(2018) 06 BOM CK 0100

In the Bombay High Court

Case No : CRIMINAL APPICATION NO. 1166 OF 2018

SUSHILKUMAR KISHANLAL MODHOK — APPELLANT

Vs

THE STATE OF MAHARASHTRA AND ANR — RESPONDENT

Date of Decision : 27-06-2018

Acts Referred:
Code of Criminal Procedure, 1973 — Section 482
Indian Penal Code, 1860 — Section 34, 274, 275, 276, 420
Drugs and Cosmetics Act, 1940 — Section 18A, 18(c), 22, 23(3), 23(4), 23(5), 25, 25(2), 25(3), 25(4), 26, 27(b)(ii), 28 (b), 32, 33 EEC (a) (i), 33 EEA (b) (d), 33 (c) (e), 33 (I), 33 (I) (a) (ii), 33M, 36AC

Citation : (2018) 06 BOM CK 0100

Hon'ble Judges : T.V. NALAWADE, J;K.L. WADANE, J

Bench : Division Bench

Advocate : Akhilsh C. Tripati, S.J. Salgare

Final Decision : Dismissed

Judgement

T.V. NALAWADE, J

1. The proceeding is filed under section 482 of Criminal Procedure Code (hereinafter referred to as 'Cr.P.C.' for short) for quashing of F.I.R. No.

1/2018 dated 11.1.2018 registered in Vedant Nagar Police Station for the offences punishable under sections 420, 274, 275, 276 r/w. 34 of Indian

Penal Code (hereinafter referred to as 'IPC' for short) and sections 33 EEC (a) (i), 33 EEA (b) (d), 33 (I) (b), 33 EEC (a) (i), 33 (c) (e), 33 (I) (a) (ii),

26, 28 (b), 18 (c) and 27 (b) (ii) of the Drugs and Cosmetics Act, 1940 (hereinafter referred to as the 'Act' for short). Almost all the provisions of both

the Chapters IV and IV-A are mentioned in addition to aforesaid provisions of IPC. Both the sides are heard.

2. The papers of investigation were made available to this Court which contained

complete F.I.R. The learned counsel for applicant has produced a

copy of printed F.I.R. and this printed F.I.R. is somewhat misleading. It is not giving complete narration and it can be said that it was done either

intentionally or by mistake.

3. The F.I.R. is given by a Inspector appointed under the Act. The F.I.R. is given against the applicant and others. The department of the first

informant had received specific information on 24.4.2016 that the applicant and others were visiting various places, they were arranging camps and

they were selling spurious Ayurvedic medicines containing Allopathic ingredients. On this occasion, the name of hotel, lodge, where the applicant and

his associates were staying was supplied. The Inspector visited that place on 1.6.2016.Â Â Â Â Â Â Â Â

4. The place was Hotel Great Punjab situated at Railway Station Aurangabad. In a room, the present applicant and one Dr. Ashok Gadage were

present. The Inspector found boxes and packets of many drugs/medicines and they were bearing labels of Raj Ayurvedic Pharmacy, West Bengal.

The officer took samples of four medicines and four samples of each medicine were purchased by the officer. All the samples were forwarded to

Government Analyst under the provisions of the Act and one sample was given to the person from whom it was purchased, the applicant. Applicant

Sushilkumar Modhok is the owner of Raj Ayurvedic Pharmacy of West Bengal. By sending notice to him, more information was collected regarding

manufacturing activity of this concern by the Inspector of the department. On the basis of that record, it transpired that present applicant was shown

as owner of the firm and the four medicines taken over by the Inspector were manufactured by his concern.

5. The Government Analyst gave report in copies on 13.6.2017 to the Inspector under the Act that Churan Dama Daman, 100 gm B.No. 1516 M/D,

05/2016, E/D 04/2018 manufactured under licence No. AL-946M manufactured by Raj Ayurvedic Pharmacy Factory at B.N. Para Bhaktinagar,

Jalpaiguri 734006, West Bengal was not as per standards prescribed. It was spurious and it was containing chemical substance like Allopathic

elements as under :

1) The sample gives TLC, HPTCL and HPLC identifcation test for the presence of Salbutamol sulphate.

2) The sample contains 0.679% of Salbutamol Sulphate.

Hence the Ayurvedic Drug is Spurious vide Chapter IV-A, Section 33-EEA (d) of the Drugs and Cosmetics Act, 1940 and Rules there under.

6. Dr. Gadage, who had informed that he was B.A.M.S. and who had given address when the samples were collected was not found on the address

given by him. So, copy of the report of Government Analyst was sent to present applicant Modhok on 2.8.2017. On 16.8.2017 and 4.9.2017 the

applicant sought time for giving reply to the notice given by the department through advocate. Ultimately, he gave reply through advocate on 7.9.2017.

7. In the reply to the notice given by the department, present applicant contended that aforesaid Gadage was not in touch with the firm, though he had

contacts with the firm in the past. He contended that probably Gadage was manufacturing spurious drug. Applicant Modhok was found in the

company of Gadage and that is specifically mentioned everywhere by the department and so even at this stage, it can be said that the said explanation

is not tenable. Further, the contents of reply to the notice can lead to one probability that present applicant was indirectly admitting that spurious drug

was taken over on that day.

8. It is the case of department, of the Inspector that substance 'Salbutamol Sulphate' is Allopathic medicine mentioned in schedule 'H' of the Act and it

is prescribed on Asthama and it cannot be sold without prescription. This substance was found in aforesaid Churan Dama Daman. In view of this

circumstance, the provisions of both Chapters IV and IV-A of the Act are used as this case can be looked from both the angles, given in Chapter IV

and IV-A of the Act. It can be said that if it was Allopathic medicine, then there was no licence with the applicant to manufacture and there was

adulteration of Allopathic medicine and it was being sold as spurious medicine. It is specific contention of the department that this substance needs to

be given only under medical prescription and this substance may cause injury to health of consumers. There is allegation of the Inspector that Dr.

Gadage and present applicant were selling this Churan as Ayurvedic medicine.

9. The record of investigation of police papers contains report of Government Analyst which is to the aforesaid effect. In the reply dated 7.9.2017, no

request was made by the present applicant to send the second sample to Central Laboratory as provided under the Act. This reply was given by the

applicant after 28 days of suppling copy of report of Government Analyst and in that reply also, no request was made to get tested the other sample.

The record also shows that the drugs and medicines were seized on 1.6.2016 and not on 25.4.2016 as contended by the applicant. It can be said that

information was there against the applicant and Dr. Gadage on 25.4.2016 and action was taken when they were available in aforesaid lodge i.e. on

1.6.2016.Â Â

10. The provisions of the Act show that in section 33-M, it is mentioned that separate provisions are made for Ayurvedic medicines. Similarly, section

33-A shows that the provisions of Chapter IV of the Act are not applicable, save as otherwise provided in the Act for Ayurvedic medicines. If these

two Chapters are read together, it can be said that if Allopathic medicine is being sold in the name of Ayurvedic medicine, the provisions of Chapter

IV can be used from angles given in both these Chapters and action can be taken against the manufacturer. The provision of section 36-AC provide

that offences mentioned in Chapter IV are punishable under sections 27, 28 etc. of the Act and they are cognizable in nature. These offences are

more serious. The provision of section 32 of the Act shows that the prosecution for offences under other Acts like under the provisions of IPC is also

possible in such cases. These provisions need to be kept in mind while appreciating the allegations made against the applicant and contentions made by

the applicant in defence.

11. If we go through the object behind the Act and the scheme of the Act, it can be said that it is concerned with the standards and purity of drugs

manufactured in this country, medicines manufactured in other country and imported in this country and also other things. In the past, there were no

provisions in this Act to cover Ayurvedic or Unani systems of medicines. Due to absence of the provisions in the Act, tendency was developed to

market preparations containing partly modern drugs and partly Ayurvedic drugs or Unani drugs under names given in Ayurvedic or Unani medicines.

As Ayurvedic or Unani drugs were not covered under the Act, it was difficult to have control over such drugs by using the provisions of the Act.

Thus, in the past, even when the drugs prepared were contaminated with foreign matters and even when the circumstances under which Ayurvedic

medicines were manufactured were not hygienic, no action was possible as

Ayurvedic medicines were not covered under the Act. Such medicines

were proving to be injurious to health and so, in the year 1964, Ayurvedic and Unani drugs were included in the Act.

12. Big companies have entered in the manufacturing activity of Ayurvedic and Unani medicines. It has become commercial activity and these

medicines are not prepared by Vaidus (oSn)q as it was being done in the past. As trend of consumers is changed and many people are preferring

Ayurvedic medicines over Allopathic medicines, steep competition is developed amongst the concern manufacturers of Ayurvedic medicines.

Ayurvedic medicines take time to show the effects, give results and so, to show that their medicines are more effective and it gives immediate relief,

the manufacturer firms tend to use Allopathic substances in Ayurvedic medicines. Such medicines makes Ayurvedic medicines adulterated and also

substandard. It also becomes spurious drug under Chapter IV of the Act. As Allopathic medicines like present one can be sold only under medical

prescription and they can cause harm to health of some consumers, such activity needs to be dealt with seriously. When such medicine is sold, the

Allopathic contents on packet or bottle are not shown and so, the harm cannot be prevented.

13. For the present purpose, the definition of the term like 'patent or proprietary medicine' as given in section 3 (h) (i) is relevant and provides as under

:-

(h) ""patent or proprietary medicine"" means,(i) in relation to Ayurvedic, Siddha or Unani Tibb systems of medicine, all formulations containing only

such ingredients mentioned in the formulae described in the authoritative books of Ayurveda, Siddha or Unani Tibb systems of medicine specified in

the First Schedule, but does not include a medicine which is administered by parenteral route and also a formulation included in the authoritative books

as specified in clause (a);

14. Provision of section 4 of the Act is also relevant and it provides as under :-

4. Presumption as to poisonous substances.- Any substance specified as poisonous by rule made under Chapter III or Chapter IV or Chapter IV-A

shall be deemed to be a poisonous substance for the purpose of Chapter III or Chapter IV or Chapter IV-A, as the case may be.

15. The aforesaid provisions of the Act show that Ayurvedic medicines in which

Allopathic ingredients are mixed can be called as substandard drugs

as they do not confirm with the provisions of Schedule I and II of the Act. It can be also called as mis-branded as per the provisions of Chapters IV

and V of the Act. It can be also called as spurious under both the chapters.

16. Section 18 (a) (i) of the Act provides as under :-

18. Prohibition of manufacture and sale of

certain drugs and cosmetics.- From such date as may be fixed by the State Government by notification in the Official Gazette in this behalf, no person

shall himself or by any other person on his behalf-

(a) manufacture for sale or for distribution, or sell, or stock or exhibit or offer for sale, or distribute-

(i) any drug which is not of a standard quality, or is misbranded, adulterated or spurious;

Thus, the manufacture and sale etc. of a medicine/drug which is not of standard quality, which is mis-branded or which is spurious is prohibited and

the provisions of section 18 (a) (iii) of the Act provides for prohibition of manufacture and sale etc. of any patent or proprietary medicine. In a case

like present one, the provisions of section 18 (1) (b) of the Act can also be used.

17. It is already observed that the provisions of Chapter IV and IV-A can be used in the matters like present one. In the present matter, admittedly,

the medicine was being sold as Ayurvedic Churan and the report of Government Analyst shows that it contained Allopathic ingredients, medicine

prescribed for Asthama. Thus, apparently without considering other technicality, it can be said that it is not open to the applicant to say that no offence

is made out. The offence of cheating under section 420 of IPC is made out as the article was purchased by the Inspector. It is not disputed that in the

past, this article was sold as Ayurvedic medicine.

18. In the provisions of sections 22 to 25 of the Act, the procedure is prescribed for Inspector for seizure of aforesaid medicine and also taking

sample. These provisions are applicable to provisions of Chapter IV-A of the Act also. The provisions of section 23 (3)(4)(5) runs as under :-

Â ""23. Procedure of Inspectors.-

(1) .....

(2) .....

(3) Where an Inspector takes a sample of a drug or cosmetic for the purpose of test or analysis, he shall intimate such purpose in writing in the

prescribed form to the person from whom he takes it and, in the presence of such person unless he willfully absents himself, shall divide the sample

into four portions and effectively seal and suitably mark the same and permit such person to add his own seal and mark to all or any of the portions so

sealed and marked:

Provided that where the sample is taken from premises whereon the drug or cosmetic is being manufactured, it shall be necessary to divide the sample

into three portions only:

Provided further that where the drug or cosmetic is made up in containers of small volume, instead of dividing a sample as aforesaid, the Inspector

may and if the drug or cosmetic be such that it is likely to deteriorate or be otherwise damaged by exposure shall, take three or four, as the case may

be, of the said containers after suitably marking the same and, where necessary, sealing them.

(4) 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 or 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 under section 18-A.

(5) Where an Inspector takes any action under clause (c) of section 22,-

(a) he shall use all despatch in ascertaining whether or not the drug or cosmetic contravenes any of the provisions of section 18 and, if it is revoke the

order passed under the said clause or, as the case may be, take such action as may be necessary for the return of the stock seized;

(b) if he seized the stock of the drug or cosmetic, he shall as soon as may be inform a Judicial Magistrate and take his orders as to the custody

thereof;

(c) without prejudice to the institution of any prosecution, if the alleged contravention be such that the defect may be remedied by the possessor of the

drug or cosmetic, he shall, on being satisfied that the defect has been so remedied, forthwith revoke, his order under the said clause.

19. In the present matter, four samples were collected of the aforesaid Ayurvedic medicine and one sample was sent to Government Analyst. Other

sample was given to the applicant and so, there were two more samples with the Inspector. The applicant is not only the person from whom the

sample was collected, but also the manufacturer. However, the samples were not collected from the premises where the manufacturing activity was

going on and so, four samples were collected. The aforesaid record shows that it is not disputed that the report of Government Analyst was supplied

to the present applicant.

20. After provision of section 23, the provision of section 25 of the Act comes in to play. The provision of section 25 runs as under:-

25. Reports of Government Analysts. - (1) The Government Analyst to whom a sample of any drug or cosmetic has been submitted for test or

analysis under sub-section (4) of section 23, shall deliver to the Inspector submitting it a signed report in triplicate in the prescribed form.

(2) The Inspector on receipt thereof shall deliver one copy of the report to the person from whom the sample was taken and another copy to the

person, if any, whose name, address and other particulars have been disclosed under section 18-A, and shall retain the third copy for use in any

prosecution in respect of the sample.

(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 under section 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.

(4) Unless the sample has already been tested or analysed in the Central Drugs Laboratory, where a person has under sub-section (3) notified his

intention of adducing evidence in introversion of a Government Analyst's report, the Court may, of its own motion or int its discretion at the request

either of the complainant or the accused, cause the sample of the drug or

cosmetic 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, or 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.

(5) The cost of a test or analysis made by theCentral Drugs Laboratory under sub-section (4) shall be paid by the complainant or accused as the Court

shall direct.

The provision of section 25 has two parts and the two parts create separate and different kinds of right in favour of accused persons. Section 25 (2) of

the Act is in respect of the person from whom sample was taken over and also the person, whose address was supplied under section 18-A. For

exercising the right, to get one more sample tested, the provision is there in section 25 and that provision shows that within 28 days of receipt of copy

of report of Government Analyst, the report needs to be disputed by the accused. Not only that, the accused person need to inform to the Inspector or

the Court as the case may be that he intends to adduce evidence in controversion of the report. This intimation needs to be given in writing to the

Inspector when no proceeding is filed in the Court in respect of the said sample and the application can be moved in the Court when any proceeding in

respect of such sample is pending in the Court. It can be said that the persons mentioned in section 25Â (2) are entitled to receive the copy of report

of Government Analyst under that section and then they are expected to take steps within 28 days as provided in this section. It can be said that this

part of the provision of section 25 (2) is mandatory in nature and that is particularly in respect of the person from whom the sample was collected and

so, the present applicant also falls under the provision.

21. The provision of section 25 (4) of the Act starts with exception of section 25 (3) and shows that this part is not applicable to the persons covered

by section 25 (3) of the Act. Provision of section 25 (4) also shows that discretionary power is given to the Court under this provision. In view of these

circumstances, it can be said that if the person mentioned in section 25 (2) of the Act has not availed the statutory right given to him under section 25

(3) of the Act, it is not binding on the Court to send the other sample to Central Laboratory. In the case reported as AIR 2001 SUPREME COURT

1303 [Amery Pharmaceuticals and Anr. Vs. State of Rajastan], the Apex Court has made observations in relation to the power of the Court given

under section 25 (4) of the Act. The Apex Court has observed that when prayer is made after long delay under section 25 (4) of the Act, the Court is

not under compulsion to send such sample to Central Laboratory. In the same case, the Apex Court has laid down that in the Act, no separate right is

given to the manufacture to get copy of report of Government Analyst and that can be lacuna in the Act, but due to that lacuna the manufacturer

cannot get acquittal. The present case is on better footing for the prosecution as copy of report of the Government Analyst is supplied to the

manufacturer. Thus, it was necessary for the applicant to use the provision of section 25 (3) of the Act and so, the report of Government Analyst has

become conclusive evidence against the present applicant.

22. The starting part of section 25 (4) that ""Unless the sample has already been tested or analysed in the Central Drugs Laboratory, where a person

has under sub-section (3) notified his intention of adducing evidence in introversion of a Government Analyst's report, the Court may, of its own

motion or int its discretion at the request either of the complainant or the accused, cause the sample of the drug [or cosmetic] 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, or 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"" shows that after suppling copy of report of Government Analyst under section 25 (2) of the Act, if a person to

whom the copy is supplied does not take steps as provided under section 25 (3) of the Act and he does not give written notice to the Inspector in a

case like present one, he loses the right to get other sample tested. If the provisions of section 23 (4) (ii), section 25 (2), section 25 (3) and section 25

(4) are read together, it becomes clear that the Inspector needs to send the sample to the Central Laboratory after receiving notice under section 25

(3) of the Act. There is nothing in the Act, preventing the Inspector from sending the sample to Central Laboratory, and on the contrary, the aforesaid

purpose behind the notice by accused to Inspector mentioned in section 25 (3) of the Act can be inferred.

23. The learned counsel for applicant has placed reliance on observations made by this Court and by the Apex Court in two cases reported as (2008)

7 Supreme Court Cases 196 [Medicamen Biotech Limited and Anr. Vs. Rubina Bose, Drug Inspector] and 2015 ALL MR (Cri) 1394 [M.S.

Theivendran and Ors. Vs. State of Maharashtra and Ors.]. The facts of the aforesaid cases were different. In the case decided by the Supreme

Court the complaint was filed when shelf life period was to be over within few days from the date of the complaint and the summons of the case was

served on accused on 9.5.2005. The shelf life period was up to August 2002. The Apex Court held that there was no compliance of provision of

section 25 (4) of the Act and notice was given by the manufacturer to the Inspector that it was disputing the correctness of the report of Government

Analyst. In Bombay case also, notice was given to send the sample to Central Laboratory, but other sample was not sent to Central Laboratory by the

Inspector. Complaint was filed on 31.10.2011 when the shelf life period was up to November 2011. In view of facts of those cases, it was held that it

was not desirable to allow to continue the prosecution.

24. The facts of the present matter are altogether different. This Court has already observed that not only the provisions of Chapter IV-A, but also the

provisions of Chapter IV are attracted and severe punishment is provided under Chapter IV. Further, there is allegation that it amounts to cheating as

Allopathic drug was sold as Ayurvedic medicine. The procedure given for institution of prosecution under Chapter IV is different as the offences are

treated as more serious and the Courts trying the offences are not to be inferior to that Court of Sessions. In view of peculiar facts of the present

matter, this Court holds that it is not possible to grant the relief claimed by the applicant, manufacturer. In the result, the application stands dismissed.

