Manager, Medico Pharmaceutical Processors Vs. State of H.P. and ors.

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SooperKanoon Citation : sooperkanoon.com/889946

Court : Himachal Pradesh

Decided On : Oct-07-1982

Reported in : 1983CriLJ67

Judge : Vyas Dev Misra, C.J.

Appellant : Manager, Medico Pharmaceutical Processors

Respondent : State of H.P. and ors.

Advocate for Pet/Ap. : Mr. Kapil Dev Sood

Judgement :
ORDER

Vyas Dev Misra, C.J.

1. Shri S. N. Sharma, Drugs Inspector Dharamsala, on 27th Feb., 1979 went to the shop of M/s. Best Pharma Corporation, Palampur, pharmaceutical distributors (referred to as the Vendor), and took a sample of chloramphenicol I. P. in accordance with the provision of Section 23 of the Drugs and Cosmetics Act (the Act). One portion of the sample was given to the Vendor and another was sent to the Government Analyst. The analyst declared the sample as not of standard quality on the ground that it did not conform to I, P. in respect of polymorph-A content. A copy of the report along with the show cause notice was sent to the Vendor. The latter sent an attested copy of the purchase invoice of the drug to the Drugs Inspector. It revealed that the drug in question had been purchased from

M/s. Bharat Drug House (referred to as the Distributor). A copy of the report of the analyst as well as a part of the sample was sent to the Distributor. A complaint for contravening Section 18(a)(i) of the Act, punishable under Section 27(b), was filed before the Sub-Divisional Judicial Magistrate, Palampur, against (1) Shanti Sharma of M/s. Best Pharma Corporation, Palampur (the Vendor), (2) Sushil Kumar of M/s. Bharat Drug House (the Distributor) and (3) Manager, M/s. Medico Pharmaceutical Processors (the Manufacturer). After recording preliminary evidence, all the three accused were summoned. They have been charged for an offence punishable under Section 27(b) of the Act. The manufacturer prays that the charge be quashed and the order summoning him as an accused be set aside.

2. Mr. Kapil Dev Sood, learned Counsel for the petitioner, contends that it was the duty of the Drugs Inspector to send a copy of the report of the Government Analyst along with the sample to the manufacturer (the petitioner in this case) and the Drugs Inspector having failed to do so, the right of the petitioner to have the drug analysed has been taken away.

3. Section 18 (a) of the Act lays down that no person shall manufacture for sale or sell, or stock or expose for sale, or distribute any drug which is not of standard quality. The expression 'standard quality' has been defined by Section 16 of the Act to mean that the drug complies with the standard set out in the Second Schedule. The Second Schedule lays down that the drug included in the Indian Pharmacopoeia should comply with 'standards of identity, purity and strength specified in the edition of the Indian Pharmacopoeia for the time being in force and such other standards as may be prescribed.

4. Section 23 of the Act lays down the procedure for taking a sample. The Drugs Inspector is required to divide the sample into four portions and effectively seal and suitably mark the same. He is further required to give one portion of the sample to the person from whom the sample is taken. Second portion of the sample is to be sent to the Government Analyst for test or analysis. The third portion is required to be produced in the Court if any proceedings are instituted in respect of the drug. The fourth portion is required to be sent to the person, if any, whose name, address and other particulars have been disclosed under Section

18-A of the Ad. Section 18-A reads:

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.

5. Section 25 of the Act relates to the report of Government Analyst. Under Sub-section (1) the Government Analyst is required to send to the Inspector a signed report in triplicate in the prescribed form. Sub-section (2) require the Inspector to 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 of the Act. The Inspector is further required to retain the third copy for use in any prosecution in respect of the samples. Sub-section (3) makes the report evidence of the facts slated therein as conclusive evidence 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 days of the receipt of the copy of the report, notified in writing to 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. Sub-section (4) makes the report of the Central Drugs Laboratory conclusive evidence of the facts stated therein. It reads:

(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 controversion of a Government Analyst's report, the Court may of its own motion or in his 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 analysts to the said laboratory, which shall make a 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.

6. At this stage some relevant dates may be noticed. The record reveals that it was on 25th September, 1978 that the drug was sold by the Manufacturer to the

Distributor who in turn sold the same on 28th September, 1978, to the Vendor. The sample was taken by the Drugs Inspector on 27th February, 1979 and was sent to the Government Analyst vide his memo, dated 3rd March, 1979, which was received by the Government Analyst, Calcutta, on 23rd March, 1979. The report of the analyst is dated 10th October, 1979. The Drugs Inspector sent, a copy of the report to the Vendor on 23rd October. 1979 who disclosed the name of the supplier under Section 18-A vide his letter dated 30th October, 1979. The Drugs Inspector sent a copy of the report to the Distributor by his letter dated 7th November, 1979 which was acknowledged by the latter vide his letter dated 19th November, 1979. It was on 24th May, 1980 that the complaint was filed in the court of Sub-Divisional Judicial Magistrate, Palampur.

7. It is not in dispute before me that the Drugs Inspector had duly taken the sample. The Inspector had received the report of the Government Analyst in triplicate and had supplied one of these to the Vendor and the other to the Distributor. He was required to divide the sample into four portions and he had done, so. He had, retained one portion of the sample as required by law whereas another portion was sent to the Government Analyst. One was left with the Vendor and the fourth was sent to the Distributor. He thus fully complied with the provisions of Section 23 of the Act. The petitioner, who is the manufacturer, cannot, therefore, be heard to say that he was entitled to receive a copy of the report as well as a portion of the sample. He thus cannot contend that his right to have the sample analysed has been taken away.

8. It may be remembered that under Section 25(4) of the Act the report of the Central Drugs Laboratory has been made conclusive evidence of facts stated therein. Now the drug can be got tested or analysed by the Drugs Inspector or by any of the accused in case the drug has not already been tested or analysed by the Central Drugs Laboratory. In the instant case since the true has not been tested or analysed by the Central Drugs Laboratory, it is open to the petitioner to request the Magistrate to have the drug so analysed.

9. It may be noticed that under Section 32-A of the Act the manufacturer could be impleaded at any stage of the trial. This section reads:

32 A. Power of Court to implead the manufacturer, etc. - Where, at any time during the trial of any offence under this chapter alleged to have been committed by any person, not being the manufacturer of a drue or cosmetic or his agent for the distribution thereof, the Court is satisfied, on the evidence adduced before it, that such manufacturer or agent is also concerned in that offence, then, the court may, notwithstanding anything contained in Sub-section (1) of Section 351 of the Cri. P. C., 1898, proceed against him as though a prosecution had been instituted against him under Section 32.

10. It is obvious that this situation would arise when under Section 18-A the manufacturer is not the supplier of the drug to the person from whom a sample is taken by the Drugs Inspector. In other words, a manufacturer cannot claim that though his name has not been disclosed in terms of Section 18-A of the Act he is still entitled to a copy of the analyst's report and a portion of the sample.

11. It is contended that since the expiry date on the drue was 'use before January, 1980' the right of the petitioner to have the drug analysed has been taken away. It may be repeated that the purpose of sending copies of the reports to the person from whom the sample was taken as well as to the person who supplied the drug is to put them on notice that they have a right of having the drug analysed or tested by notifying their intention in writing to the Drugs Inspector or the court within twenty days of the receipt of the copy of the report (Section 25(3) of the Act). In the instant case the vendor and the Distributor did not choose to exercise this right. Since the petitioner had no right to receive a copy of the report, he cannot have grievance that as the expiry date of the drug was January, 1980, his right to have the drug analysed has been taken away.

12. Mr. Sood contends that since there was no allegation against the manufacturer he could not be prosecuted Jointly with the retailer and the distributor of the drug. He cites a Full Bench decision of the Delhi High Court in Municipal Corporation of Delhi v. Laxmi Narain 1973 Cri LJ 690. This was a case under the Prevention of Food Adulteration Act which provides for impleading a manufacturer as a co-accused during the trial of a vendor of an adulterated article of food. I find that the Bench came to the conclusion that a vendor and a manufacturer could be

prosecuted jointly for selling an adulterated article of food. Mr. Sood, however, relies on the following observations (at p, 696):

When a manufacturer produces an article of food which is adulterated, his purpose is to sell it. Likewise when the distributor obtains that article from the manufacturer, his purpose is the same till the article ultimately reaches the consumer. xx xx xx xx xx xx That unity of purpose can in our opinion be predicated only if before the prosecution is launched there is material to show the connection of the manufacturer and the distributor with the particular article of food which on analysis has been found to be adulterated. If this test is satisfied, then there would be unity of purpose and design between the vendor, the distributor and the manufacturer, in respect of the sale of the article of food and these series of acts would form part of the same transaction and there can be a joint trial of these persons under Section 239 of the code.

13. This decision of the Delhi High Court was affirmed by the Supreme Court in Bhagwan Das Jagdish Chander v. Delhi Administration : 1975 CriLJ1091 wherein it was observed (Para 13):.there seems no logically sound reason why, if a distributor or a manufacturer can be subsequently impleaded, under Section 20-A of the Act, he cannot be joined as a co-accused initially in a joint trial if the allegations made justify such a course.

14. In the instant case the facts show that the drug was sold by the manufacturer in a sealed boltle which was in turn sold by the distributor to the vendor. There is thus prima facie evidence that there was unity of purpose.

15. The last contention of Mr. Sood is that the report of the analyst is vague since it does not show the extent of adulteration. It is Rule 46 of the Drugs and Cosmetics Rules, 1945 which lays down the procedure to be followed by the Government Analyst on receipt of the sample. The relevant part of this rule reads:

On receipt of a package from an Inspector containing a sample for test or analysis, the Government Analyst shall compare the seals on the packet with the specimen impression received separately and shall note the condition of the seals on the package. After the test or 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.

-Explanation, It shall be deemed to be full and sufficient compliance with the requirement of the rule in respect of the supply of 'protocols of the test or analysis applied' if (1) for pharmacopoeial drug, where the tests or methods of analysis prescribed in the official pharmacopoeia are followed, references to the specific tests or analysis in the pharmacopoeias are given in the report; xx xx

16. Now the relevant part of the report of the Government Analyst may be noticed. It reads.

In the opinion of the undersigned the sample referred to above is not of ' standard quality as defined in the Drugs Act, 1940, and rules thereunder for reasons given below:

Method : I. P. Supple' 75. Description : Orange coloured suspension with a characteristic sweet flavour. Identification : Yields positive test for chlo-ramphenicol palmitate. Polymoroph-A : Does not comply with I.P. Assay : Found/5ml. : Claim/5ml. : Limit : Content of Chlo. 125mg. 95 to 115% of = rampheniool claim.143.25 mg.(= 114.6% ofclaim)Reasons for declaring the sample as not of standard quality:

Remarks : The sample does not conform to I. P. in respect to Polymorph-A content.

17. Now it is 1975 supplement to the Pharmacopoeia of India which lays down the standard of quality. It also provides for the test which the drug should comply with. One of the tests is polymorph-A. How the test is to be conducted is described in detail. It is the contention of Mr. Sood that details should have been given by the Government Analyst since it is ultimately provided that the extinction ratio of the sample is greater than the extinction ratio of the standard containing 10 per cent w/w of polymorph-A'. I am afraid there is no substance in this contention. As already noticed. Explanation (1) to Rule 46 specifically lays down that 'protocols of the tests or analysis applied' well be sufficiently complied with in respect of a

pharmacopoeia drugs where the methods prescribed in the official pharmacopoeia are followed and references to the specific tests or analysis in the pharmacopoeias are given in the report. In the instant case the report makes a specific reference to the Indian Pharmacopoeia supplement 1975 as regards the methods. It specifically mentions the test of polymorph-A. Since the sample did not conform to this test, it was declared to be not of standard quality as defined in the Act. It is thus a sufficient compliance and it was not necessary to describe the test in detail or mention in detail the result of the test.

18. My attention has been drawn to a Division Bench judgment of the Karnataka High Court in State of Karnataka v. Vikram Chemical Laboratories, Bangalore 1975 Cri LJ 332, where a similar view was taken. In T. A. Krishnaswamy v. State of Madras : 1966 CriLJ803 , it was ruled that rule 46 contemplates analysis and test as two different things. It was observed that the rule and the form require that the protocol of the test should be stated though these did not require any protocol to be stated in the report of analysis.

19. Mr. Sood has made a reference to the State of Maharashtra v. Jawaharlal Shamlal Ujawne 1979 Cri LJ 530 (Bom), S. Dutta v. State : AIR1959 Cal427 and Dharam Deo Gupta v. Stale : AIR1958 All865 . I have carefully gone through these judgments and I am of the opinion that these cases were decided on their own peculiar facts and have no relevance to the present case. In the first case the court came to the conclusion that it was not known what the protocol of the test applied for was since the report was silent on that point. The second case refers to the Bengal Drugs Rules, 1946. The decision was based on Rule 5 of these rules which I find is not pari materia with the present Rule 46 with which I am concerned. However, the case related to olive oil and the court came to the conclusion that full protocols of the test applied were set out In the third case the court found that no factual data at all had been given in the report.

20. The result is that the petition fails and is dismissed.