

**B E F O R E**  
**HON'BLE MR. JUSTICE KALYAN RAI SURANA**

**ORDER**

**26.09.2019**

Heard Mr. P.K. Roychoudhury, learned counsel for the petitioners. Also heard Ms. L. Hage, learned Public Prosecutor for the State, respondent No. 1 as well as Mr. T. Tagum, learned Special Public Prosecutor and standing counsel for the Health Department, respondent No. 2.

2) By this application under Section 482 of Code of Criminal Procedure, the petitioners have prayed for quashing of the CR Case No. 123(AP)/ 2018 which is a criminal complaint case under Section 200 Cr.P.C. lodged by the Drug Inspector, office of the Director of Health Services, Arunachal Pradesh, Naharlagun before the Court of learned Chief Judicial Magistrate, Capital Complex, Yupia, alleging offence punishable under Section 19(a)(i) read with Section 27(d) of the Drugs and Cosmetics Act, 1940. The petitioners herein are the accused No. 1 and 2 in the said complaint case.

3) The said complaint case was made over for trial before the Court of learned Judicial Magistrate 1<sup>st</sup> Class, Capital Complex, Yupia. The said learned Court by an order dated 10.12.2018 took cognizance of the offence committed under Section 17(b)/ 18(a)(i)/ 23(3)/ 22(1)(c)(cca) of Drugs and Cosmetics Act, 1940 (hereinafter referred to as "1940 Act") punishable under Section 17B/ 27(a) and (c)/ 28/ 28A/ 22(3) of the said 1940 Act and ordered issuance of summons to the accused persons for appearance, fixing 28.01.2019 for appearance.

4) The learned counsel for the petitioners has referred to the complaint petition and he has submitted that the respondent No. 2 had collected sample of drugs, namely, Ferrous Sulphate and Folic Acid Syrup (100 ml), Batch No. L0179, Expiry date- September, 2019, manufactured by the petitioner No. 2 and the same was sent to the Regional Drugs Testing Laboratory, Guwahati (RDTL for short) on 27.12.2017. The test report bearing No. RDTL/716/2017 dated 19.03.2018 contain a remark that the sample referred therein is not of standard quality as defined in the 1940 Act and Rules, that the sample does not confirm to I.P. with respect to the test performed, and that the sample was found to be "misbranded drug" as per Section 17(b) of the 1940 Act.

5) The learned counsel for the petitioners submits that the respondent No. 2 did not issue any show cause notice to the petitioners and, as such, the petitioners cannot be prosecuted for the offence under Section 28 or 28A of the 1940 Act and that none of the other provisions would be attracted as no criminal *mens rea* can be attributed to the petitioners. However, on receipt of notice dated 21.04.2018, the petitioner No. 1 acting for self and the petitioner No. 2 by a letter dated 03.05.2018, informed the Drug Inspector that they had reserved their right to challenge or adduce further evidence as per Section 25(3) of the 1940 Act and Rules on receipt of the sample portion and requested the authority to immediately send them the drug sample. It is submitted that till date the petitioners have not been provided with the concerned sample. However, it is submitted that by a letter dated 14.11.2018, the respondent No. 2 had requested the learned Public Prosecutor to obtain permission from the Court for sending one part of the drug sample to the Central Drugs Laboratory at Kolkata for confirmation of the test report of the RDTL, Guwahati.

6) It is submitted that till date the respondent No. 2 did not obtain any order from the learned Trial Court for sending these drugs sample to the Central Drug Laboratory, Kolkata which would cause great prejudice to the petitioners because of two reasons, viz., (i) the petitioners had not received the

sample to challenge the allegations made against them, and (ii) if the seized drug sample is not tested by 30.09.2019, the seized drug sample would cross its expiry date and there would be no way for the petitioners to absolve themselves from the allegations based on which the learned trial Court had taken cognizance of the offence.

7) It is also submitted that the rights of the petitioners is safeguarded under Section 25(3) of the 1940 Act, and although the petitioners exercised their right by expressing their intention to adduce evidence in controversion of the report signed by a Government Analyst, but as the sample was not sent by the court to the Central Drug Laboratory at Kolkata, the said statutory rights and privilege to which the petitioners were entitled to, has been violated. In this regard, the learned counsel for the petitioners has also referred to the provisions of Section 25(4) of the 1940 Act. Accordingly, it is submitted that the present complaint petition is an abuse of the process of the Court. It is submitted that although the petitioners have in their custody the reports issued by the Central Analytical Laboratories, Indore, Madhya Pradesh, certifying that the drug manufactured by them was of standard quality, at this stage, as the Court is required to rely only on the documents appended to the complaint petition, at this stage, he is refraining from referring to the same, as because from the complaint petition as well as the documents appended to the complaint petition, it is revealed that the present prosecution is an abuse of the process of Court and that the ingredients of the offences alleged under the 1940 Act are not attracted in the present case. Therefore, the learned counsel for the petitioners has prayed for staying the complaint proceeding at this stage pending herein of this application.

8) Per contra, the learned Special Public Prosecutor has submitted that perhaps, the learned counsel for the petitioners has not been appropriately instructed because it appears from the documents annexed to this application that two sets of samples of drugs manufactured by the petitioners were collected at different point of time by separate authorities. The present

prosecution initiated against the petitioners herein was on the basis of report by the RDTL bearing No. RDTL/716/2017-18 dated 19.03.2018. It is submitted that although the petitioners had been issued show cause notice in respect of the said report dated 19.03.2018, but in this application, there is no document to show that the petitioners had exercised their right to contest the said report. In this regard, the learned Special P.P. has referred to various documents annexed to this writ petition.

9) Having heard the learned counsel for the petitioners, the documents annexed to this application including the complaint petition and enclosures thereto has been examined by the Court. It is seen that CR Case No. 123 (AP)/2018 has been initiated against the petitioners on the basis of report bearing No. RDTL/716/2017-18 dated 19.03.2018 by the RDTL, Guwahati. It appears that as against the said RDTL report dated 19.03.2018, show- cause notice was issued to the petitioner No. 2 on 07.06.2018 by the respondent No. 2 together with (i) analysis report, (ii) disclosure letter of the concerned drug seller, and (iii) one part of the sealed drug sample, which was sent through courier service. The said show cause notice is annexed at page-54 and 55 of this application. The said notice appears to be followed by another show- cause notice dated 03.07.2018 sent by registered post, wherein the previous show cause notice dated 07.06.2018 was referred to and a copy of the said notice is available at page-57 and 58 of this application. It is also seen that the said notice was also sent to the petitioners through e-mail on 04.07.2018 and reminders dated 19.07.2018 and 30.08.2018 were sent, which are available at page-57 to 65 of this application. In this connection, it is observed that the learned counsel for the petitioners had referred to the petitioners' letter dated 03.05.2018, by which the petitioner No. 1 had disclosed his intention to adduce further evidence, and the said letter (page-76 of this application) is found to contain reference to the report of the RDTL bearing No. RDTL/697/2017-18. The said report available at 79 of this application reveals that the sample involved therein was collected by the Inspector of Drugs, Naharlagun who is a separate authority having competence to initiate

prosecution and the said sample was collected elsewhere and, as such, it *prima facie* appears that the report No. RDTL/697/2017-18 dated 19.12.2017 (page-79 of this application) is not the basis on which CR Case No. 123 (AP)/ 2018 has been initiated.

10) Accordingly, in light of the discussions above, *prima facie*, it appears that there is no document in this application which demonstrates that in terms of Section 25 of the 1940 Act, the petitioners had exercised their right to challenge/ question the report No. RDTL/716/2017-18 dated 19.03.2018 by the RDTL, Guwahati i.e. a Government Analyst. The learned Special P.P. has been able to *prima facie* satisfy the Court that show- cause notice and reminders were sent to the petitioners, but they did not give any reply. Accordingly, this Court is not satisfied that any right survived in favour of the petitioners to get the sample of seized drug tested at the Central Drug Laboratory at Kolkata. Under such circumstances, this Court does not find that there is merit in the submissions made by the learned counsel for the petitioners that legal duty was cast on (i) the prosecution to get the sample tested in the Central Drug Laboratory at Kolkata, and (ii) on the Court to act on the prayer made in the complaint petition to get the sample tested in the Central Drug Laboratory at Kolkata. It is observed that the petitioners have not been able to demonstrate that they had exercised their right as envisaged under Section 25(3) of the 1940 Act by reserving their right to challenge and/or question the RDTL report dated 19.03.2018, as such, the plea of the petitioners that they have suffered prejudice by non- testing of the sample by the Central Drug Laboratory at Kolkata cannot be accepted. Hence, this Court is not convinced that the proceeding of C.R. Case No. 123(AP)/2018 stands vitiated because the drug sample has not been sent for testing by the Central Drug Laboratory at Kolkata.

11) In support of the submissions, the learned counsel for the petitioners had heavily relied on the case of *Medicamen Biotech Ltd. and Anr. Vs. Rubina Bose, Drug Inspector, (2008) 7 SCC 196*. It appears that in the said

case, the appellants therein had repeatedly controverted the accuracy of the report of the Government Analyst and that despite the objections raised by the appellants therein, the exercise of sending sample to the Central Drugs Laboratory and obtaining an opinion therefrom had not been carried out and under such circumstances, it was held by the Supreme Court of India that the appellants therein were deprived of their valuable right available under Section 25(3) and 25(4) of the 1940 Act. As indicated hereinbefore, in the present case in hand the petitioners are not found to have controverted the accuracy of the report dated 19.03.2018, as such, on facts, the present case is distinguishable and, as such, the ratio of the cited case would not come to the rescue of the petitioners. Rather, it appears that on facts, the case of *State of Haryana Vs. Brij Lal Mittal and Ors. (1998) 5 SCC 343*, cited by the learned Special P.P. is found to be squarely applicable as it has been laid down in the said case that the right to get the sample examined by the Central Drugs Laboratory through the Court before which the prosecution is launched arises only after the person concerned notified in writing to the Inspector or to the court concerned within twenty-eight days from the receipt of the copy of the report of the Government Analyst that he intends to adduce evidence in controversion of the report.

12) As a result of the discussion above, this Criminal petition is found devoid of merit and is accordingly dismissed. However, it is provided that the learned trial Court shall try the proceeding of C.R. Case No. 123(AP)/2018 without being influenced by anything contained in this order.

**JUDGE**

*Mkumar.*