

**HIGH COURT OF JAMMU AND KASHMIR AND LADAKH
ATJAMMU**

Reserved on 02.02.2023
Pronounced on 09.02.2023

CRMC No. 396/2018
c/w
CRM(M) No. 93/2021
(O&M)

1) Sundaram Surgicals th. G. Mathu Mari
2) Khalid Bashir

.....Appellant/Petitioner(s)

Through :- Mr. Sachin Gupta, Advocate
Mr. Hamzah Hussaini, Advocate

v/s

Drugs Inspector Doda C/o Controller
Drugs and Food Control Org. Muthi and
others.

.....Respondent(s)

Through :- Mr. S. S. Nanda, Sr. AAG

Coram: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) Through the medium of this judgment, afore-titled two petitions filed under Section 482 of the Cr. P.C. are proposed to be disposed. In both these petitions, the petitioners have challenged the complaint filed by the respondent-Drugs Inspector, Doda against them alleging commission of offence under section 18(a)(i), read with section 27 (c) of the Drugs and Cosmetics Act, 1940 (hereinafter to be referred as the Act), which is stated to be pending before the Court of Chief Judicial Magistrate, Doda.

2) It appears that the respondent, Drugs Inspector, Doda, has lodged the impugned complaint against the petitioners and co-accused alleging therein that the sample of drug "Handloom Cloth Rolled Bandage, Batch No. 24 date

of manufacturing August/2010, date of expiry February/2014” collected from the shop of the petitioner/accused, Khalid Bashir was found to be not of standard quality. After completion of the necessary formalities and investigation, the Drugs Inspector lodged the impugned complaint against the petitioner, Khalid Bashir, retailer, M/s Sundaram Surgicals, manufacturer and other co-accused in their capacity as distributors and dealers.

3) As already noted, the petitioner, Khalid Bashir has been impleaded as an accused in his capacity as a retailer, whereas the petitioner, M/s Sundaram Surgicals has been impleaded as an accused in its capacity as manufacturer of the drug in question.

4) The petitioners have challenged the impugned complaint as also the order, whereby the process has been issued by the learned trial Magistrate against the petitioners, on various grounds. Primary ground urged by the petitioner, M/s Sundaram Surgicals is that the drug in question has not been manufactured by it and despite the respondent-Drugs Inspector, having collected material during the investigation of the case to show that the petitioner, M/s Sundaram Surgicals is not the manufacturer of the drug in question, he has chosen to launch prosecution against it. It has been submitted that once it was established that the drug in question was not manufactured by the petitioner, Sundaram Surgicals, it could not have been prosecuted for the offence relating to sub-standard quality of the drug, as it was a case of spurious drugs.

5) The petitioner, Khalid Bashir has primarily challenged the prosecution on the ground that once it was shown that it is a case of spurious drugs and

there is evidence on record to show that the said petitioner had purchased the subject drug from a duly licenced dealer, he could not have been prosecuted. It is also contended that even if it is a case of sub-standard quality of the drug, still then in view of the provisions contained in Section 19 (3) of the Act, unless it is shown that the drug in question, while in his possession, was not properly stored, he could not have been prosecuted.

6) I have heard learned counsel for the parties and perused the record of the case including the trial court record.

7) Since the contentions raised by the two petitioners are distinct from each other and role of two the petitioners are also severable in nature, as such, it would be apt to deal with these contentions separately.

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8) This petition has been filed by M/s Sundaram Surgicals, purported manufacturer of the drug, which was found to be of sub-standard quality. As already noted, the petitioner has contended that during the investigation of the case, respondent-Drugs-Inspector had collected the material, which goes on to suggest that the petitioner is not the manufacturer of the drug in question, as such, he could not have been prosecuted. In this regard, the petitioner has relied upon the averments made in para (19) of the impugned complaint. In the said para, it has been submitted by the complainant/Drugs Inspector that he received a communication No. DFO/D-T/1040/8466-69 dated 17.11.2012 from the office of the Controller, Drugs and Food Control Organization J&K, wherein it was stated that the manufacturer i.e. the petitioner herein, has communicated in writing that the subject drug has not been manufactured at

his end. It was also contended by the petitioner in the said communication that the sample falls under the provisions of section 17 B (e) of the Drugs and Cosmetics Act, 1940, meaning thereby that it is a spurious drug and not a drug of sub-standard quality, regarding which the purported manufacturer cannot be prosecuted.

9) Learned counsel for the respondent-Drugs Inspector has contended that the complainant has only made reference to the reply submitted by the petitioner herein to the communication of Drugs Inspector. He has submitted that whatever the petitioner has stated in its communication addressed to the Controller, Drugs and Food Control Organization, J&K, cannot be treated as gospel truth and the same is subject to proof of its contents during the trial of the complaint. The learned counsel has further submitted that the question whether or not the petitioner was the actual manufacturer of the drug in question, cannot be decided by this Court in these proceeding.

10) At first blush, argument of the learned counsel for the respondents appears to be attractive but when we analyse the reply filed by the respondent-Drugs Inspector to the petition, it is revealed that in para (6) of the said reply, it has been stated that after filing of the complaint, respondent No. 1 received a communication dated 27.01.2015 bearing No. DCO/J/4676-79, by virtue of which respondent No. 1 was informed by the office of Deputy Controller, Drugs and Food Control Organization, Jammu that they have received a communication from the office of Drugs Control Department, Tamil Naidu stating therein that the drug in question has not been manufactured by the petitioner. A copy of the said communication has been

annexed to the reply. A perusal of the said communication shows that the Director of Drugs Control, Tamil Naidu has in response to the communication dated 11.12.2014 of the Drugs Controller, Jammu informed him that the matter has been investigated at their end. The relevant portion of the said communication is reproduced as under:

“In continuation of the letter 2nd cited above, it is informed that the Drugs Inspector of this Directorate has investigated the matter on 16.11.2012 at Sundaram Surgicals, Chatrapatti and reported the following:

1. No product of Bach No. 24 was manufactured by Sundaram Surgicals during August-2010.
2. No address, such as Door Number and Street Name are printed on the labels of Drugs Manufactured by Sundaram Surgical. But in the received references from you office, the Door No. and Street Name are given.
3. The Sundaram Surgical has not Manufactured by the referred Bach of Drug.

Hence, it is informed that the name of the person responsible for the Manufacturer of Bach No. 24 in August 2010 as requested in the 1st reference, does not arise.”

11) From a perusal of the contents of the aforesaid communication, it is clear that the Director of Drugs Control, Tamil Naidu has intimated to the Drugs Controller, Jammu that the subject drug was not manufactured by the petitioner. This information has been submitted after the investigation of the matter. Thus, the documents produced by the respondent No. 1 itself show that the subject drug was not manufactured by the petitioner.

12) The above position is further substantiated by the fact that in the revision petition filed by respondent No. 1 against order dated 22.03.2013 passed by the Additional Sessions Judge, Doda in the impugned complaint, whereby the learned Additional Sessions Judge, Doda had observed that the complaint is triable by the Chief Judicial Magistrate, respondent No. 1 has

admitted that the drug in question is spurious in nature, as it was found that it has not been manufactured by the petitioner. In view of this admitted position, the contention of the learned counsel for respondent No. 1 that question whether or not the petitioner has actually manufactured the subject drug, is required to be tried, has no substance.

13) From what has been discussed above, it has been established that the subject drug was not truly a product of petitioner, M/s Sundaram Surgicals, of whom it purports to be a product. Thus, it is a case of spurious drug as defined in Section 17 B (e) of the Act. The prosecution for commission of offence under section 18 (a) (i), read with section 27 (c) of the Act cannot be launched against a purported manufacturer of whom the subject drug is truly not a product. It is only the dealer, retailer and actual manufacturer, who can be prosecuted for sale, stock or exhibition of spurious drug. The petitioner has not conducted any investigation in the case so as to ascertain the identity of the actual manufacturer of the subject drug, after it came to know that the petitioner is not the actual manufacturer of the drug in question. Thus, on the basis of insufficient material, which does not *prima facie* show complicity of the petitioner, it could not have been prosecuted. Accordingly, the prosecution launched against the petitioner, M/s Sundaram Surgicals, is liable to be quashed.

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14) As already noted, this petition has been filed by the retailer, in whose shop the sample of the subject drug was collected. The contention of the petitioner is that it is a case of “spurious drug” and as such, the petitioner

could not have been prosecuted as he had obtained the subject drug from the licensed dealer.

15) Whether it is a case of spurious drug or sub-standard quality drug, the retailer cannot escape his liability merely because he has obtained the same from a licensed dealer. Section 27 of the Act clearly provides that any person, who manufactures for sale or for distribution, or sells, or stocks or exhibits or offers for sale or distributes any drug, deemed to be spurious drug under section 17 B of the Act, is liable to punishment. There is material on record as also a specific allegation in the impugned complaint that the petitioner had stored the drug in question and exhibited it for sale in his shop and the said drug was found to be spurious in nature. Once there is material on record to support this allegation, it cannot be stated that no offence is made out against the petitioner.

16) It is contended by the petitioner that he has obtained the subject drug from a licensed dealer and there was nothing on record to show that he had not properly stored it. Thus, no offence is made against him.

17) In the above context, it is to be noted that Section 19 (3) of the Act provides that a person other than the manufacturer of a drug, cannot be prosecuted if he shows that he has acquired the drug from a duly licensed manufacturer, distributor or dealer and that he did not know and could not, with reasonable diligence, ascertain contravention of the provisions of the section and further that the drug or the cosmetic was properly stored and remained in the same state as, when he acquired it. The burden to prove the aforesaid three conditions would always be upon the concerned dealer.

18) In the instant case, there is nothing on record to show that while the drug was in possession of the petitioner, Khalid Bhashir, it was properly stored and remained in the same state as when he acquired it. These are the facts, which have to be established by the petitioner during the course of the trial. From the material on record of the trial court, there is nothing to suggest that the petitioner had complied with the aforesaid conditions.

19) In view of the above, the prosecution as against the petitioner cannot be scuttled at this stage particularly when there is material on record regarding his complicity in the matter.

20) Viewed thus, the petition filed by M/s Sundaram Surgicals bearing no CRMC No. 396/2018 is allowed and the proceedings to its extent pending before the trial Magistrate are quashed. The petition filed by the petitioner, Khalid Bashir bearing No. CRM(M) No. 93/2021 lacks merit and the same is, accordingly, dismissed.

21) Copy of this order be sent to the trial court.

(Sanjay Dhar)
Judge

JAMMU

09.02.2023

Karam Chand/Secy.

Whether the order is speaking:	Yes/No
Whether the order is reportable:	Yes/No