

Sri Tamarai Kannan Vs. State At The Instance Of Assistant Of Drugs

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SooperKanoon Citation : sooperkanoon.com/1233980

Court : Karnataka

Decided On : May-19-2022

Judge : K.Natarajan

Appeal No. : CRL.P 9047/2016

Appellant : Sri Tamarai Kannan

Respondent : State At The Instance Of Assistant Of Drugs

Advocate for Pet/Ap. : Sri. Desu Reddy.G

Judgement :

1 IN THE HIGH COURT OF KARNATAKA AT BENGALURU R DATED THIS THE19H DAY OF MAY, 2022 BEFORE THE HONBLE MR. JUSTICE K.NATARAJAN CRIMINAL PETITION No.9046 OF 2016 CONNECTED WITH CRIMINAL PETITION No.2923 OF 2016 CRIMINAL PETITION No.9047 OF 2016 CRIMINAL PETITION No.9048 OF 2016 IN CRIMINAL PETITION No.9046 OF 2016 BETWEEN1. RAKESH KUMAR AGED ABOUT41YEARS S/O SRI H PARASMAL PROPRIETOR OF M/S INTRA LIFE WARD NO48 NO65 1ST FLOOR CHENNAMMA MEMORIAL SCHOOL COMPOUND BENGALURU - 560027 2 . M/S INTRA LABS NO4344, P S LANE, B R D BUILDING CHICKPET CROSS, BENGALURU - 560053 REPRESENTED BY ITS PARTNER3. RAKESH KUMAR AGED ABOUT41YEARS S/O SRI H PARASMAL R/AT NO5 FLAT NO1 ANDREE ROAD, GOVINDAVILLA APARTMENT SHANTHINAGARA

BENGALURU - 560027 2 4 . M/S INTRA LABS INDIA PVT LTD NO4522 BHARATHERSHWARA COLONY2D STREET, KODAMBAKKAM CHENNAI - 600024 REPRESENTED BY ITS MANAGING DIRECTOR5. SRI H PARASAMAL AGED ABOUT68YEARS S/O SRI HAZARIMAL R/AT NO9240 ETA GARDENS F804, MAGADI ROAD BENGALURU - 560023 6 . M/S SURIEN PHARMACEUTICALS P LTD NO108 CHEKKADI STREET KOVUR, CHENNAI - 602101 REPRESENTED BY ITS MANAGING DIRECTOR7. SRI R KRISHNAMOORTHY AGED ABOUT47YEARS S/O SRI RAMASWAMY UDAYAR R/AT OLD NO21, NEW NO3, BAJANIKOVIL3D STREET CHOO LAIMEDU CHENNAI - 600094 8 . SRI R TAMARAI KANNAN AGED ABOUT32YEARS S/O SRI M SANTHAPPAN PROPRIETOR OF M/S SURIEN PHARMACEUTICALS R/AT NO636C MARATHAVIYAN KOILTHOTTAM KANAVAIPATTY, KAMARAJANAGARA POST KARKOODALPATTY - 636202 3 RASIPURAM TALUK, NAMAKKAL DISTRICT TAMIL NADU ... PETITIONERS (BY SRI DESU REDDY G, ADVOCATE) AND STATE OF KARNATAKA AT THE INSTANCE OF DRUGS INSPECTOR MANDYA CIRCLE MANDYA - 571 402. ... RESPONDENT (BY SRI VINAYAKA V.S., HCGP) THIS CRIMINAL PETITION IS FILED UNDER SECTION482OF CR.P.C PRAYING TO QUASH THE ENTIRE PROCEEDINGS PENDING ON THE FILE OF THE LEARNED PRL. CIVIL JUDGE AND JMFC, MANDYA IN C.C.NO.202/2016. IN CRIMINAL PETITION No.2923 OF 2016 BETWEEN1. RAKESH KUMAR AGED ABOUT41YEARS S/O SRI H PARASMAL PROPRIETOR OF M/S INTRA LIFE WARD NO48 NO65 1ST FLOOR CHENNAMMA MEMORIAL SCHOOL COMPOUND BENGALURU - 560027 2 . M/S INTRA LABS NO4344 P S LANE, B R D BUILDING CHICKPET CROSS, BENGALURU - 560053 REPRESENTED BY ITS PARTNER43 . RAKESH KUMAR AGED ABOUT41YEARS S/O SRI H PARASMAL R/AT NO5 FLAT NO1 ANDREE ROAD, GOVINDAVILLA APARTMENT SHANTHINAGARA BENGALURU - 560027 4 . M/S INTRA LABS INDIA PVT LTD NO4522 BHARATHERSHWARA COLONY2D STREET, KODAMBAKKAM CHENNAI - 600024 REPRESENTED BY ITS MANAGING DIRECTOR5. SRI H PARASAMAL AGED ABOUT68YEARS S/O SRI HAZARIMAL R/AT NO9240 ETA GARDENS F804, MAGADI ROAD BENGALURU - 560023 6 . M/S SURIEN PHARMACEUTICALS (P) LTD., NO108 CHEKKADI STREET KOVUR, CHENNAI

- 602 101 REPRESENTED BY ITS MANAGING DIRECTOR⁷. SRI R KRISHNAMOORTHY AGED ABOUT 47 YEARS S/O SRI RAMASWAMY UDAYAR R/AT OLD NO 21, NEW NO 3, BAJANIKOVIL 3D STREET CHOOLAIMEDU CHENNAI - 600094 8 . SRI R TAMARAI KANNAN AGED ABOUT 32 YEARS S/O SRI M SANTHAPPAN PROPRIETOR OF M/S SURIEN PHARMACEUTICALS R/AT NO 636C MARATHAVIYAN KOILTHOTTAM KANAVAIPATTY, KAMARAJANAGARA POST KARKOODALPATTY - 636202 RASIPURAM TALUK NAMAKKAL DISTRICT TAMIL NADU ... PETITIONERS (BY SRI DESU REDDY G, ADVOCATE) AND STATE OF KARNATAKA AT THE INSTANCE OF DRUGS INSPECTOR MANDYA CIRCLE MANDYA - 571 402. ... RESPONDENT (BY SRI VINAYAKA V.S., HCGP) THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C PRAYING TO QUASH THE ENTIRE PROCEEDINGS PENDING ON THE FILE OF THE LEARNED PRL. CIVIL JUDGE AND JMFC, MANDYA IN C.C.NO.1821/2015. IN CRIMINAL PETITION No.9047 OF 2016 BETWEEN 1. SRI TAMARAI KANNAN AGED ABOUT 32 YEARS S/O SRI M SANTHAPPAN PROPRIETOR OF M/S SURIEN PHARMACEUTICALS R/AT NO 636C MARATHAVIYAN KOILTHOTTAM KANAVAIPATTY KAMRAJANAGARA POST KARKOODALPATTY - 636202 RASIPURAM TALUK NAMAKKAL DISTRICT TAMIL NADU 62 . M/S SURIEN PHARMACEUTICALS P LTD NO 108 CHEKKADI STREET KOVUR CHENNAI - 602101 REPRESENTED BY ITS MANAGING DIRECTOR³. SRI R KRISHNAMOORTHY AGED ABOUT 47 YEARS S/O SRI RAMASWAMY UDAYAR R/AT OLD NO 21 NEW NO 3 BAJANIKOVIL 3D STREET CHOOLAIMEDU CHENNAI - 600094 4 . M/S INTRA LABS INDIA PVT LTD NO 4522 BHARATHERSHWARA COLONY 2D STREET KODAMBAKKAM CHENNAI - 600024 REPRESENTED BY ITS MANAGING DIRECTOR⁵. SRI H PARASAMAL AGED ABOUT 68 YEARS S/O SRI HAZARIMAL R/AT NO 9240 ETA GARDENS, F804 MAGADI ROAD, BENGALURU - 560023 6 . M/S INTRA LABS NO 4344, P S LANE B R D BUILDING CHICKPET CROSS BENGALURU - 560053 REPRESENTED BY ITS PARTNER⁷. RAKESH KUMAR AGED ABOUT 41 YEARS S/O SRI H PARASAMAL R/AT NO 5 FLAT NO 1 ANDREE ROAD, 7 GOVINDAVILLA APARTMENT SHANTHINAGARA BENGALURU - 560027 8 . RAKESH KUMAR AGED ABOUT 41 YEARS S/O SRI H PARASAMAL PROPRIETOR OF M/S INTRA LIFE, WARD NO 48 NO 65 1ST FLOOR,

CHENNAMMA MEMORIAL SCHOOL COMPOUND, BENGALURU - 560027 ... PETITIONERS (BY SRI DESU REDDY G, ADVOCATE) AND STATE AT THE INSTANCE OF ASSISTANT OF DRUGS CONTROLLER - 1, OFFICE OF THE DEPUTY DRUGS CONTROLLER REGIONAL OFFICE, TUMKUR - 572101. ... RESPONDENT (BY SRI VINAYAKA V.S., HCGP) THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C PRAYING TO QUASH THE ENTIRE PROCEEDINGS PENDING ON THE FILE OF THE LEARNED PRL. CIVIL JUDGE AND JMFC, MADHUGIRI IN C.C.NO.1459/2015. IN CRIMINAL PETITION No.9048 OF 2016 BETWEEN 1. SRI TAMARAI KANNAN AGED ABOUT 32 YEARS S/O SRI M SANTHAPPAN PROPRIETOR OF M/S SURIEN PHARMACEUTICALS R/AT NO 636C MARATHAVIYAN 8 KOILTHOTTAM, KANAVAIPATTY KAMRAJANAGARA POST KARKOODALPATTY - 636202 RASIPURAM TALUK NAMAKKAL DISTRICT TAMIL NADU 2. M/S SURIEN PHARMACEUTICALS (P) LTD NO 108 CHEKKADI STREET KOVUR CHENNAI - 602101 REPRESENTED BY ITS MANAGING DIRECTOR 3. SRI R KRISHNAMOORTHY AGED ABOUT 47 YEARS S/O SRI RAMASWAMY UDAYAR R/AT OLD NO 21 NEW NO 3 BAJANIKOVIL, 3RD STREET CHOO LAIMEDU CHENNAI - 600 094 4 . M/S INTRA LABS INDIA PVT LTD NO 4522 BHARATHERSHWARA COLONY 2D STREET KODAMBAKKAM CHENNAI - 600024 REPRESENTED BY ITS MANAGING DIRECTOR 5. SRI H PARASAMAL AGED ABOUT 68 YEARS S/O SRI HAZARIMAL R/AT NO 9240 ETA GARDENS, F804 MAGADI ROAD, BENGALURU - 560023 6 . M/S INTRA LABS NO 4344, P S LANE B R D BUILDING, CHICKPET CROSS 9 BENGALURU - 560053 REPRESENTED BY ITS PARTNER 7. RAKESH KUMAR AGED ABOUT 41 YEARS S/O SRI H PARASAMAL R/AT NO 5 FLAT NO 1 ANDREE ROAD, GOVINDAVILLA APARTMENT SHANTHINAGARA BENGALURU - 560027 8 . RAKESH KUMAR AGED ABOUT 41 YEARS S/O SRI H PARASAMAL PROPRIETOR OF M/S INTRA LIFE, WARD NO 48 NO 65 1ST FLOOR, CHENNAMMA MEMORIAL SCHOOL COMPOUND, BENGALURU - 560027 ... PETITIONERS (BY SRI DESU REDDY G, ADVOCATE) AND STATE AT THE INSTANCE OF ASSISTANT DRUGS CONTROLLER - 1, OFFICE OF THE DEPUTY DRUGS CONTROLLER REGIONAL OFFICE, TUMKUR - 572101. ... RESPONDENT (BY SRI VINAYAKA V.S., HCGP) THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF

CR.P.C PRAYING TO QUASH THE ENTIRE PROCEEDINGS PENDING ON THE FILE OF THE LEARNED PRL. CIVIL JUDGE AND JMFC, TIPTUR IN C.C.NO.1197/2015. THESE CRIMINAL PETITIONS HAVING BEEN HEARD AND RESERVED FOR

ORDER

S ON 21.04.2022 THIS DAY THROUGH VIDEO CONFERENCING, THE COURT PRONOUNCED THE FOLLOWING:

10.

ORDER

Crl.P.No.9046/2016 is filed by petitioners-accused Nos.2 to 9 under Section 482 of Cr.P.C for quashing the criminal proceedings in C.C.No.202/2016 pending on the file of the Principal Civil Judge and JMFC, Mandya for the offence punishable under Sections 26-A punishable under Section 28-B of the Drugs and Cosmetics Act, 1940 (hereinafter referred to as 'D.C. Act').

2. Crl.P.No.2923/2016 is filed by the petitioners- accused Nos.4 to 11 under Section 482 of Cr.P.C. for quashing the criminal proceedings in C.C.No.1821/2015 pending on the file of Principal Civil Judge and JMFC, Mandya for the above said offences.

3. Crl.P.No.9047/2016 is filed by the petitioners- accused Nos.1 to 8 under Section 482 of Cr.P.C. for quashing the criminal proceedings in C.C.No.1459/2015 pending on the file of the Additional Civil Judge and JMFC, Madhugiri, Tumkur for the above said offences. 11

4. Crl.P.No.9048/2016 is filed by the petitioners- accused Nos.1 to 8 under Section 482 of Cr.P.C. for quashing the criminal proceedings in C.C.No.1197/2015 pending on the file of Principal Civil Judge and JMFC, Tiptur, Tumkur District for the similar offences.

5. Heard the arguments of Sri Desu Reddy.G, learned counsel for the petitioners and learned High Court Government Pleader for the respondent-State in all the cases.

6. The case of the prosecution in CrI.P.No.9046/2016 is that the respondent-complainant who is the Drugs Inspector appointed under Section 21 of the D.C. Act who has been posted as Assistant Drugs Controller-2, Tumkur Circle has filed a complaint under Section 200 of Cr.P.C. read with Section 26-A of the D.C. Act alleging that the petitioners are said to be the Manufacturers as well as Distributors of the drugs. That on 25.11.2010, the then Assistant Drugs Controller, Mandya Circle, Mandya have investigated the matter at 12 M/s. Green Pharma, Shop No.3, 1st Floor, Vinobha Nagar, Subashnagar, Mandya and found the stock Quantity of 25x100ml of prohibited drug VENTASOL-AX Expectorant 100ml manufactured by accused No.9-M/s.Surien Pharmaceuticals at Puducherry and accused No.1 is said to be the Proprietor-cum-Competent person of M/s.Green Pharma, Mandya to dispose the stocks and further prohibited periodically for a period of every 20 days, till the date of seizure. Subsequently, during the investigation, CW.2 received a letter from accused No.1 who is a Proprietor-cum-Competent person of M/s.Green Pharma, Mandya along with the sales distribution details of prohibited drug. In the said letter, accused No.1 has informed that they had purchased the said prohibited drug from accused No.2-M/s.Intra Life at Bengaluru. On 30.11.2010, they had also received a letter from accused No.1-Jayaramu, the Proprietor-cum-Competent person of M/s.Green Pharma, Mandya. In the said letter, accused No.1 has informed about the non-availability of the said prohibited drug to whom they are supplied. Subsequently, 13 on 09.02.2011, CW.2 drawn a legal sample of VENTASOL- AX and sent to chemical lab and they found that the said fixed dose combination being prohibited for Manufacture, Sale and Distribution under the Notification No.GSR578(E), dated 23.07.1983 which was further substituted vide G.S.R290E) dated 16.04.2008. Accordingly, the complaint came to be lodged on 29.04.2015 and the trial Court by condoning the delay under Section 473 of Cr.P.C. read with Section 5 of the Limitation Act, took cognizance against the accused persons and issued summons which is under challenge.

7. In CrI.P.No.2923/2016 a similar complaint came to be filed by the Drugs and Cosmetics Department on 18.03.2015 before the Principal Civil Judge and JMFC, Mandya against eight accused persons for having found selling the prohibited drugs as per the Notification stated above by the Central Government and after

drawing samples which was subjected to chemical analysis had filed a complaint, the trial Court took cognizance of the offences 14 and issued summons by allowing the application and condoned the delay under Section 473 of the Cr.P.C. which is under challenge.

8. CrI.P.No.9047/2016 is also filed by the similar complainant by Drugs and Cosmetics Department before the Additional Civil Judge and JMFC, Madhugiri, Tumkur District in PCR No.38/15 under Section 200 of Cr.P.C. read with Section 28-B of the D.C. Act where the trial Court after dispense with recording of sworn statement, took cognizance and issued the summons to the petitioner which is under challenge.

9. In CrI.P.No.9048/2016, a similar complaint filed by the Drugs and Cosmetics Department before the Principal Civil Judge and JMFC, Tiptur, Tumkur District in PCR, the same is numbered as C.C.No.1197/2015 for similar allegation against accused Nos.1 to 11 alleging that the petitioners are said to be manufacturers as well as distributors of the prohibited drugs which was as per the Notification of the Central Government and after receipt of 15 the complaint, the trial Court by condoning the delay under Section 473 of Cr.P.C. took cognizance and issued summons to accused Nos.1 to 11 and hence, the petitioners are before this Court.

10. Learned counsel appearing for the petitioners in all four petitions has strenuously contended that the alleged offences in all four cases are said to have been committed in the year 2008, but the complaint came to be filed after three years belatedly and the trial Court though allowed the delay application under Section 473 of Cr.P.C., but no notice has been issued to the petitioners before condoning the delay. Therefore, the order of the Magistrate for condoning the delay under Section 473 of Cr.P.C. is not sustainable and filing the complaint after three years for the offence punishable up to three years and as per Section 468 of Cr.P.C., three years is limitation and beyond three years, no Court can take cognizance for the offence punishable under any offence which is punishable from one year to three years. Therefore, taking 16 cognizance is barred by the limitation and therefore, on that ground, learned counsel for the petitioners seeking for quashing the criminal proceedings in all four cases.

11. Learned counsel for the petitioners also submits that even though the learned Magistrate in three cases have passed an order by condoning the delay, but, in one case i.e. CrI.P.No.9047/2016, there is no order for condoning the delay and also no order has been passed for taking cognizance and blindly issued the summons, therefore, the CrI.P.No.9047/2016 is also not sustainable for taking cognizance and it is liable to be quashed.

12. Learned counsel for the petitioners also seriously contended that as per Section 19(3) of the D.C. Act, except the manufacturer, the distributors and sellers are not liable for any prosecution for any contravention under Section 80 of the D.C. Act. Except the manufacturer, the Tamarai Kannan who is the proprietor of M/s. Surien Pharmaceuticals, Puducherry and others are distributors are not at all liable for any prosecution as the 17 manufacturer has not informed them regarding banning of the VENTASOL-AX Expectorant Drugs by the Central Government and they have purchased and sold the same to the public. Therefore, there is no criminality to attract against any of the distributor and sellers of the said drugs. The learned counsel also contended that even otherwise, Tamarai Kannan who is the proprietor of M/s. Surien Pharmaceuticals who has obtained the license from the Pondicherry Government vide due license and manufacturing the drugs and even if before banning the drugs, there is no notice issued to the petitioner-manufacturer by the Inspector for stopping the manufacture and all these drugs were manufactured before banning the Notification issued by the Government and further contended that the Delhi High Court has quashed all the Notifications of the Central Government issued between 1983 till 2012 and thereby, filing complaint under the same Notification for banning drugs does not arise. When the manufacturer having valid license who manufactured the drugs which is of a standard quality as 18 per the very report of the FSL filed by the Government Analyst Report, such being the case, it cannot be said that it is spurious drugs in order to ban or seize and to say that there is contravention of Section 18 or Section 26 of the D.C. Act. Therefore, on that ground, the learned counsel for the petitioners seeking for quashing the criminal proceedings as abuse of process of law. In support of his contention, the learned counsel has relied upon the following judgments of the Honble Supreme Court as well as various judgments of other High Courts:

1. M/s. Sanjeevini Medical & General Stores & another vs. State of Karnataka reported in 2011 (2) Drugs Cases (DC) 18. (Karnataka High Court)
- 2) State of Maharashtra vs. Devahari Devasingh Pawar & others reported in 2008 Drugs Cases (DC) 158.
- 3) Pfizer Limited & anr. vs. Union of India & anr. reported in 2016(2) Drugs Cases (DC) 240. (Delhi High Court) 19
- 4) P.K. Choudhury vs. Commander, 48 BRTF (GREF) in Crl.A.No.480/2008 (arising out of SLP(Crl.) No.5911 of 2006).
- 5) Mohinder Kaur vs. State of Punjab in Crl. Appeal No.490 of 2008 (Arising out of SLP (Crl.) No.8213 of 2007).
- 6) Jethmal Himmatmal Jain and others vs. The State of Maharashtra in Crl.A.No.1399/1980 dated 12.03.1981 (Bombay High Court)
- 7) M/s. Earnest Co. Indore and another vs. The State of Madhya Pradesh in Criminal Revision No.63/1990, dated 27.07.1990 of Madhya Pradesh High Court, Indore Bench. (Madhya Pradesh High Court)
- 8) Sanofi India Limited and anr. vs. Union of India & anr. reported in 2021(2) Drugs Cases (DC) 50. (Delhi High Court)
- 9) State of M.P., through Drug Inspector, Ratlam vs. Jyotibai Bhagwandas Modi and others in Criminal Revision No.104/1988 dated 06.09.1990 of Madhya Pradesh High Court-Indore Bench. 20
- 10) Radhey Sham vs. State of Punjab reported in 2015(1) Drugs Cases (DC) 306 of Punjab and Haryana High Court.
- 11) Baljit Singh vs. State of Punjab in CRM No.M- 26116 of 2013 (O&M) dated 30.08.2013 of Punjab and Haryana High Court.
- 12) Madan Lal vs. The State of Punjab and others in Crl.Revision No.755/1979 dated 22.09.1981 of Punjab and Haryana High Court.

13) State vs. Romesh Chander in Criminal Appeal No.73-D of 1961 dated 27.03.1962 of Punjab High Court.

14) Ashok Kumar Tyagi vs. State of H.P. and others reported in 2015(1) Drugs Cases (DC) 185 of Himachal Pradesh High Court.

13. Per contra, the learned High Court Government Pleader seriously objected the petition and contended that as regards to the delay, the complaint came to be filed under Section 200 of Cr.P.C. and along with the complaint, they have filed an application under Section 473 of Cr.P.C. for condoning the delay and also for extension of the time 21 for taking cognizance as per Section 468 of Cr.P.C. The learned Magistrate in all three cases has passed a considerable order and accepted the reason assigned by the complainant and condoned the delay under Section 473 of Cr.P.C., took cognizance under Section 473 application is filed, there is no necessity for the Magistrate to issue notice to the accused before passing order for condoning the delay and therefore, it is contended that on the ground of delay, the proceeding cannot be quashed. Though the learned High Court Government Pleader also submits that in one case, though learned Magistrate has not passed any elaborate order, but he has taken cognizance of course without condoning the delay. But once the Magistrate taken cognizance by application of mind, at this stage, it cannot be considered that there is delay in filing the complaint. It is also contended by learned High Court Government Pleader that the delay was caused which is satisfactorily explained by the complainant where all the documents were seized by the CBI in the investigation and they have provided the documents only 22 after two to three years. Therefore, after receiving the documents, the complaint came to be filed. Therefore, absolutely, there is no delay in lodging the complaint even otherwise the delay was satisfactorily explained by the State, therefore, prayed for dismissing the petition.

14. Learned High Court Government Pleader further contended that as per Section 19(3) of D.C. Act, it is stated that including the manufacturer, the dealer are all liable to prosecute, if there is any contravention under Section 18 of the D.C. Act and as per Section 32 of the Act, in the company who are responsible for the company including the Director, Pharmacist or any other person who are

responsible for manufacturing of the drugs are all liable for prosecution. Such being the case, the petitioner cannot take shelter under Section 19(3) of the D.C. Act. Therefore, prayed for dismissing the petition. Learned High Court Government Pleader also submits that the Central Government once issued the notice, if any license issued by the State Government which supersedes the Central 23 Government Notification and thereby, the prohibition of the manufacture of the drugs is impermissible. Therefore, if any drugs manufactured subsequent to the banning of the drugs is an offence under the D.C. Act. Therefore, the accused persons are manufacturers and distributors of the VENTASOL-AX Expectorant, therefore, they are liable for prosecution. If at all, they have no knowledge regarding cognizance, they can take a plea under Section 19(1) of the D.C. Act. Therefore, the petitioners are required to face the trial before the Magistrate and they should establish the case, that they have no knowledge in respect of the drugs sold by them which was banned by the Central Government. Hence, prayed for dismissing all the petitions.

15. Learned High Court Government Pleader has also relied upon the judgment of the Honble Supreme Court in the case of Vincent Panikurlangara vs. Union of India and Others reported in (1987) 2 SCC165 24 16. Learned counsel for the petitioner also contended that even the license is not yet renewed and that will not come to the aid. The license already surrendered by the petitioner and later cancelled on 28.02.2012 before filing the complaint.

17. Having heard the arguments of learned counsel for the parties and on perusal of the records, the prosecution came to be launched against the petitioners under the D.C. Act for having found selling the drugs which were banned by the Central Government by its Notification i.e., VENTASOL-AX. Admittedly, accused No.9-M/s.Surien Pharmaceuticals who is the manufacturer at Pondicherry, they have obtained the license by his proprietor one Tamarai Kannan and accused No.2-M/s.Intra Life at Bengaluru are the distributor of the said drugs manufactured by accused No.1. Learned counsel for the petitioner has mainly challenged in respect of taking cognizance by the learned Magistrate against the petitioner on the ground No.1 that there was delay in lodging the 25 complaint. The complaint itself is barred by limitation. The offence punishable against the petitioner is upto three

years. Therefore, Section 28B of the D.C. Act is punishable with three years. Therefore, cognizance must have been taken within three years from the date of offence. Though the trial Court has condoned the delay as per Section 473 of Cr.P.C., but no notice was issued to the petitioner before condoning the delay.

18. Learned counsel for the petitioners has relied upon the judgment of the Hon'ble Supreme Court in this regard in the case of P.K. Choudhury stated supra, in the similar situation, the Hon'ble Supreme Court has held that before condoning the delay, the accused is entitled to get an opportunity of being heard before the delay could be condoned. The same view was taken by the Bombay High Court in the case of Jethmal Himmatmal Jain stated supra, where it has been held that the Magistrate was required to be satisfied it was also necessary for the Magistrate to be satisfied after giving an opportunity for 26 the accused of being heard. The same view was taken by the Madhya Pradesh High Court in the case of Earnest Company Indore and others stated supra that before condoning the delay under Section 473 of Cr.P.C., the accused shall be heard on the application. The Delhi High Court also in a recent judgment in the case of Sanofi India Limited stated supra has taken a similar view.

19. On considering the facts and circumstances of the case, admittedly the learned Magistrate has condoned the delay in three cases i.e., in C.C.Nos.202/2016, 1821/2015 and 1459/2015, but in CrI.P.No.9047/2016 challenged in respect of C.C.No.1459/2015, the learned Magistrate has not condoned the delay in filing the complaint and also not taken any cognizance, but has simply issued the summons to the accused persons. Absolutely, the order sheet of the trial Court in all four cases clearly reveals that the learned Magistrate before condoning the delay under Section 473 of Cr.P.C., and no notice was issued to the accused/petitioners while 27 condoning the delay. In another case i.e., C.C.No.1459/2015, even the delay was not condoned and even the cognizance was also not taken and simply issued notice. Therefore, in my view, taking cognizance against the petitioners in all four cases by the learned Magistrate is liable to be set aside and the matter is required to be remanded back for giving an opportunity for the petitioners-accused for filing or raising their objection on the delay application and thereafter, the Magistrate shall have to pass

an order by application of mind satisfying the delay caused to the complainant in filing the complaint. Though the learned High Court Government Pleader argued that all the documents were seized by the CBI and vested with the CBI and they have given the documents only after three years, therefore, there was delay in filing the complaint. Whatever may be the reason, that has to be considered by the Magistrate only after giving an opportunity to the accused persons while condoning the delay, otherwise for taking cognizance, there is a bar under Section 468 of Cr.P.C. Therefore, the contention of 28 learned High Court Government Pleader is not sustainable. Accordingly, the taking cognizance by the Magistrate in all the four cases is liable to be set aside.

20. The another contention raised by the learned counsel for the petitioners is that except the manufacturer, the dealers and others are not liable for prosecution as per Section 19(3) of the D.C. Act. For the sake of convenience, the provisions of Section 19(3) is read as hereunder:

"19(3): A person, not being the manufacturer of a drug or cosmetic or his agent for the distribution thereof, shall not be liable for a contravention of section 18 if he proves- (a) that he acquired the drug or cosmetic from a duly licensed manufacturer, distributor or dealer thereof; (b) that he did not know and could not, with reasonable diligence, have ascertained that the drug or cosmetic in any way contravened the provisions of that section; and 29 (c) that the drug or cosmetic, while in his possession was properly stored and remained in the same state as when he acquired it.

21. On bare reading of the provision, it says that a person, not being manufacturer of a drug or cosmetic or his agent for the distribution there of, shall not be liable for contravention of Section 18 of the D.C.Act, if he proves, the provision reveals that except the manufacturer and distributors, others required to prove the criteria of Section 19(3)(a)(b)(c) stated above which is applicable to the retailer or the pharmacists, but the manufacturer and distributor cannot take shelter under Section 19(3) of the D.C. Act. As per Section 19, the manufacturer can take the plea in respect of the test analysis. Therefore, the petitioners are the manufacturers and distributors of the VENTASOL-AX drugs. If at all, any defence

available to them as per Section 19(3)(a)(b)(c), it has to be reverse burden on the accused to prove that they have purchased from duly manufacturer or distributor or the ignorance of 30 the banned drugs or any contravention of the provisions of that Section and the drugs which was in possession was properly stored and remain in the same that as when he acquired it. Therefore, this ground is available to the accused persons only during the trial and they can take defence during the trial. Therefore, that ground is not available to the petitioners under Section 482 of Cr.P.C. Therefore, on that ground, the criminal proceedings cannot be quashed.

22. As regards to the other contention taken by learned counsel that as per the drug analysis report, the drug is of standard quality, therefore, three months notice is required to be issued to the petitioners-manufacturers under Section 16(2) of the D.C. Act. On bare reading of the provisions, of course, the Government has issued Notification after consideration with the Board regarding amendment of the 2nd schedule for the purpose of the Chapter 4, then only a notice is required to be issued. But here in this case, the Central Government has issued 31 notice by banning the VENTASOL-AX drugs manufactured by the petitioner-company. Such being the case, the contention of the petitioner cannot be available at this stage and they can take as a defence during the trial. Therefore, that contention also not available to the petitioner.

23. The another contention raised by the learned counsel for the petitioners is that the Delhi High Court has quashed all the Notifications issued by the Central Government in the case of Pfizer Limited & anr. stated supra where 344 Notifications were quashed by Delhi High Court, those Notifications were issued by the Government by exercising the power under Section 26A of the D.C. Act. In the said case, where the manufacturers have challenged the issuance of notices and subsequently, they have also filed an applications before the Committee and the said Committee have not considered their applications. But here in this case, it is not clear as to whether the notice issued by the Central Government by banning the 32 manufacture of VENTASOL-AX drugs by accused No.1 has been quashed by the Delhi High Court and the petitioner is also not a party to the said case challenged the said Notifications issued against this petitioner. On the other hand, the Hon'ble Supreme Court has held in the case of Vincent Panikurlangara stated

supra where the Writ Petition were filed for withdrawal of 7,000 fixed dose combinations and withdrawal of license of manufacturers engaged in manufacture of about 30 drugs which have been licensed by the Drugs Control Authorities which were challenged and the Hon'ble Supreme Court has held that the Government has power to issue such notices in the interest of public at large and have taking health care of the public.

24. Though the learned counsel for the petitioner also contended that the petitioner-accused No.1 was licensed drug manufacturer and license was renewed by the Pondicherry Government, but the Pondicherry Government was issued license for manufacture of drugs, 33 but the Central Government is empowered under the D.C. Act for issuing any Notifications and Section 16(a) and 26A of D.C. Act. Therefore, once the Central Government issued Notification by acting under Section 26A of the Act banning the drugs manufactured by the petitioner-accused No.1-company, he cannot take any shelter for quashing the criminal proceedings and he can take as a ground before the Magistrate. Therefore, the ground urged by learned counsel is not sustainable under the law.

25. In view of my reasons in respect of point No.1- on the ground of delay, all the four petitions are liable to be allowed-in-part. Accordingly, all four criminal petitions are allowed-in-part. Taking cognizance by the Magistrate in all four cases and issuing notice to the accused persons as well as condoning delay in filing the complaint under Section 473 of Cr.P.C. in three cases are hereby set aside and the matter is remanded back to the Magistrate for giving an opportunity to the petitioners being heard under Section 34 473 of Cr.P.C. application and pass an appropriate order for condoning the delay in all four cases, if it is satisfactorily explained by the complainant and thereafter, the trial court can proceed in accordance with law. Sd/- JUDGE GBB

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