

ALLAHABAD HIGH COURT

Raj Kishan

Vs.

State (Allahabad)

Criminal Revn. No. 1132 of 1958. against order of Addl. S.J. Moradabad

(M.C. Desai, J.)

27.06.1958. 01.09.1959

ORDER

M.C. Desai, J.

1. The applicant has been convicted under Section 18 (a) (i) and (ii) of the Drugs Act. A Municipal Medical Officer of Health took a sample of a medicine called Gripex on 10-11-1955 from the shop of the applicant and sent it for analysis. The Government Analyst after analysis gave his report on the prescribed form that it was 'sub-standard' but did not give the protocols of the test applied by him. The report was received in evidence against the applicant and on its basis he has been convicted. The Government analyst himself was not examined as a witness to prove the tests applied by him.

2. On the date on which the Municipal Medical Officer of Health took the sample, the Drugs Act of 1940 stood amended by the Act of 1955. Section 21 of the Act as it stands now empowers a State Government to appoint such persons, as it thinks fit "having the prescribed qualifications, to be Inspectors for the purposes of this Chapter within such local limits as it may assign to them respectively". Under Section 33 the Central Government has been empowered to make rules prescribing qualifications of Inspectors.

In exercise of that power, in June, 1957, the Central Government made the Drugs Rules. Rule 49 prescribes the qualifications for an Inspector, it is subject to three provisos, the last one being that for the purposes of inspection of shops in any specified area any officer of the medical or public health department, who is a graduate in science, may be appointed an ex-officio Inspector. No appointment has been made by the State of Uttar Pradesh after 1955. Prior to the amendment of the Act in 1955, the power to prescribe qualifications for an Inspector vested in the State Governments and in exercise of that power the State of Uttar Pradesh had made Rule 49 prescribing qualifications for an Inspector. Those qualifications were exactly the same as are mentioned in Rule 49 of the Drugs Rules made in 1957, with this difference that in the last

proviso it was said that for the purposes of inspection of retail shops, any officer of the public health department, who was a graduate in science, could be appointed an ex-officio Inspector. Accordingly in 1954 the State Government had issued a notification appointing all officers of the public health department (they were all graduates in science) as ex-officio Inspectors for inspection of retail shops. No appointment of an Inspector has been done by the State Government subsequently.

The Municipal Medical Officer of Health, who took the sample in the present case, is an officer of the public health department and graduate in science and was appointed an Inspector for inspection of retail shops within his district. It is not known whether the shop of the applicant is a retail shop or a wholesale shop; there is no evidence on the record. If it is a wholesale shop, the Municipal Medical Officer of Health was not empowered even to inspect it. Section 22 of the Act lays down that subject to any Rules made by the Central Government in this behalf, an Inspector may take samples of any drug, but if an Inspector is appointed for a purpose other than that of taking samples, he is not an Inspector within the meaning of this provision of Section 22. The word 'Inspector' occurring in the beginning of Section 22 means an 'Inspector' with reference to the particular power that is sought to be exercised; a person who is appointed an Inspector for the exercise of a particular power does not become an Inspector within the meaning of Section 22 for the exercise of any other power mentioned in sub-section (1). Under Section 33 (n) the Central Government has the power of regulating the powers and duties of Inspectors and in exercise of this power it has made Rule 51 laying down that an Inspector authorised inspect premises licensed for the sale of drugs must inspect all establishments licensed for the sale of drugs at least twice a year and procure and send for test or analysis, if necessary, samples of any drug, which he has reason to suspect is being sold or stocked or exhibited for sale in contravention of the provisions of the Act or Rules made there under, and to institute prosecutions in respect of breaches of the Act and the Rules made there under. The Municipal Medical Officer of Health having been appointed for inspection of retail shops may not be said to be an "Inspector authorized to inspect premises licensed for the sale of drugs"; a retail shop may not have been licensed at All. In the present case, the applicant has been found not to have a proper license for the shop. Consequently, it can be said that an Inspector appointed for inspection of retail shops has not the powers conferred by Rule 51 and cannot procure and send for test or analysis samples of any drug. His power is confined to making an inspection of retail shops and the power to inspect does not include the power to procure and send samples for test or analysis. Had the Municipal Medical Officer of Health been appointed an Inspector for the purpose of inspecting premises licensed for the sale of drugs and had the applicant's premises been licensed for the sale of drugs, he could not only inspect them but also (under the authority of Rule 51) procure and send for test or analysis samples of any drug sold or stocked therein. That is not the case here and the Municipal Medical Officer of Health must be held to have had no power to procure and send for test or analysis the sample of Gripex. Sections 23, 24 and 25 would come into application only when a sample is taken by an Inspector under, Section 22(1)(b). If it is taken by a person who is an Inspector for a certain purpose but not for the purpose of taking a sample, Sections 23, 24, 25 etc. will not apply and even if he gets the sample

analyzed by a Government Analyst and the Government Analyst sends his report signed by him, the report cannot be evidence of the facts stated therein. The Government Analyst may in that case be examined as a witness to prove his opinion by oral testimony but his report itself would not be evidence. Consequently, in the present case, the report of the Government Analyst could not be treated as evidence.

3. There is a serious defect in the report of the Government Analyst and it is that full protocols of the test are not supplied. The report is in the prescribed form but all the headings are not fully answered. One of the headings of the prescribed form is "Result of test or analysis with protocols of test applied". The report contains only the result of the test or analysis. When it does not state the protocols of the test applied, it cannot be said to be a report "in the prescribed form." The mere use of the prescribed form containing the headings will not make it a report "in the prescribed form" if all the headings are not duly filled in. If there is an omission to fill in a certain heading and the omission does not cause any prejudice, it may be held that the report is still in the prescribed form but the omission to state either the result of the test or the protocols of the test applied is a substantial omission which goes to the root of the existence of the report "with prescribed form". It is necessary for the accused to have full information about the protocols of the test applied so that he may be in a position to controvert the result by producing evidence, which power has been conferred upon him by Section 25 (3). If he does not know the protocols of the test, he would not be in a position to adduce evidence to controvert the report by showing that the test applied was not a conclusive test or was not a correct test. If the protocols of the test are not stated in the report, the report must be held to be not a report "in the prescribed form" within the meaning of Section 25 and cannot be treated as evidence of the facts stated therein. If the report cannot be treated as evidence, the Government Analyst must himself be examined as a witness to prove his opinion; otherwise the case will not be proved against the accused. Note to form No. 13, by which the form of report is prescribed, provides that no protocols of test applied are necessary in respect of patent and proprietary medicines which are registered at the Central Drugs Laboratory. There is no evidence on the record to show that Gripex is a patent or proprietary medicine registered at the Central Drugs Laboratory, and it cannot be assumed that no protocols of the test applied were necessary. If the Government Analyst refrained from supplying the protocols because of the registration, he should have referred to it in the report or the prosecution should have produced evidence to prove that Gripex is a patent or proprietary medicine registered at the Central Drugs Laboratory. Had such evidence been produced, there would have been no defect in the report and it would have been treated as evidence under Section 25(3).

4. I do not agree with Sri P.C. Chaturvedi that the appointments of Inspectors made by the State Government in 1954 cannot be valid after the amendment of the Drugs Act in 1955. An Inspector must have prescribed qualifications but it does not follow that he must be appointed after the qualifications have been prescribed. If a person is appointed an Inspector before the qualifications are prescribed, but happens to possess the qualifications which are prescribed

subsequently, he is an Inspector having prescribed qualifications. What is required is that he must possess the necessary qualifications at the time of his appointment; it is not necessary that the qualifications must have been prescribed before his appointment. The word 'prescribed' is used only in the sense of an adjective and governs the qualifications required to be possessed; no element of time is involved in the use of the word and I do not agree that the appointment must be made after the qualifications have been prescribed.

5. It was also contended by Sri P. C. Chaturvedi that the last proviso to R.49 is ultra vires. The reason given is that an Inspector must be appointed under Section 21 for all the purposes of the Chapter and cannot be appointed for only some of them and that consequently there can be no appointment of a person as an Inspector only for the purpose of inspecting shops. The words used in Section 21 are "Inspectors for the purposes" : there is nothing to suggest that every Inspector must be for all the purposes and that there cannot be different Inspectors for different purposes or an Inspector for only some of the purposes. Section 22, which lays down the powers of Inspectors, confers the powers subject to any Rules made by the Central Government in this behalf; this means that the Central Government has the power of making rules governing which powers shall be exercised by which Inspectors. When it has this power, it can certainly appoint an Inspector for only some of the powers. The use of the words "within such local limits" does not mean that an Inspector must have all the powers to be exercised within his territorial jurisdiction. It is not essential to have only one Inspector for one territory; there can be more than one Inspector exercising different powers in the same territory.

There is no bar on the Central Government's prescribing different qualifications for Inspectors for different purposes; it has full freedom to prescribe any qualifications and can prescribe one set of qualifications for an Inspector for one purpose and another set of qualifications for an Inspector for another purpose. It could, therefore, prescribe lower qualifications for an Inspector for inspection of shops and the last proviso to Rule 49 cannot be held to be ultra vires. A contrary view has been taken by my brother Raghubar Dayal in *Gyanendra Nath Mittal v. Damodhar Bhatt*¹, I respectfully dissent from it but it is not necessary to refer the case to a Bench because, for the reason given above, the applicant must be acquitted.

6. I set aside the conviction and sentence of the applicant and acquit him. His bail bonds are discharged. The fine, if realized, shall be refunded.

Revision allowed.

¹ AIR 1958 All 163