opportunity of analysis of the sample can be afforded to the person against whom charges could be levelled ultimately. The right given u/s 25 of the Act to accused persons is the most valuable right to defend them in a criminal trial regarding drugs and cosmetics. This provision of section 23 of the Act is a protection of fundamental rights guaranteed under Article 21 of the Constitution

of India to every accused to defend himself. If such protection is not provided then the actions of Drug Inspector may also be termed as unilateral arbitrarily action. A person performing duty of the Drug Inspector is always supposed to work as per the provisions given in the Act and to perform his duties after following all formalities provided in the Act. In the facts of the present case if the Drug Inspector found some suspended article in a bottle of a Crocin Syrup then at the place of merely seeing it and taking the bottle from the shop it was necessary for him to draw samples as per section 23 of the Act and divide it into four parts or to take 3-4 bottles looking to the quantity of syrup and then to seal them. One such sample was required to be given to the person from whom the sample was taken or to the person whose name was disclosed u/s 18A of the Act, i.e. The manufacturer of the drug or his agents for distribution etc.

Without any chemical analysis it can never be said that in a sealed medicine there was a foreign substance or not. Such substance may be some component of the liquid which might had taken solid shape due to change of temperature. Chemical test is the surest method to determine the actual nature and the quality of the substance which was suspending in solid form in liquid syrup. Without chemical test merely by seeing from naked eyes it cannot be held conclusively that such substance is a foreign substance.

Learned Government Advocate tried to argue that the substance which was found suspended in the syrup should be treated as filthy substance and as per definition given in section 9-A of the Act that drug should be treated as adulterated drug. This argument might have some force, if, chemical test would have been conducted to determine the quality and nature of the foreign substance. Whether the syrup contained any filthy substance or not or any foreign substance or not or it contained any such thing on the basis of which the drug can be treated as adulterated drug, can only be determined with certainty by chemical examination alone. Such chemical examination was never conducted in the present case as the drug was never sent for any chemical examination during the life time of the drug and it appears that though the sample was taken on 12-10-1998 and shelf life of the drug was going to expire on May, 2001, but no action was taken by the Drug Inspector to get the sample analyzed by Government Analyst. Learned Sr. Advocate appearing for petitioners placed reliance on two decisions of Punjab and Haryana High Court one is in the case of Anurag Arora v. State of Haryana reported in (2002) II CCR 429 and second is State of Haryana and another v. A. Kumar Bansal and Others, 1995 (1) page 280. In both these cases even when the drug was found sub-standard by Government Analyst on chemical examination but as the shelf life of the drug already expired and the complaint was filed after the expiry of shelf life of the drug, so it was found that the valuable right to get sample tested from the Central Drug Laboratory was lost and, therefore, the complaint was not found maintainable. In the first case petition filed u/s 482 of the Criminal Procedure Code was allowed, whereas in the second case revision preferred by the State of Haryana against judgment of acquittal was dismissed.

View taken by Punjab and Haryana High Court in the above cited two cases appears to be proper and appropriate. In the present case also the valuable right of the petitioner to get sample analyzed in the Central Drug Laboratory have been lost, due to expiry of shelf life of the drug, so if the documents produced by the prosecution along with the complaint even if accepted in their totality even then they do not disclose commission of any offence by the petitioners because the drug was never examined by any chemical analyst. Thus the complaint filed against the petitioners is not maintainable and is required to be quashed. Therefore, this petition succeeds and is allowed. The proceedings of the complaint in criminal case No. 662/03 pending in the Court of CJM, Jhabua as it relates to present petitioners is concerned are hereby quashed, by allowing the petition filed by the petitioners.