

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH  
AT SRINAGAR

**OWP 347/2016**

**SYED SAREER AHMAD ANDRABI** ...Petitioner(s)  
**S/O SYED MUBARAK ANDRABI**  
**R/O CHATTARHMA, HAZRATBAL, SRINAGAR**  
**INCHARGE STORES, GOVT. PSYCHIATRIC**  
**DISEASE HOSPITAL SRINAGAR**

Through: Mr. Salih Pirzada, Advocate

**Vs.**

**UNION OF INDIA THROUGH DRUG** ...Respondent(s)  
**INSEPECTOR SIDHARTH SAHAI MALHOTRA,**  
**CENTRAL DRUG, STANDARD CONTROL**  
**ORGANIZATION (CDSCO) SUB ZONE**  
**CHANDIGARH, SECTOR 39-C CHANDIGARH**  
**REGIONAL OFFICE, SUB ZONE JAMMU, C/O**  
**OFFICE OF FOOD AND DRUG**  
**ORGANIZATION MUTHI, JAMMU**

Through: Mr. T.M. Shamsi, DSGI with  
Ms. Yasmeena, Advocate

**CORAM:**

**HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE**

**ORDER**

**09.07.2024**

**Oral:**

1. Through the medium of the instant petition filed under Article 226 read with Article 227 of the Constitution, the petitioner herein has prayed for the following reliefs:-

*“I. By a writ of certiorari*

*The complaint and the proceedings initiated by the court of Chief Judicial Magistrate, Srinagar, in complaint file No. 2516002520820140015/14 titled Union of India v. Rajiv Mukul and others under order dated 21.08.2014 may be quashed.*

*II. By a writ of mandamus*

*The Amending Act 19 of 1972, whereby the Drugs and Cosmetics Act, 1940 was extended to the State of Jammu & Kashmir be declared ultra vires as violative of Article 370.”*

2. The facts giving rise to the filing of the instant petition as stated therein are that the respondents herein filed a complaint against the petitioner herein alongwith others before the Chief Judicial Magistrate, Srinagar (for short the CJM) alleging therein the commission of offences under Section 18-A and 27 (D) of the Drugs and Cosmetics Act, 1940 (for short the Act) alleging that the petitioner herein failed to disclose the particulars from whom alleged sub-standard Drug had been acquired. The drug had been lifted from the stores of the Government Psychiatric Hospital, wherein the petitioner herein was working as a Storekeeper and on account of the said failure of the petitioner herein to disclose the name of the person from whom the said drug was acquired, the petitioner committed offence under Section 18-A of the Act punishable under Section 28 of the Act.
3. The petitioner has maintained the instant petition on the following grounds:

*“a. That the complaint indicts the petitioner under Section 18A of the Drugs and Cosmetics Act, 1940, which reads as under:*

*18A. 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.]*

*As per the dictum laid down by this provision, a person who acquires drugs or cosmetics is mandated to disclose the name and other particulars of the manufacturer from which it is procured. The petitioner under no circumstances falls within the ambit of Section 18A for such kind of disclosure, as*

*the drugs admittedly by the contents of the complaint, are not acquired by him. The drugs in the Hospitals are procured by a devised mechanism to which the participation of the petitioner remains aloof. Paragraph 15 of the complaint reveals that the Medical Superintendent of Government Psychiatric Diseases Hospital, Srinagar, had procured the drugs in question from the manufacturer and not the petitioner, which he even isn't entitled to do. Therefore the prosecution launched against the petitioner under Section 18A is ultra vires as the petitioner does not satisfy the edict enunciated by the contents of the said provision.*

*b. The learned Chief Judicial Magistrate, Srinagar, has disregarded the legal proposition provided by the Act while dealing with offences by the Government Departments and even abandoned the factual disclosures made in the complaint while applying his mind. Section 34A reads as follows:*

***"34A. Offences by Government Departments.***

*Where an offence under Chapter IV or Chapter IVA has been committed by any department of Government, such authority as is specified by the Central Government to be in charge of manufacture, sale or distribution of drugs or where no authority is specified, the head of the department, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this section shall render any such authority or person liable to any punishment provided in Chapter IV or Chapter IVA, as the case may be, if such authority or person proves that the offence was committed without its or his knowledge or that such authority or person exercised all due diligence to prevent the commission of such offence."*

*Therefore ideally the construction of Section 18A read with Section 34A elucidates that the authorized person or the Head of the Department who has acquired the drugs in question, mutatis mutandis Medical Superintendent in this case, has to comply*

*the mandate of the said provisions. However, in utter disregard to the provisions of law, the learned Chief Judicial Magistrate has issued process against the petitioner which renders the entire process void ab initio.*

*c. That the complaint reveals that the batch of drugs in question was tested twice. At the first instance the drugs were found to be of standard quality, but after the general direction of this Hon'ble High Court dated 10.09.2013, the batch was sent for reanalysis, whereafter the batch was found to be not of standard quality. Such a direction, which the complainant has relied on, could not have been passed as it goes against the object of the Act, and against the mandate of law laid down by the Hon'ble Supreme Court. The Act does not in any of the provisions authorize the authorities to reanalyze a batch after having a conclusive exoneration. The adjudication proceedings cannot be reordered to be conducted on the same facts, once it has reached finality with exculpatory findings, even on the ground "to dispel any impression of error or any extraneous consideration." The Hon'ble Supreme Court in *Radheyshyam Kejriwal v. State of West Bengal and anr.* (2011) 3 SCC 581: [2011] 4 S.C.R. 889, has held:*

*"The yardstick would be to judge as to whether allegation in the adjudication proceedings and the proceedings for prosecution was identical and exoneration of the person concerned in the adjudication proceeding was on merits. In case it is found on merit that there was no contravention of the provisions of the Act in the adjudication proceedings, the trial of the person concerned shall be an abuse of the process of the Court."*

*Therefore any order of this Hon'ble High Court for such reexamination or reanalysis can neither circumvent the Act occupying the field nor can it dilute the principles of criminal jurisprudence*

*reiterated by the Hon'ble Supreme Court. Hence the order of the Hon'ble High Court dated 10.09.2013 is per in curium.*

*d. That there has been abdication and transgression of exercise of jurisdictional power by the trial court while entertaining the complaint and taking cognizance of the same. The jurisdictional error committed by the trial court as well as the complainant/respondent can be dichotomized into the following:*

*i. That respondent has no jurisdiction to conduct investigation of its own accord within Jammu & Kashmir State. Since respondent is a Central Government agency cannot conduct investigation for contravention of any offence committed within Jammu & Kashmir State apart from CBI for a limited purpose. The trial court without considering the competence of complainant to launch prosecution has taken cognizance. Therefore the proceedings being without jurisdiction are liable to be set-aside.*

*ii. The complaint has been filed by the attorney and there has been no examination of complainant before taking cognizance and issue of process. The memorandum of complaint does not verify that the attorney is conversant with the facts as such the proceedings have been initiated at the instance of a wrong person. There must be a statement asserting the personal knowledge of the power of attorney holder in the complaint. The power of attorney holder, who has no knowledge regarding the transactions, cannot be examined as a witness in the case.*

*The trial court has issued process in a mechanical manner with utter disregard to the position of law, therefore the proceedings are liable to be set-aside as the impugned order suffers material illegality and incurable defect.*

*That without prejudice to the grounds raised above, it is submitted that The Drugs and Cosmetics Act, 1940 was extended to the State of Jammu & Kashmir by an Amending Act 19 of 1972. The Statement of Objects and Reasons of the Act read as follows:*

*"1. To give effect to the recommendations of the Drugs Enquiry Committee, in so far as they relate*

*to matters with which the Central Government is primarily concerned, a Bill to regulate the import of drugs into British India was introduced in the Legislative Assembly in 1937. The Select Committee appointed by the Legislative Assembly was of the opinion that a more comprehensive measure providing for the uniform control of the manufacture and distribution of drugs as well as of import was desirable. The Government of India accordingly asked Provincial Governments to invite the Provincial Legislatures to pass resolutions under Section 103 of the Government of India Act, 1935, empowering the Central Legislature to pass an Act for regulating such matters relating to the control of drugs as fall within the Provincial Legislative List. Such resolutions have now been passed by all Provincial Legislatures."*

*The State of Jammu & Kashmir had not adopted Government of India Act, 1935, as elicited in Ashok Kumar and others v. State of J&K and others (SWP No. 1290/2014 dated 09.10.2015), and thus could not have passed any resolution as provided under Section 103 of the Act. Entry 19 of the concurrent list comprises of "Drugs", and the concurrent list was extended to the State of Jammu & Kashmir by the Constitutional Application Amendment Order of 1963. The Drugs and Cosmetics Act, 1940 is an archaic legislation which could only have been extended by way of provisions of Government of India Act, 1935. The extension of the Concurrent List in the Seventh Schedule of the Constitution of India, to the State of Jammu & Kashmir only enabled Government of India to extend Legislations legislated after the formation of the Union Parliament or new Legislation legislated after the Constitutional Application Amendment Order, 1963. Therefore, the amendment of 1972 could not have extended the Drugs and Cosmetics Act, 1940 to the State of Jammu and Kashmir, primarily because the State of Jammu and Kashmir neither had adopted Government of India Act, 1935 as its Constitution, nor the*

*Government of India was a legal position to make applicable an archaic legislation formed before the formation of Constitution of India and the Concurrent List enumerated therein. Therefore, the petitioner cannot be subjected to doubtful penalization as the law is ultra vires.*

*f. That there is abuse of process of Court and powers have been exercised by the trial court without jurisdiction. A severe miscarriage of justice has resulted, as such, the supervisory jurisdiction of the Hon'ble court is sought to undo the wrong. The Learned Chief Judicial Magistrate, Srinagar, has disregarded the legal proposition provided by the Act while dealing with offences by the Government Departments and even abandoned the factual disclosures made in the complaint while applying its mind. Therefore ideally the construction of Section 18A read with Section 34A elucidates that the authorized person or the Head of the Department who has acquired the drugs in question, mutatis mutandis Medical Superintendent in this case, has to comply the mandate of the said provisions. However, in utter disregard to the provisions of law the Learned Chief Judicial Magistrate has issued process against the petitioner which renders the entire process void ab initio.*

*g. That the complaint reveals that the batch of drugs in question was tested twice. At the first instance the drugs were found to be of standard quality, but after the general direction of this Hon'ble High Court dated 10.09.2013, the batch was sent for reanalysis, whereafter the batch was found to be not of standard quality. Such a direction, which the complainant has relied on, could not have been passed as it goes against the object of the Act, and against the mandate of law laid down by the Hon'ble Supreme Court. The*

*Act does not in any of the provisions authorize the authorities to reanalyze a batch after having a conclusive exoneration. The adjudication proceedings cannot be reordered to be conducted on the same facts, once it has reached finality with exculpatory findings, even on the ground "to dispel any impression of error or any extraneous consideration." The Hon'ble Supreme Court in Radheyshyam Kejriwal v. State of West Bengal and anr. (2011) 3 SCC 581: [2011] 4 S.C.R. 889, has held:*

*"The yardstick would be to judge as to whether allegation in the adjudication proceedings and the proceedings for prosecution was identical and exoneration of the person concerned in the adjudication proceeding was on merits. In case it is found on merit that there was no contravention of the provisions of the Act in the adjudication proceedings, the trial of the person concerned shall be an abuse of the process of the Court."*

*Therefore any order of this Hon'ble High Court for such reexamination or reanalysis can neither circumvent the Act occupying the field nor can it dilute the principles of criminal jurisprudence reiterated by the Hon'ble Supreme Court. Hence the order of the Hon'ble High Court dated 10.09.2013 is per in curium.*

*h. That there has been abdication and transgression of exercise of jurisdictional power by the trial court while entertaining the complaint and taking cognizance of the same. The jurisdictional error committed by the trial court as well as the complainant/respondent can be dichotomized into the following:*

*i. That respondent has no jurisdiction to conduct investigation of its own accord within Jammu & Kashmir State. Since respondent is a Central Government agency cannot conduct investigation for contravention of any offence committed within*



*J&K State apart from CBI for a limited purpose. The trial court without considering the competence of complainant to launch prosecution has taken cognizance. Therefore the proceedings being without jurisdiction are liable to be set-aside.*

*ii. The complaint has been filed by the attorney and there has been no examination of complainant before taking cognizance and issue of process. The memorandum of complaint does not verify that the attorney is conversant with the facts as such the proceedings have been initiated at the instance of a wrong person. The trial court has issued process in a mechanical manner, therefore the proceedings are liable to be set-aside as the impugned order suffers material illegality and incurable defect.*

*i. That without prejudice to the grounds raised above, it is submitted that the Drugs and Cosmetics Act, 1940 was extended to the State of Jammu & Kashmir by an Amending Act 19 of 1972. The Statement of Objects and Reasons of the Act read as follows:*

*"1. To give effect to the recommendations of the Drugs Enquiry Committee, in so far as they relate to matters with which the Central Government is primarily concerned, a Bill to regulate the import of drugs into British India was introduced in the Legislative Assembly in 1937. The Select Committee appointed by the Legislative Assembly was of the opinion that a more comprehensive measure providing for the uniform control of the manufacture and distribution of drugs as well as of import was desirable. The Government of India accordingly asked Provincial Governments to invite the Provincial Legislatures to pass resolutions under Section 103 of the Government of India Act, 1935, empowering the Central Legislature to pass an Act for regulating such matters relating to the control of drugs as fall within the Provincial Legislative List. Such resolutions have now been passed by all Provincial Legislatures."*

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*extended to the State of Jammu and Kashmir by the Constitutional Application Amendment Order of 1963. The Drugs and Cosmetics Act, 1940 is an archaic legislation which could only have been extended by way of provisions of Government of India Act, 1935. The extension of the Concurrent List in the Seventh Schedule of the Constitution of India, to the State of Jammu & Kashmir only enabled Government of India to extend Legislations legislated after the formation of the Union Parliament or new Legislation legislated after the Constitutional Application Amendment Order, 1963. Therefore, the amendment of 1972 could not have extended the Drugs and Cosmetics Act, 1940 to the State of Jammu & Kashmir, primarily because the State of Jammu & Kashmir neither had adopted Government of India Act, 1935 as its Constitution, nor the Government of India was in a legal position to make applicable an archaic legislation formed before the formation of Constitution of India and the Concurrent List enumerated therein. Therefore, the petitioner cannot be subjected to doubtful penalization as the law is ultra vires.”*

**Heard learned counsel for the parties and perused the record.**

4. At the outset while making his submission the counsel for the respondents raised a preliminary objection qua the maintainability of the petition contending that the same is filed under Article 226 read with Article 227 of the Constitution for seeking quashment of the criminal complaint, the proceedings instituted thereon inasmuch as the impugned order of cognizance, which is not permissible under the said Articles.

In rebuttal thereto, the counsel for the petitioner would contend that the Extraordinary and Supervisory jurisdiction of this Court is exercisable in the matter by this Court and in this regard referred to and relied upon the judgment of the Apex Court passed in case titled as **“Radhey Shyam & Anr Vs. Chhabi Nath and others”** reported in 2015 (5) SCC page 423 wherein it has been held that jurisdiction under Article 227 of the constitution is exercisable on both civil and criminal side though in very exceptional cases.

There appears to be substance in the said submission of the counsel for the petitioner having regard to the aforesaid position of the law laid down by the Apex Court in the judgment *supra*, as also in view of the judgment of the Apex Court in case titled as **“Pepsi Food Limited and Another Vs. Special Judicial Magistrate & Ors”** reported in 1988 (5) SCC page 749, wherein it has held that the nomenclature under which the petition is filed is not quite relevant and does not debar the Court from exercising jurisdiction which otherwise it possesses unless there is special procedure prescribed which procedure is mandatory in nature.

5. In view of the aforesaid position of law, the preliminary objection raised by the counsel for the respondents is turned down and the instant petition is held maintainable.
6. Reverting back to the case in hand, as has been noticed in the preceding paras, the impugned complaint filed against the petitioner alleges commission of offence under Section 18-A of the Act and following is the specific allegation leveled in the

impugned complaint which for brevity and convenience is extracted hereunder:-

*“13. That it is however pertinent to mention here the In Charge Store, Government Psychiatric Diseases Hospital, Srinagar, never replied to notice dated 24.07.2014. It was quite strange to the complainant that the Pharmacist never cooperate with the complainant and submitted any response and hence liable to be prosecuted under Section 18-A.”*

Furthermore, in the backdrop of the aforesaid allegation, the contents of para 14 & 15 of the complaint being relevant herein are also required to be referred for the sake of brevity and convenience hereunder:-

*“14. That the complainant hence, issued the notice/letter U/S 25(2) and 23(4)(iii) to M/s. Zee, Laboratories, 47, Industrial Area, Paonta Sahib 173205, bearing no. NZ/CHZO/NSQ-01/Sample/ UA/SM/2013-14/854 dated 24/07/2014 through registered post and investigation of the same was conducted by Sh. Sushant Sharma, Drug Inspector, CDSCO, Chandigarh Sub Zone on dated 10/07/2014, in pursuance to the letter from Asst. Drugs Controller (India), CDSCO, Sub Zone, Chandigarh vide reference no. NZ/CH-SZO/INVEHIM/2014-15/725 dated 09/07/2014. The copy of Notice dated 24/07/2014 and letter for investigation from. Asst. Drugs Controller (India), CDSCO, Sub. Zone, Chandigarh dated 09/07/2014 attached as Annexure-J).  
15. The complainant came to know from reply that the drug in question has been sold by the manufacturer to the Medical Superintendent,*

*Government Psychiatric Diseases Hospital,  
Srinagar.”*

7. As is manifest from paras 14 & 15 of the complaint *supra*, the complainant respondent herein admittedly had sought an information under Section 18-A from the petitioner on 24<sup>th</sup> July, 2014, inasmuch as had also issued a notice under Section 25 (2) and 23 (4) (iii) to the Manufacturer of the Drug namely M/S Zee Laboratories on 24<sup>th</sup> July, 2014, itself. However, it appears from the said para 14 of the complaint *supra* as well that prior to the issuance of letter dated 24<sup>th</sup> July, 2014, to the Manufacturer of the Drug, an investigation in the matter pertaining to the Manufacturer have had been undertaken by one through Sh. Sushant Sharma, Drugs Inspector CDSCO, Chandigarh Sub Zone and pursuant to the letter from the Assistant Drug Controller, India, CDSCO, Sub Zone Chandigarh, dated 9<sup>th</sup> July, 2014, the complainant respondent herein have had earlier come to know from the reply submitted by the Manufacturer thereto that the drug in question have had been sold by the Manufacturer to the Medical Superintendent Government Psychiatric Diseases Hospital, Srinagar. Thus, in this view of this matter there was no reason or occasion for the complainant respondent herein to have sought the said information under Section 18-A from the petitioner as the complainant respondent herein indisputably have had received the information about the name, address and particulars of the person from whom the drug in question had been acquired by the Government Psychiatric Disease Hospital, where petitioner had been working as the Storekeeper.

It is significant and pertinent to note here that the provisions of Section 18-A has been incorporated in the Act of 1940 in order to ascertain the identity of the Manufacturer of the Drug for the purpose of ensuring compliance with the provisions of the Act and to launch prosecution thereof in the event of breach of the provisions of Act against the Manufacturer, Agent or Distributor thereof.

8. On account of availability of the information required under Section 18-A of the Act had been already with the complainant-respondent herein, and under the said circumstances seeking such an information from the petitioner herein at a later stage i.e. after receipt of such an information, was unnecessary and uncalled for and, therefore, petitioner cannot by any sense of imagination be said to have committed an offence under Section 18-A, even if the petitioner have had failed to furnish and disclose the name, address and particulars of the person from whom the drug in question had been acquired. Therefore, the allegation of commission of offence under Section 18-A by the petitioner is misconceived and legally untenable.

9. Having held that the allegation of commission of offence under Section 18-A of the Act by the petitioner is not made out in the complaint, further consideration of the issues raised in the petition in particular the challenge thrown to the impugned order of cognizance though may not be warranted, yet for the sake of brevity and propriety the validity of the impugned order is also being looked into. However, before proceeding to advert to the validity or otherwise of the impugned order, it would be

pertinent to refer to the position of principle of law qua the taking of cognizance and summoning of an accused in a criminal case. A reference in this regard to the judgment of the Apex Court passed in ***“Pepsi Food Limited and Another Vs. Special Judicial Magistrate & Ors”*** reported in 1988 (5) SCC page 749, would be imperative, wherein at para 28 following has been laid down:-

*“28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.*

Having regard to the aforesaid position and principles of law laid down by the Apex Court and reverting back to the challenge thrown to the impugned order, it is manifest from a

bare perusal of the same that the Magistrate has failed to apply his mind to the facts and circumstances of the case, in that, as has been noticed in the preceding paras, the petitioner herein was alleged to have committed the offence of Section 18-A by the complainant respondent herein in the complaint yet the Magistrate while passing the impugned order has failed to take into consideration the said allegation and to take cognizance of the same and has instead in absence thereof passed the impugned order. The Magistrate seemingly has committed grave and serious illegality which is not legally sustainable, more so, in view of the judgment *supra*.

10. **Viewed thus**, what has been observed, considered and analyzed hereinabove, the petition succeeds, as a consequence whereof, the impugned complaint, proceedings initiated thereon including the impugned order dated 21.08.2014 are quashed insofar as the petitioner herein is concerned.

**11. Disposed of.**

12. The Xerox record of the trial court summoned earlier is directed to be retained on the files of the instant petition.

**(JAVED IQBAL WANI)  
JUDGE**

**SRINAGAR**  
**09.07.2024**  
*ARIF*

Whether the order is speaking?	Yes
Whether the order is reportable?	Yes