(1998) CriLJ 4534 : (1999) 1 WLC 498

Rajasthan High Court

Case No: Criminal Miscellaneous Petition No. 74 of 1994

Dueful Laboratory and Another		APPELLANT
	Vs	
State of Rajasthan and Others		RESPONDENT

Date of Decision: July 3, 1998

Acts Referred:
Constitution of India, 1950 â€" Article 22(2), 227#Criminal Procedure Code, 1973 (CrPC) â€" Section 482#Drugs and Cosmetics Act, 1940 â€" Section 16, 17, 18, 18A, 18B#Drugs and Cosmetics Rules, 1945 â€" Rule 124B, 65, 78#Evidence Act, 1872 â€" Section 114, 136, 165, 25(1), 3#Insecticides Act, 1968 â€" Section 29

Citation: (1998) CriLJ 4534 : (1999) 1 WLC 498

Hon'ble Judges: Amaresh Ku. Singh, J

Bench: Single Bench

Advocate: Swunand Jasmatiya, for the Appellant; D.S. Rathore, Public Prosecutor and Jagdish Vyas, for No. 2, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Amaresh Ku. Singh, J.
Heard the learned counsels for the petitioners, the learned Public Prosecutor and the learned counsel for the non-

petilioner No. 2.

2. The petitioners filed this petition under Article 227 of the Constitution with the prayer that the proceedings of criminal Case No. 429/92 State of

Rajasihan v. Mahaveer Medical Store pending in the Court of Chief Judicial Magistrate, Chittorgarh be quashed. The petitioner submitted that if it

is held that petition is not maintainable under Article 227 of the Constitution, the petition should be treated as one u/s 482, Cr.P.C.

3. In view of the aforesaid submission, the petition was treated as an application u/s 482, Cr.P.C. by the. order passed by this Court on 27-1-94.

4. The facts necessary for the disposal of this petition, may be summarised as below :-

5. On 17th December. 1987, the Drug inspector, Chittorgarh took sample of Zcntamicin from M/s. Mahaveer Medical Store, Mandi Choraha,

Nimbahera. At the time of taking the sample from M/s. Mahaveer Medical Store (non-petitioner No. 3), Ratan Singh Pareek (non-petitioner No.

4) was present. One of the samples was sent to Government Analyst, Gaziabad for analysis. After conducting analysis, the Government Analyst

sent a report of analysis dated 28th February, 1989 to the Drug Inspector. According to report of analysis, the sample did not confirm to claim in

respect of Gentamycin content. The sample was found to contain 18.71 mg./ml. Gentamycin in the sample, in place of 40 ing./ml. claimed by the

manufacturer. The drug of which sample was taken and sent for analysis was manufactured by M/s. Dueful Laboratory, Jaipur (petitioner No. 1).

M/s. Mahaveer Medical Store, Nimbahera had purchased the drug from M/s. Luxrnichand, Udaipur (non-petitioner No. 5). A copy of the report

of analysis and one of the samples collected by the Drug Inspector was sent to M/s. Lax midland & Sons (non-petitioner No. 5). A complaint was

filed by the Drug Inspector, Chittorgarh against ten accused, including Shri Brij Mohan Sliarma (accused No. 9) and Shri N.C. Das (accused No.

10), who are manufacturing chemist and Chief Analyst respectively in M/s. Dueful Laboratory, Jaipur alleging the commission of offences u/s 18

read with 16 and 17 of the Drugs and Cosmetics Act, 1940 and Rules 65, 78 and 124B of the rules made under the Drugs; and Cosmetics Act.

6. On the basis of the complaint filed by the Drug Inspector, the learned Chief Judicial Magistrate, Chittorgarh took cognizance of the offence on

16th November, 1989 and directed the issue of bailable, warrants of arrest against all the accused persons. On 16-4-90 Ratan Singh Pareck

appeared on behalf of M/s. Mahaveer Medical Store, Nimbahera and for himself. Shri Sundarlal Bachwani appeared on behalf of M/s.

Laxmichaud & Sons, Udaipur and himself. They moved applications for bail, which were allowed. On 23rd April, 90 Smt. Shanti Devi and Aasu

Devi appeared before the trial Magistrate, they were released on bail. Accused No. 7 to 10 did not appear and the case was adjourned from time

to time for the- appearance of accused No. 7 to 10.

7. Without appearing before the trial Magistrate, the accused No. 7 and 8 have filed this petition for quashing the proceedings initiated against them

by the learned Chief Judicial Magistrate, Chittorgarh.

8. The petitioners have not disputed that the drug of which sample had been taken by the Drug Inspector was manufactured by them. The

petitioners have challenged cognizance as well as continuance of proceedings against them by the Magistrate. Regarding the offence u/s 28(a) of

the Drugs and Cosmetics Act, 1940, it is submitted that photostat copies of the entire record, which was asked for by the Drug Inspector was sent

to him along with letter dated 25th April, 1989 (Annex. 4) and therefore, the offence u/s 28(a) of the Act is not made out. Regarding the offences

manufacturing drug, which was found to be mis-branded, it has been contended on behalf of the petitioners that the petitioners have been deprived

of their statutory right u/s 25(4) of the Drugs and Cosmetics Act. i 940 and therefore, the learned Chief Judicial Magistrate, could not have taken

cognizance of the offence and the continuation of the proceedings in the Court of the trial Magistrate amounts to abuse of the process of the Court.

9. The learned counsel for the petitioners has submitted that in the instant case, the petitioners have been deprived of their right under Sub-section

(4) of Section 25 of the Act to get one of the samples analysed by Central Drugs Laboratory and therefore, the petitioners cannot be convicted on

the charge of manufacturing of mis-branded drugs and therefore, neither the Chief Judicial Magistrate, could have taken cognizance of the offences,

nor the proceedings instituted against the accused can be continued in accordance with law as no useful purpose would be served by continuing the

proceedings when the petitioners cannot be convicted of the charge on account of the deprivation of the right u/s 25(4) of the Act.

10. The learned Public Prosecutor and the counsel appearing for non-petitioner No. 2 have contested this petition and they have submitted that in

this case, the petitioners cannot be said to have been deprived of their right u/s 25(4) of the Act and therefore, the petition has no force.

11. I will first of all consider whether in the instant case, the petitioners have been deprived of the right u/s 25(4) of the Drugs and Cosmetics Act,

1940.

12. Section 25 of the Drugs and Cosmetics Act reads :-

25. Reports of Government Analysts - (1) The Government Analyst to whom a sample of any drug or cosmetic has been submitted for test or

analysis under Sub-section (4) of Section 23, shall deliver to the Inspector submitting it a signed report in triplicate in the prescribed form,

(2) The Inspector on receipt thereof shall 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 u/s 18A and shall retain the third copy for use in any prosecution in

respect of the sample.

(3) Any document purporting to be a report signed by a Government Analyst under this Chapter shall be evidence of the facts stated therein and

such evidence shall be conclusive unless the person from whom the sample was taken or the person whose name, address and other particulars

have been disclosed u/s 18A has, within twenty-eight days of the receipt of a copy of the report, notified in writing 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.

(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 its 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 analysis to the said Laboratory, which shall make the 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.

(5) The cost of a test or analysis made by the Central Drugs Laboratory under Sub-section (4) shall be paid by the complainant or accused as the

Court shall direct.

13. A bare perusal of Section 25 of the Drugs and Cosmetics Act shows that after conducting analysis, the report of analysis is to be sent by the

Government Analyst in triplicate to the concerned Inspector. After receiving the report of analysis in triplicate, the Drug Inspector is required to

deliver one copy of the report to the person from whom the sample was taken. Another copy of the report is to be delivered to the person, if any,

whose name, address and other particulars have been disclosed u/s 18A and the third copy is to be retained by the Drug Inspector for use in any

prosecution in respect of the sample. Sub-section (3) of Section 25 provides that any document purporting to be a report signed by a Government

Analyst shall be the evidence of the facts stated therein and such evidence shall be conclusive unless the person from whom the sample was taken

or the person whose name, address and other particulars have been disclosed u/s 18A within 28 days of the receipt of a copy of the report notified

in writing the Inspector of the Court before which any proceedings in respect of the sample are pending that he intends to adduce evidence in

controversion of the report. Subsection (3) of Section 25 contains two important provisions: (1) that the report of the Government Analyst shall be

the evidence of the facts stated therein and (2) the report of the Government Analyst shall be conclusive evidence if the person from whom sample

was taken or the person whose name, address and other particulars are disclosed u/s 18A does not notify in writing to the Inspector or the Court

that he intends to adduce evidence in controversion of the report and if the person from sample was taken or the person whose name, address or

other particulars are disclosed u/s 18A, notified in writing to the Inspector or the Court before whom a proceeding in respect of a sample is

pending that he wants to adduce evidence in controversion, then the report of the Government Analyst may not be treated as conclusive evidence,

but. it will continue to be a relevant piece of evidence of the facts stated therein.

14. Sub-section (4) of Section 25 confers a valuable right on the person from whom sample was taken or the person whose name, address or

other particulars have been disclosed u/s 18A of the Act. Sub-section (4) provides that if such person has notified to the Inspector or the Court

that he wants to adduce evidence in controversion of the report of the Government Analyst, then the Court may, of its own motion or in its

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 analysis to the Central Drugs Laboratory. Sub-section (4) of Section 25 further provides that

the Central Drugs Laboratory shall make 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. The report of the Central Drugs Laboratory

is thus declared to be the conclusive evidence of the facts stated therein and such report supersedes the report of the Government Analyst. The

right conferred by Sub-section (4) of Section 25 of the Act is therefore, a valuable right and an innocent person is likely to be benefited by

exercising this right for the purpose of showing that the drug of which sample had been taken was not mis-branded. I, therefore, find force in the

submission that if it is proved that the accused, who is entitled to avail of the right u/s 25(4) of the Act is deprived of right to get one of the samples

sent to the Central Drugs Laboratory for analysis, then, he cannot be convicted on the charge of manufacturing mis-branded drug. The question

whether the accused has or has not been deprived of his statutory right u/s 25(4) of the Act, is a question of fact and not a question of law.

Therefore, before it may be said that the accused has been deprived of his right u/s 25(4) of the Act, it must be established by evidence on record

that accused has been deprived of the right conferred by Section 25(4) of the Act.

15. In the instant case, the petitioners (accused No. 7 and 8) have not appeared before the Chief Judicial Magistrate, Chittorgarh in spite of issue

of bailable warrants issued against them. They have not moved any application in the Court of the Chief Judicial Magistrate, Chittorgarh for sending

one of the samples to the Central Drugs Laboratory for analysis. It does not appear from the record that the Chief Judicial Magistrate, Chittorgarh

was requested by either party to send one of the samples to the Central Drugs Laboratory for analysis nor it appears that the Chief Judicial

Magistrate, Chittorgarh has suo rnotu sent one of the samples to the Central Drugs Laboratory for analysis. These facts clearly indicate that none

of the accused (including the petitioners) has moved any application before the Chief Judicial Magistrate, Chittorgarh for sending one of the

samples to the Central Drugs Laboratory for analysis. Therefore, it is proper to hold that so far as the exercise of right u/s 25(4) of the Act is

concerned, the accused persons have not taken any steps by moving application before the Chief Judicial Magistrate, Chittorgarh in whose Court

the case is pending.

16. The crucial question is whether in the abovementioned circumstances, it can be said that the accused persons have been deprived of their right

u/s 25(4) of the Act.

17. The learned counsel for the petitioners has submitted that the petitioners had notified their intention vide letter dated 25th April, 89 (Annex. 4)

to adduce evidence in controversion of the report given by the Government Analyst and therefore, it must be said that the petitioners have

complied with the provisions of Sub-section (3) of Section 25 of the Act and the report of Government Analyst cannot be treated as conclusive

evidence of the facts stated therein. It is further submitted by him that since the date of expiry given on the drug was February, 89 it should be

inferred that the drug was rendered unfit for analysis after 28th February, 89 and no useful purpose could be served by sending one of the samples

to the Central Drugs Laboratory and therefore, it should be inferred that the accused persons have been deprived of the right u/s 25(4) of the Act.

18. It is not disputed that the sample was taken on 17-12-87 as alleged in para No. 1 of the complaint. The sample was sent to the Government

Analyst, Gaziabad with a copy of Form No. 18 on 5th December, 88. The Government Analyst prepared the report of analysis on 28th February,

89 and sent the same in triplicate to the Drug Inspector. One copy of the report of analysis was sent to Ratan Singh Pareek (accused No. 2 and

proprietor of M/s. Mahaveer Medical Store, Nimbahera, accused No. I), on 14th March, 89 and he was asked to furnish particulars of the sale,

purchase and stock of the drug. When no information was received from Ratan Singh Pareek, notice was sent to him u/s 18A, 18B and 22-B(1)

(CCA). Ratan Singh however did not comply with the notice. The Drug Inspector, then obtained the copy of the purchase invoice dated 1-12-87.

On 3-4-89, the shop of M/s. Mahaveer Medical Store, Nimbahera was again inspected and some information was collected. On the basis of that

information, a copy of the report of the Government Analyst and one of the samples in sealed condition was sent to M/s. Laxmichand & Sons

(accused No. 3). Accused No. 3 M/s. Laxmichand & Sons, Udaipur was also required to furnish information regarding purchase, sale and stock

of the drug to the Drug Inspector. M/s. Laxmichand & Sons informed the Drug Inspector vide their letter dated 18th April, 89 that they had

purchased the Drug from M/s. Dueful Laboratories (accused No. 7 and petitioner No. 1) on 26-10-87. On 20th April, 89 the Drug Inspector sent

the letter to M/s. Dueful Laboratories informing him about the analysis done by the Government Analyst and sought some information. In reply, the

petitioner No. 1 (accused No. 7) vide letter dated 25th April, 89 informed the Drug Inspector that the control sample was got tested in the

Laboratory of the petitioner (accused No. 7) and the sample was found to be of the prescribed quality. By this letter dated 25th April, 89, the

petitioner No. 1 informed the Drug Inspector that the right to adduce evidence in controversion of the control of the Government Analyst was

being reserved.

19. Above facts indicate that though the sample had been collected on 17th December, 87, the same was not sent to the Government Analyst till

5th December, 88. The delay in sending the sample to the Government Analyst for analysis has not been explained by the prosecution and in the

facts and circumstances of the case, the conduct of the Drug Inspector, who neglected to send the sample to the Government Analyst for about

one year must be condemned as unwarranted and unreasonable, particularly when the expiry date given in the drug was February, 89. It would be

proper if suitable action is taken against the officers, who are responsible for delay in sending the sample to the Government Analyst so that such

delay may not be repeated in future. It further appears that after the receipt of the report of analysis from the Government Analyst, the petitioner

No. 1 was not informed about the result of analysis before 20th April, 89 and after receiving the letter dated 20th April, 89, the petitioner No. 1

(accused No. 7), informed the Drug Inspector by letter dated 25th April, 89 that in the Laboratory of the petitioner No. 1, the drug was tested and

found to be of a prescribed quality anil that the petitioner No. 1 reserved his right to'' adduce evidence in controversion of the report of the

Government Analyst.

20. It is true that there was unnecessary delay in sending one of the samples to the Government Analyst for analysis. It is also true that petitioners

were informed about the report of analysis on or after 20th April. 89, whereas the date of expiry given on the drug was February, 89. In these

circumstances, it is to be considered whether the petitioners have been deprived of the right u/s 25(4) of the Act.

21. The learned counsel for the petitioners has submitted that by letter dated 25th April, 89 (Annex. 4), the petitioner No. 1 had informed the Drug

Inspector that the petitioner wanted to adduce evidence in the controversion of the report of the Government Analyst and therefore, there was

sufficient compliance of Sub-section (3) of Section 25 of the Act by the petitioners. The relevant words used in reply dated 25th April, 89 sent on

behalf of the non-petitioner No. 1 are as given below :-

We have checked and analysed our control sample of Inj. Gcntamycin Batch No. 8709 and found to complying in respect of Gentamycin

contents. Sterility, pyrogen, unduetoxicity and volume as prescribed in I.P. 85 microbiologically in our own analytical laboratory.

We, therefore, reserve our right to adduce in contravention of any report that you may be intending to use against us.

22. The contents of the letter dated 25th April, 89 indicated two things : (I) that the drug was analysed in the Laboratory of the petitioner No. 1

and it was found to be of prescribed quality and (2) that the petitioner No. I intended to ""reserve his right to adduce evidence in controversion of

any report which might be used by the Drug Inspector."" Sub-section (3) of Section 25 of the Act requires that the person from whom sample was

taken or the person whose name, address and other particulars are furnished u/s 18A of the Act, notify in writing to the Inspector of the Court that

he wants to adduce evidence in controversion of the report of analysis. According to Sub-section (3) of Section 25 if the aforeaid intention is

notified in the manner indicated'' in Sub-section (3), the report of the Government Analyst may not be treated as conclusive evidence of the facts

stated therein. The expression ""notify"" has not been defined in the Drugs and Cosmetics Act, 1940. The ordinary meaning of the term ""notified"" is

to bring to the notice of some other person. Unless any particular form in which a fact is to be notified to another is prescribed, no particular form

for the purpose of notifying a fact to another can be insisted. However, what is required to be notified must be notified in unambiguous words and

in writing. Sub-section (3) of Section 25 of the Act requires the person from whom sample was taken or the person whose name, address and

other particulars are furnished u/s 18A to notify to the Inspector or the Court that he intends to adduce evidence in controversion of the report. In

other words, intention to adduce evidence in controversion of the report of the Government Analyst is required to be notified by Sub-section (3) of

Section 25. In the instant case, the petitioner No. 1 by letter dated 25th April, 89 merely reserved its right to adduce evidence in controversion of

any report"", but did not express any intention to adduce evidence in controversion of the report. There is a clear distinction between ""reserving a

right"" and ""exercise of a right"". The distinction between the two is this : when a person reserves a right, he merely asserts that he has a right and that

he does not want to waive it or abondon it. At the time of reserving the right, he neither decides nor notifies whether he would or would not

exercise the right if an occasion should arise for the exercise thereof. On the other hand, in the case of exercise of right, the person having a right

not only asserts his right, he exercises that right in a particular manner so as to leave no room for doubt as to the manner in which he would

exercise the right when the occasion for exercise thereof would arise. Reserving of right is therefore, distinguishable from exercise Of a right. Sub-

section (3) of Section 25 of the Act requires the person from whom the sample was taken or the person whose name, address or other particulars

are furnished u/s 18A of the Act, to exercise the right to adduce evidence in controversion of the report in a particular way by intimating that he

intends to adduce evidence in controversion of the report. Keeping this difference in view, I am of the opinion that the petitioner No. 1 did not

notify his intention to adduce evidence in controversion of the report of the Government Analyst by sending the letter dated 25th April, 89. Above

conclusion is further supported by the fact that the consequences of notifying of intention to adduce evidence in controversion of the report of

Government Analyst is to reduce the degree of probity of the report of analysis from ""conclusive evidence to ordinary evidence of the facts stated

therein"".

23. The right to adduce evidence in controversion of the report of analysis is a part and parcel of the right to be defended conferred by Article

22(2) of the Constitution and the right to be defended available to the accused person under the Code of Criminal Procedure. Since, law confers

this right on the accused persons, the accused persons need not reserve this right. They are required to exercise this right in accordance with the

provisions contained in Sub-sections (3) and (4) of Section 25 of the Act. The distinction between Sub-sections (3) and (4) of the Act is that Sub-

section (3) of Section 25 declares the report of the analysis to be conclusive evidence of the facts stated therein. The expression ""conclusive proof

has been defined in Section 4 of the Evidence Act. According to the definition ""conclusive proof"" given in Section 4 of the Evidence Act when one

fact is declared by the Evidence Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved and

shall not allow evidence to be given for the purpose of disproving it. It means that what is declared to be conclusive proof, in any provision of the

Evidence Act, would not only be the satisfactory evidence of the fact, it would also be unrebuttable evidence of that fact. Thus, the definition of

conclusive proof given in Section 4 of the Evidence Act provides two things:- (1) it provides that what is declared to be the conclusive proof of any

fact, shall be sufficient evidence to prove that fact; and (2) that no party shall be permitted to adduce evidence to disprove that fact.

24. If the definition of conclusive proof given in Section 4 of the Evidence Act is applicable to any fact, then both the consequence mentioned

above would occur, which means that what is declared to be conclusive proof shall not only be sufficient evidence of the concerned fact, the

parties would not have any right to adduce evidence to disprove that fact. On the other hand, if the definition of conclusive proof given in Section 4

of the Evidence Act does not apply to any evidence, which is declared to be conclusive by or any law other than the evidence Act, then only the

first consequence would arise and the second would not arise. In other words, if any law other than the Evidence Act declares any fact to be

conclusive evidence of some other fact, but does not make: the definition of conclusive proof given in Section 4 of the Evidence Act applicable to

such evidence, then the evidence which is declared to be conclusive shall be regarded as sufficient evidence of the concerned fact, but the Parties

would not be prohibited from adducing evidence to disprove that fact. On the other hand, if any law other than the Evidence Act declares a fact to

be conclusive evidence of some other feet and further provides that the definition of conclusive proof given in Section 4 of the Evidence Act shall

be applicable to such evidence, then the evidence would not only be sufficient to prove the concerned fact, the Parties would also be precluded

from adducing evidence to disprove that fact. In view of this, the provisions contained in Sub-section (3) of Section 25 of the Drugs and Cosmetics

Act, have the effect of declaring the report of the Government Analyst to be sufficient evidence of the facts mentioned in the report. When the

person from whom sample was taken or the person whose name, address or other particulars are furnished u/s 18A of the Act notifies his intention

to adduce evidence in controversion of the report of analysis, the prosecution as well as the Court, are apprised of the above mentioned intention

of the accused to controvert the report of the government Analyst.

25. The effect of Sub-section (4) of Section 25 of the Act is that the report of the Central Drugs Laboratory is declared conclusive evidence of the

facts stated therein. It means that if there be any inconsistency between the report of the Government Analyst (delivered to the Inspector under

Sub-section (1) of Section 25) and the report of the Central Drugs Laboratory (prepared under Sub-section (4) of Section 25), it is the report of

the Central Drugs Laboratory that would be the conclusive evidence and not the report of the Government Analyst. In other words, in view of the

provisions contained in Sub-section (4) of Section 25, it may be said that the report of the Central Drugs Laboratory supersedes the report of the

Government Analyst, to the extent it is inconsistent with the report of the Government Analyst. Sub-section (4) of Section 25 gives a valuable right

to the prosecution, the Court and the accused persons, to send one of the samples to the Central Drugs Laboratory for analysis so that the report

of the Central Drugs Laboratory may be obtained and it may be used as evidence of the facts slated therein, whether such report supports the case

of the prosecution or it supports the defence of the accused. In fact Sub-section (4) of Section 25 gives valuable right not only to the accused

persons, it also gives valuable right to the prosecution and to the Court as mentioned above. The right conferred by Sub-section (4) of Section 25

of the Act does not appear to be controlled in any manner by any Act or omission on the part of the prosecution, the Court or the accused

person(s). I, therefore, hold that the rights conferred by Sub-section (4) of Section 25 of the Act can be availed of whether the accused whether

he has or has not notified his intention under Sub-section (3) of Section 25 to controvert the report of the analysis. In order to avail of the benefits

of Sections 25(3) of the Act, it was not sufficient for the petitioner ""to reserve his right to adduce evidence in controversion of the report"", it was

further necessary for the petitioner to notify in writing that he intended to exercise the right to adduce evidence in controversion of the report in a

positive manner. I, therefore, do not find any force in the submission that by sending the letter dated 25th April, 89, the petitioner No. 1 notified its

intention to adduce evidence in controversion of the report of analysis.

26. Above conclusion however does not put an end to the right conferred by Section 25(4) of the Act. The right conferred by Section 25(4) of the

Act is a valuable right and is an integral part of the right to be defended against the charge on which the accused is being tried. Therefore, the right

conferred by Section 25(4) of the Act deserves to be construed in a liberal way and therefore, it should be held that this right is available to the

accused person even after the expiry of the period mentioned in Sub-section (3) of Section 25 of the Act. Particularly when the definition of

conclusive proof as given in Section 4 of the Evidence Act has not been made applicable to the report given by the Government Analyst under

Sub-section (1) of Section 25 of the Act.

27. In my opinion if the person from whom sample was taken or the person whose name,; address and other particulars are furnished u/s 18A of

the Act does not notify the Inspector of the Court of his intention to adduce evidence in controversion of the report of analysis, his right u/s 25(4)

of the Act cannot be said to have been forfieted. The right u/s 25(4) of the Act therefore, can be availed of even after the expiry of the period

prescribed by Section 25(3).

28. As pointed out earlier, the petitioners have not appeared in the Court of the Chief Judicial Magistrate, Chittorgarh nor they have moved any

application u/s 25(4) of the Act for sending one of the samples to the Central Drugs Laboratory for analysis. In these circumstances it is to be

considered whether petitioners'' right u/s 25(4) of the Act has been denied to them.

29. The learned counsel for the petitioners has submitted that since the date of the expiry as given on the drug was February, 89, it should be held

that the drug was rendered unfit for analysis after the date of expiry given on the drug and therefore, no useful purpose would be served by sending

one of the samples to the Central Drugs Laboratory for analysis and therefore, it should be held that the petitioners'' right u/s 25(4) of the Act has

been denied to them.

30. This argument requires consideration of the relevance and probative value of the ""date of expiry"" given by the manufacturer on the drugs sold

by him. It is well established that while deciding questions of fact, only those facts can be taken into consideration for arriving at any conclusion,

which are declared to be relevant and are duly proved. Facts, which are not relevant under any provision of the Evidence Act or which though

relevant, but are not duly proved, cannot be taken into cons (deration for the purpose of discharging, acquittal or conviction of the accused. The

learned counsel for the petitioners has not brought to my notice any provision of the Evidence Act, which may be said to make the date of expiry

given by the manufacturer on the drug relevant for the purpose of deciding that the drug has been rendered unfit for analysis. The particulars given

by the manufacturer on the drug manufactured by it, are in the nature of statements made by the manfuacturer about the drug. Unless, these

statements are relevant under any provision of the Evidence Act, they cannot be considered by the Court and even if they are relevant, unless they

are proved, they cannot be taken into consideration by the Court.

31. My attention has not been drawn to any provision of the Evidence Act, which may be said to make a date of expiry given by the manufacturer

relevant for the purpose of deciding whether the sample has or has not disintegrated and rendered unfit for analysis.

32. The date of expiry given by the manufacturer on the drug does not appear to be relevant under any provision of the Evidence Act. The reasons

for the above mentioned conclusions are given below :-

(1) The dale of expiry is given by the manufacturer at the time of supplying the drug to the retail shop-keepers. The statement that the drug shall

expire in a certain month and in a certain year is in the nature of a prophesy/prediction about a future event. The future events are events which arc

likely to occur in future. They do not appear to be included in the definition of ""fact"" as defined in Section 3 of the Evidence Act. The definition is

reproduced below :-

Fact""-""Fact"" means and includes-

(1) any thing, state of things, or relation of things, capable of being perceived by the senses;

(2) any mental condition of which any person is conscious.

Illustrations: (a) That there are certain objects arranged in a certain order in a certain place, is a fact.

(b) That a man heard or saw something, is a fact.

(c) That a man said certain words, is a fact.

(d) That a man holds a certain opinion, has ;a certain intention, acts in good faith or fradulently, or uses a particular word in a particular sense, or is

or was at a specified time conscious of a particular sensation, is a fact.

(e) That a man has a certain reputation, is a fact.

33. A bare reading of the definition of the fact and the illustrations given below definition of ""fact"" clearly indicate that events as well as the facts of

any kind which have neither occured in the past nor are occurring at the time when the statement about them is made and are said to be likely to

occur in future, do not fall within the definition of ""fact"" as defined in the Evidence Act, because such facts cannot be perceived by the senses, as

required by Clause (1) of definition. Future events cannot be said to be covered by the expression ""mental condition"" of which a person is

conscious within the meaning of Clause (2) of the definition. Five illustrations given below the definition of ""fact"" in Evidence Act clearly indicate

that unless facts which have either occurred in the past or are occurring in the present. They cannot be covered by the definition of ""fact"". Future

events and facts which are only likely to occur in future do not fall within the definition of ""facts"". Statement about a future event may be a fact by

itself, but what is stated, is related to a future event or fact, which is likely to occur in future and therefore, what is said in a prophesy or prediction,

cannot be treated as a fact as defined in the Evidence Act. Since, the events and facts which are likely to occur in future and which have neither

occurred in the past nor are occurring in present, do not amount to facts within the meaning of the Evidence Act, they cannot be relevant as ""facts

under any provision of the Evidence Act. It may be pointed out that the division of time into three classes: past, present and future is very important

for the purpose of perception, conceptulisation and inferencing. Infinite continuance of time is basically divisible into two: past and future. The

present, is of a very short duration and almost imperceptible to man. However, by taking into consideration some portion of the immediate past

and the present, which is of a very short duration, a statement about the present is made as the consciousness about such a present is possible with

the help of the senses. The events of the past are therefore, broadly divisible into two parts : (1) events, which arc so proximate to the present in

which consciousness is occurring that they are regarded as part of the present; and (2) the events which are distant from the present and therefore

they are regarded as belonging to the past which is distinguishable from the present.

34. That part of the continuance of time which is regarded as ""future"" is beyond the reach of man. The facts including events, which are likely to

occur in future and cannot be said to have occurred in the past or the present, are, not knowable with the help of senses, nor anyone can"" become

conscious of them. Such events do not leave signatures or prints before they actually occur and therefore, what will occur in future is, a matter of

opinion, expectation, prediction, prophesy or a conjecture; it cannot be regarded as a fact. The expectation, propaesy, prediction and the like

about a future event/occurrence/fact may or may not be true, because future is completely beyond the reach of man. It is true that sometimes some

prophesies/predictions/expectations or conjectures turn out to be true, but it is equally true that many expectations, predictions, prophesies and

conjectures about the future events do not turn out to be true. In view of the definition of ""fact"" given in Section 3 of the Evidence Act, it must be

held that expectations, prophesies, predictions or conjectures about a future event or fact, which is likely to occur in future and has neither

occurred in the past, nor is occuring in the present, cannot be called a ""fact"" within the meaning of the Evidence Act and much less a relvant fact

within the meaning of Sections 136, 114 and 165 of the Evidence Act. All such prophesies, predictions, expectations and conjectures about the

future events or facts, which are likely to occur in future, are therefore, completely irrelevant under the Evidence Act and the Court cannot act on

such expectations, prophesies, predictions or conjectures for the purpose of deciding any right or liability or any fact in dispute.

35. The conclusion that facts which are likely to occur in future are not ""facts"" within the meaning of Section 4 of the Evidence Act, does not mean

that such prophesies, predictions and the like have no relevance whatsoever under the Evidence Act. The facts or the events, which are likely to

occur in future are relevant u/s 114 of the Evidence Act if they can be said to indicate the ""common course."" of natural events, human conduct and

public or private business. The expression ""common course"" as used in Section 114 of the Evidence Act is wide enough to include all the varieties

and forms of ""common courses"" including those cases in which a future occurrence is made obligatory by any known or unknown factor.

Therefore, if it is shown that according to the common course of natural events, human conduct and public and private business, a certain fact is

likely to occur in future, then the aforesaid common course of natural events, human conduct and public and private business would become

relevant u/s 114 of the Evidence Act, though the fact about which expectation, prophsey, prediction or conjecture is made would not be a relevant

fact under the Evidence Act. Even in those cases, where the existence of a common course of natural events, human conduct and public and

private business as they apply to the particular facts of the case, is established, the degree of probability of the occurrence will have to be

established before the Court. Unless, the Court is satisfied that there is a high degree of probability of the occurrence of a certain fact, according to

common course ""established before it, the Court would not be justified in presuming the existence of such a fact. In other words, a

prophesy/prediction and expectation or a conjecture about a fact, which is likely to occur in future, would not be relevant under any provision of

the Evidence Act, but the common course of natural events, human conduct and public and private business, which makes the occurrence of such

fact probable would be relevant u/s 114 of the Evidence Act and after taking into consideration a degree of probability of occurrence of the fact,

the Court will have to decide whether it should or should not draw a presumption about the occurrence of the fact. It may also be pointed out that

u/s 114 of the Evidence Act, the Court is not permitted to draw any presumptions about a future event. Section 114 empowers the Court to draw

a presumption about a fact, which is alleged to have occurred or which is occurring. This means that u/s 114 of the Evidence Act, the Court is not

permitted to make a prophesy or a prediction, nor it is permitted to express any expectation or a conjecture about a future event. The powers u/s

114 are confined to the facts, which are alleged to have occurred in the past or which are alleged to be occurring in the present. This conclusion

further shows that the Evidence Act neither permits the prophesy and prediction by private parties, nor the prophesy and prediction by public

functionaries including the Court to be regarded as ""facts"" necessary for adjudication in question of dispute.

36. Viewed in above light, the statement about the date of expiry given by the manufacturer on the drug is at best a statement about a future

occurrence and therefore, what is stated by the manufacturer by mentioning the date of expiry, cannot be regarded as a fact within the meaning of

Evidence Act. Section 114 of the Evidence Act is also not attracted to such statements, because the statement made by the manufacturer does not

indicate any such common course of natural events, human conduct and public and private business as may be relevant to the question whether the

drug would or would not be rendered unfit for analysis after the date of expiry.

(2) The Second ground for holding the ""date of expiry"" to be irrelevant is that it is in the nature of a statement made outside the Court and is

therefore, not entitled to be used as a substantive piece of evidence. This statement can be used either for corroboration or for contradiction if the

person, who made the statement of date of expiry of the drug appears in the witness box during an inquiry or trial. So long the inquiry or trial is not

commenced and the person who is responsible for mentioning the date of expiry of the drug does not appear in the witness box and makes a

statement, his previous statement cannot be of any use as a substantive piece of evidence.

(3) The statement about the future event can never be based on personal knowledge as required by Section 60 of the Evidence Act. The statement

made by the manufacturer or any other person about a future event is therefore, inadmissible u/s 60 of the Evidence Act. At best, such a statement

may be treated as an opinion u/s 45 of the Evidence Act subject to the condition that the fact about which the opinion is given is relevant under

some other provision of the Evidence Act. In order, a statement may be relevant u/s 45 of the Evidence Act, it is necessary to establish that the

fact to be proved is relevant under any provision of the Evidence Act and that the person giving opinion is qualified as an expert and that he has

legitimate grounds on the basis of which the opinion is given by him. Unless, all these conditions are fulfilled, the opinion given by a person cannot,

be relevant u/s 45 of the Evidence Act. The date of expiry given by the manufacturer on the drug manufactured by it, by itself does not fulfil

abovementioned conditions and therefore, it is neither relevant u/s 60 of the Evidence Act, nor it is relevant u/s 45 of the Evidence Act.

(4) One of the established rule of evidence is that the Court should insist upon the production of best evidence of the fact in dispute. The evidence,

which is declared to be conclusive evidence of a fact is the best evidence of that fact. Evidence, on the basis of which the Court is bound to

presume the existence or non-existence of a fact is dispute is the second best evidence. In the case of oral evidence, direct evidence relevant u/s

60 of the Evidence Act is the best evidence, provided it is reliable. In the case of documentary evidence, the original document, which is duly

proved, is the best evidence of the contents of the document. Sub-section (4) of Section 25 of the Act provides that report of the Central Drugs

Laboratory shall be conclusive evidence of the facts stated therein. One of the facts, which may be stated by the Central Drugs Laboratory is

about the condition of the sample and it may show whether the sample was or was not fit for analysis. Another fact, which the Central Drugs

Laboratory may report is whether the sample had undergone any physical or chemical change, if so, within which duration and of what kind and

with what consequence. The report of the Central Drugs Laboratory about the abovementioned points is therefore, the best evidence of facts

relating to abovementioned questions. If the sample is available and there is nothing to prevent the Court from sending one of the samples to the

Central Drugs Laboratory for analysis as contemplated by Section 25(4) of the Act, there is no reason why the prosecution, the accused should

not apply and the Court should not send one of the samples to the Central Drugs Laboratory for obtaining the best evidence about the state of

sample and the change, if any, which might have occurred; the extent of change and the result of analysis. In other words, the best evidence rule

enjoins a duty on the Court as well as on the parties to take steps for sending one of the samples to the Central Drugs Laboratory and obtain the

report of Central Drugs Laboratory for deciding the question whether the sample was or was not disintegrated and rendered unfit after the date of

expiry given by the manufacturer.

(5) No other provision under which the statement made by the manufacturer about future expiry of the drug may be said to be relevant has been

brought to my notice.

37. For above reason, I hold that the date of expiry given by the manufacturer on the drug manufactured by it is totally irrelevant for the purpose of

discharging, convicting and acquitting the accused person.

38. In short the date of expiry given by the manufacturer is neither relevant nor its proof can be dispensed with nor it has any probative value so far

as the question whether the sample has been rendered unfit for analysis in concerned. I, therefore, do not find any force in the submission that the

sample should be deemed to have become rendered unfit after the date of expiry given by the manufacturer.

39. The learned counsel for the petitioner has placed reliance on the decision given in Gupta Chemicals Pvt. Ltd. v. State of Rajasthan 1996 Cri

LR (Raj) 134 and in Pesticides India Ltd. v. State of Rajasthan, S. B. Cri. Misc. Petn. No. 366/95 decided on 11th March, 96* by a learned

single Judge of this Court. The decision given in these cases are not relevant in the present case. In both the cases, the accused persons were

prosecuted for the offences u/s 29 of the Insecticides Act and not under the Drugs and Cosmetics Act, 1940. The learned counsel for the

petitioner has not cited before me any decision under the. Drugs and Cosmetics Act, 1940, which may be said to support his submission.

40. For the reasons mentioned above, I do not find any force in the submission that after the date of expiry given by the manufacturer on the drug,

the sample was rendered unfit for analysis. Therefore, unless, it is established by the report of the Central Drugs Laboratory that the sample was

rendered unfit for analysis, it must be presumed that the sample was and continue to be fit for analysis, even after date of expiry given by the

manufacturer. Even if the Central Drugs Laboratory gives a report that the sample had undergone a change or was unfit for analysis, it would have

to be established before the Court that the disintegration of the sample was not on account of any act or omission of the accused. In cases, where

the accused himself does not apply to the Court under Sub-section (4) of Section 25 of the Act to send one of the samples to the Central Drugs

Laboratory and the delay in sending the samples to the Central Drugs Laboratory is caused or due to inaction by the accused himself, the Court

will have to decide whether the accused is or is not entitled to take the benefit of the disintegration of the sample on the ground that the statutory

right u/s 25(4) of the Act has been frustrated.

41. Since, the petitioners have not moved any application in the Court by the trial Magistrate, under Sub-section (4) of Section 25 of the Act, to

send one of the samples to the Central Drugs Laboratory, it cannot be said that the petitioners have been deprived of their statutory right u/s 25(4)

of the Act. I, therefore, do not find any force in the submission that the proceedings initiated against the petitioners are vitiated or they are rendered

useless on account of the violation of petitioners'' right u/s 25(4) of the Act.

42. As regards the statement regarding the offence punishable u/s 28A of the Act, it would be proper if the accused persons make their

submissions in this behalf before the trial Magistrate at the time of arguments on charge. While parting with the case it may be pointed out that

unless taking cognizance of the offences by the learned Magistrate is held to be without jurisdiction or is contravention of law, the trial Magistrate

must proceed with the case in accordance with law. In Surjit Singh and others Vs. Balbir Singh, their Lordships of the Hon''ble Supreme Court

observed at p. 2307 of Cri LJ :-

It is settled law that once cognizance is taken, two courses are open to the Magistrate, namely either to discharge the accused if the evidence does

not disclose the offence or to acquit of the accused after full trial. Unless either of the two courses is taken and order passed, the cognizance duly

taken cannot be set at naught.

43. For reasons mentioned above, this petition has no force and it deserves to be dismissed and is hereby dismissed. The petitioners are directed

to appear before the learned Chief Judicial Magistrate within a period of 15 days from the date of passing of this order, failing which, the learned

Chief Judicial Magistrate shall take legal steps for compelling the appearance of the accused-petitioners before him. The stay order dated 8th

February, 89 is hereby vacated.

44. A copy of the order be sent to the learned Chief Judicial Magistrate, Chittorgarh for information and necessary action.