(1994) 11 MAD CK 0005

In the Madras High Court

Case No : Criminal O.P. No. 5174 of 1993

Vaigai Pharmaceuticals and 3 others — APPELLANT

Vs

State of Tamil Nadu — RESPONDENT

Date of Decision : 01-11-1994

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) — Section 482
Drugs and Cosmetics Act, 1940 — Section 17B

Citation : (1995) 1 LW(Cri) 75

Hon'ble Judges : Jayarama Chouta, J

Bench : Single Bench

Advocate : K. Jegannathan, for the Appellant; A.N. Rajan, Government Advocate, for the Respondent

Judgement

Jayarama Chouta, J.—Petitioners who are four in number and are accused in C.C. No. 2664 of 1990 have filed this criminal original petition

u/s 482 of the Code of Criminal Procedure to quash the proceedings pending against them in the Court of the Judicial Magistrate No. I, Dindigul.

2. First Petitioner is a company manufacturing drugs, second Petitioner is the Managing partner of the firm, third Petitioner is the manufacturing

chemist and the fourth Petitioner is the analytical chemist of the said firm. Respondent filed a private complaint against the Petitioners for violation

of Section 18(a)(1) read with Section 17-B of the Drugs and Cosmetics Act punishable u/s 27(c) of the said Act (hereinafter referred to as the

''Act''). The gist of the complaint is as follows:

3. One M. Sickandar, the then Inspector Dindigul 1st range on 16.4.1990 has taken 4 x (10x200) of Ichthamal Clycarin B.P.C. Batch No.

M.9002, manufactured by M/s. Vaigai Pharmaceuticals, 4/249-250, Vandiyur

Main Road, Sathasivanagar, Madurai under cover of Form 17 from

the Licensed Sales premises of M/s. A.K. Drugs, No. 5, Muneeswaran Koil Lane, Dindigul. All the other portions of the sample were marked as

MS/21/90 dated 16.4.1990 and signed by the Drugs Inspector and the partner of M/s. A.K. Drugs and were sealed and one sealed sample was

handed over to the partner of M/s. A.K. Drugs under acknowledgment. One sealed sample portion was sent to the Government Analyst under

Form 18 as per the procedure under Rule 57 of the Drugs and Cosmetics Rule 1945. Government Analyst has declared the sample as not of

standard quality. The Drug Inspector has issued show cause memos to M/s. A.K. Drugs, M/s. Orson Drugs and M/s. Vaigai Pharmaceuticals

along with analytical reports and scaled portions of the sample (not to M/s. Vaigai Pharmaceuticals) as per Sections 25(2) and 23(4)(iii) of the

Act. Since the explanation was not satisfactory, the Drugs Inspector submitted a detailed proposal to the State Drugs Controller, to prosecute the

above accused/Petitioners for violation of Section 18(a)(i) of the Act read with Section 17-B of the said Act which is punishable u/s 27(c) of the

Act.

4. The Chief Judicial Magistrate, Dindigul registered the case in C.C. No. 2664 of 1990 recorded the statements of some witnesses, issued

summons to the accused and framed charges for the offences mentioned above. The above proceeding has been challenged in this criminal original

petition.

5. Heard the learned Advocate for the Petitioners and the learned Government Advocate for the Respondent/State. Petitioners have raised two

grounds. First ground is that analytical report in Form 13 was issued to M/s. Vaigai Pharmaceutical, i.e., 1st Petitioner only and not to the other

Petitioners which is against the mandatory provisions of the Act as required u/s 25(2) of the Act. Section 25(2) of the said Act reads as follows:

Section 5: 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 u/s 18-A) and shall retain the third copy for use in any prosecution

in respect of the sample

According to the above Section, analyst report should be given to the person from whom the sample was taken and another to the person, if any,

whose name, address and other particulars have been disclosed u/s 18-A of the Act. Section 18-A of the Act reads as follows:

Disclosure of the name of the manufacturer etc-Every person, not being the manufacturer of a drug or cosmetic or his agent for the distribution

thereof, shall, if so required, disclose to the Inspector the name, address and other particulars of the person from whom he acquired the drug or

cosmetic.

6. Here, the first Petitioner, the M/s. Vaigai Pharmaceuticals is the manufacturer and the report of the Government analyst has already been

supplied. There is no provision under the Act that the reports should be furnished to all the persons concerned with the firm or company. Learned

Advocate for the Petitioners invited my attention to a decision reported in Drugs Inspector Central Drugs Standard Control Organization (South)

Zone, Madras-6 v. Modern Drugs Hyderabad-28 and Anr. (1982 L.W.(Crl.) 108) in which the High Court has held that Section 25(2) to (4) of

the Drugs and Cosmetics Act, 1940 makes it clear that certain rights are available for the person from whom the sample, was taken and also for

the person, if any, whose name, address and other, particulars have been disclosed to the Inspector u/s 18-A Sub-section (3) of the Act gives an

opportunity for such a person, if he wants to challenge the report of the Government Analyst, to notify the Inspector or the Court in writing within

twenty eight days of the receipt of a copy of the report that he intends to adduce evidence in contravention of the report and he may under Sub-

section (4) requests the Court to send the sample to the Central Drugs Laboratory for analysis and report, Section 25 of the Act is mandatory and

it should be complied with. Strict observance of the provisions is imperative. As the analysis report is conclusive evidence of its contents, it is

absolutely necessary to observe corresponding security and safeguards. The right is a very valuable right, for, within twenty eight days, of the

receipt of the copy of the report, accused can notify in writing to the Inspector or to the Court that he intends to adduce evidence in contravention

of the report. The prosecution cannot deny the right by not serving a copy of the Analyst''s report on the accused where there is a denial of this

right, prosecution is not entitled to secure the conviction of the accused. The decision further goes on to say that the prosecution cannot merely

plead helplessness of the Drugs Inspector in complying with the provision of providing one portion of the sample and serving a copy of the

Analyst''s report to the accused if more persons are involved as accused in as much as the Act contemplates dividing the sample taken into only

three or four portions and subsequently receiving the Analysts report in triplicate. The legislature should have envisaged a case like the present one

where there are number of accused persons who are entitled to have each one portion of the sample and a copy of the Analyst''s report. This

defect in the Act has to be rectified. That however is the business of the legislature and not of the Court.

7. That was a case after trial, some of the accused who have been convicted, have challenged their conviction and against the acquittal of some

others, the Department has filed appeal against acquittal. In the case on hand, the first Petitioner is the firm whereas other accused/Petitioners are

connected with the said firm being managing partner, Manufacturing Chemist and Analytical Chemist of the concern. Admittedly, analyst report has

been served on the first accused/first Petitioner. Act does not say that it should be served on all the accused who are connected with the said firm.

Under these circumstances, I do not see any violation of the mandatory provisions of Sections 25 and 18-A of the Act so as to quash the

proceedings invoking the provisions of Section 482 of the Code of Criminal Procedure. Further, Sri Rajan, Government Advocate appearing for

the Respondent placed reliance on a decision in In re R. Dayalan and Ors. (1978 Drugs Cases 21) in which the Court has held that the procedure

under Sub-sections (2) to (4) of Section 25 of the Act is available only to the person from whom the sample was taken and to the person, if any,

whose name, address and other particulars have been disclosed u/s 18-A of the Act. Further, Sub-section (3) clearly states that if one of those

two persons wishes to challenge the report of the Government Analyst, he should within 28 days of the receipt of a copy of the report notify in

writing that he intends to adduce evidence in contravention of the report, and he may under Sub-section(4) request the Court to send the sample to

the Central Drugs Laboratory for analysis and report. It has further observed that other accused are not entitled to make use of Sub-sections (3)

and (4) of Section 25 of the Act inasmuch as they are not persons disclosed u/s 18-A of the Act. I respectfully agree with this decision. Hence, I

hold that non-supply of the analytical report to accused 2 to 4 i.e., Petitioners 2 to 4 individually is not fatal and on that ground, the proceedings

could not be quashed.

8. The second ground which has been raised by the learned Advocate for the Petitioners is that even though the Petitioners'' names and addresses-

have been disclosed u/s 18-A of the Act, one portion of the sample has not been supplied to them which violates the provisions of Sections 23(4)

(iii) and 25 of the Act and on that ground alone, the proceedings against the Petitioners should be quashed. He has pointed out that in the drug

which has been seized by the Drug Inspector, the manufacturers name and address has been given as it is clear from the complaint lodged before

the Court and inspite of that, a portion of the sample has not been given to any one of the Petitioners. In this connection, he has invited me to

Section 23 of the Act. Section 23 of the Act reads as follows:

23. Procedure of Inspection -- (1) Where an Inspector takes any sample of a drug (or cosmetic) under this chapter, he shall tender the fair price

thereof and may require a written acknowledgment therefor.

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 wilfully 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.

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 reminder 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 u/s 18-A.

Section 25(3) of the Act is to the following effect:

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 contravention 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

contention of adducing evidence in contraversion of a Government Analysts 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 (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.

9. Admittedly in this case, no sample has been given to the Petitioners as required u/s 23(4) of the Act. Even in the reply given to the show cause

notice, the first Petitioner has disputed the report of the Government Analyst and even then the Court has not sent the sample of the drug for test or

analysis to the Central Drugs Laboratory. It is true that there was no specific request on the part of the Petitioners to send the sample for Central

Drugs Laboratory, but, in his reply to the show cause notice, the first Petitioner has disputed the Government Analyst''s report. Under such

circumstances, the Court, of its own motion, as mentioned in Sub-section (4) of Section 24 of the Act could have sent the sample of the drug for

test or analysis to the said Laboratory. Further, the Drug Inspector has violated the mandatory provision of Section23(4) of the Act. u/s 23(4)(iii)

of the Act, the third portion of sample, where taken he shall send to the person, if any, whose name, address and other particulars have been

disclosed u/s 18-A of the Act. At the earliest point of time, the name and address of the first Petitioner, the manufacturer of the drug was known to

the Drug Inspector and even then, he has not been given with the sample. Hence, there is a grave violation of mandatory provision of the Act. u/s

23(4) and 23(2) to (4) of the said Act, certain rights are available to the person who has manufactured the drug and it gives an opportunity to

challenge the report of the Government Analyst to notify the Inspector or the Court in writing within twenty eight days of the receipt of a copy of

the report, that he intends to adduce evidence in contravention of the report and he may under Sub-section (4) of the Act request the Court to

send the sample to the Central Drugs Laboratory for analysis and report. The prosecution cannot deny the right of not supplying the sample to the

accused. Where there is a denial of this right, serious prejudice will be caused to the accused. There is noncompliance of the mandatory provisions

of the Act.

10. Hence, for the reasons stated above, I am of the opinion that no useful purpose would be served by allowing the proceedings to continue

before the Court below against the Petitioners which will be abused of the process of the Court and hence, in the interest of justice, I allow this

criminal original petition and quash the proceedings pending against the Petitioners in C.C. No. 2664 of 1990 on the file of the Judicial Magistrate

No. l, Dindigul Dindigul Anna District.

