

**HIGH COURT OF JUDICATURE AT ALLAHABAD****APPLICATION U/S 528 BNSS No. - 18480 of 2025**

M/S Associated Biotech And 3 Others

.....Applicant(s)

Versus

State of U.P. and Another

.....Opposite
Party(s)

Counsel for Applicant(s) : Abhinav Gaur, Ankit Tiwari, Sarthak
Singh, Sr. Advocate

Counsel for Opposite Party(s) : G.A.

Court No. - 75**HON'BLE VIKAS BUDHWAR, J.**

1. Heard Sri Abhinav Gaur, learned counsel for the applicants and Sri Pankaj Srivastava, learned AGA for the State.

2. This Court on 22.05.2025 proceeded to pass an order requiring the learned AGA to seek instructions. Today, Sri Pankaj Srivastava, learned AGA has produced before this Court instructions under the signature of the opposite party no. 2 which is taken on record and marked as Appendix 'A'. Learned AGA has further made a statement as per instructions from him that since the instructions are self sufficient and he is in the position to argue the matter, thus, he does not propose to file any response.

3. The case of the applicants is that the applicant herein is a partnership firm engaged in manufacture of drugs and possesses a statutory licence under the relevant provisions. On 23.08.2023, an inspection came to be conducted in the premises of M/s Vimla Medical Store, Aligarh and the sample of the drugs in question were drawn and the same was sent analyst report on 23.08.2023 and on 13.10.2023 the Government Analyst, U.P., Lucknow, tendered its report forming an opinion that the sample does not confirm to I.P. in respect of Assay (contains of Amoxycillin). On the receipt of the report of the Government Analyst, a letter dated 05.12.2023 was written to the M/s Vimla Medical Store, Aligarh requiring it to disclose the source from where the said samples were procured in response thereof, the name of M/s Broad Medical Agencies, Aligarh came to picture. A notice was also issued it and then the name of M/s Somkee India Private Limited was disclosed and M/s Somkee India Private Limited apprised the opposite party

no. 2 that it had purchased the drugs from the applicants herein. Post issuance of a notice, the applicants submitted their reply on 23.02.2024 and thereafter, the impugned complaint came to be lodged on 23.09.2024 under Section 18/27 of the Drugs and Cosmetics Act, 1940 against the applicants pursuant where to on 15.11.2024, the applicants came to be summoned under Section 18/27 of the Drugs and Cosmetics Act by the court of Special Judge, Drugs and Cosmetics/Additional Session Judge, Court No. 8, Aligarh.

4. Learned counsel for the applicants has submitted that the summoning order cannot be sustained for more than one reason first of all the same is non speaking unreasoned and it does not even recite the case of the complainant. Reliance has been placed upon the judgment of Hon'ble Apex Court in **M/s. JM Laboratories and others Vs. State of Andhra Pradesh and another: 2025 INSC 127**. Secondly, there has been violation of Section 25 of the Drugs and Cosmetics Act so as to accord an opportunity to the applicants to get the retesting done from a Central Laboratory. Thirdly, in absence of any committal by the jurisdictional Magistrate under Section 193 Cr.P.C./213 BNSS, the court of Sessions Judge had no authority or jurisdiction to entertain the proceedings and to summon the applicants. Reliance has been placed upon the judgment of Hon'ble Apex Court in the case of **Union of India vs Ashok Kumar Sharma: CRIMINAL APPEAL No. 200 of 2020**. Fourthly, the complaint happens to have been lodged on 23.09.2024 post enforcement of BNSS-2023, thus, the applicants were to be put to notice at a pre-cognizance stage in accordance with the first proviso to subsection (1) of Section 223 of BNSS. Reliance has been placed upon the decision in **Prateek Agarwal Vs. State of U.P. : APPLICATION U/S 482 No. - 10390 of 2024**. Learned counsel for the applicants submits that there are various other grounds but according to him, the fundamental ground which goes to the root of the matter is regarding the fact that the summoning order has not adverted to said issues and the same is non speaking. He, thus, submits that the summoning order be set aside.

5. Sri Pankaj Srivastava, learned AGA, on the other hand, submits that from the perusal of the complaint, it is more evident that *prima facie* offences are made out but according to him, the summoning order does not test the legal sanctity with regard to the mandate as laid down by the Hon'ble Apex Court in **JM Laboratories (supra)**, according to him, the summoning order be set aside, matter stands remitted back to the court below to pass a fresh order.

6. I have heard the submission so made across the bar and perused the record carefully.

7. Apparently, post lodging of a complaint under Section 18/27 of the Drugs and Cosmetics Act, 1940 on 23.09.2024, the applicants came to be summoned on 15.11.2024 is post enforcement of BNSS-2023, thus, the first proviso to sub-section (1) of Section 223 of BNSS would come into play. The summoning order dated 15.11.2024 reads as under.-

"दिनांक-15.11.2024

आज यह परिवाद प्रार्थना पत्र आषधि एवं प्रसाधन निरीक्षक द्वारा अभियुक्तगण के विरुद्ध प्रस्तुत किया गया।
वाद दर्ज रजिस्टर हो।

प्रस्तुत प्रपत्रों का अवलोकन किया गया।

परिवाद पंजीकृत किया जाये। उल्लेखनीय है कि प्रस्तुत परिवाद औषधि एवं प्रसाधन निरीक्षक द्वारा अपने पदीय कर्तव्यों के निर्वहन में लिखित रूप से संस्थित किया गया है। अतः ऐसे में धारा 223 (1) बी.एन.एस.एस. के प्रवाधान को दृष्टिगत रखते हुए परिवादी एवं साक्ष्यों की परीक्षा किया जाना आवश्यक नहीं है।

पत्रावली पर उपलब्ध प्रपत्रों के अवलोकन से स्पष्ट है कि अभियुक्तगण के विरुद्ध अपराध का संज्ञान लिये जाने का पर्याप्त आधार है। अतः अभियुक्तगण 1. मैसर्स *Associated Biotech Kishanpura, Curumnajra Road, Baddi Tehsil Nalagarh Solan 174101* 2. *Sanjeev Goel s/o Sh. Vidhya Bhushan Goel* निवासी मकान स० 850 सेक्टर 8 पंचकूला हरियाणा डायरेक्टर, मैसर्स *Associated Biotech Kishanpura, Gurumajra Road, Baddi Tehsil Nalagarh Solan 174101* 3. *Umakant Mishra s/o Sh. Motilal Mishra Mishra* निवासी निवासी ग्राम देवीपुरा पोस्ट कालन्दरपुर, तहसील-नानपाड़ा जिला बहराइच 271865 उत्तर प्रदेश *Manufacturing Chemist* एवं 4. *Sandeep Saras Mat s/o Sh. Late. Kanti chand sharma* निवासी मकान स० 19/67, गाँधी नगर पोस्ट अलीगढ़ जिला अलीगढ़ उत्तर प्रदेश *Analytical Chemist* के विरुद्ध अन्तर्गत धारा 18/27 औषधि एवं प्रसाधन सामग्री अधिनियम 1940 परिवाद पत्र में प्रदर्शित अपराध में संज्ञान लिया जाता है। अभियुक्तगण को जरिये सम्मन तलब किया जावे। परिवादी लोक सेवक है उसको नियत तिथि पर उपस्थित रहने की छूट प्रदान की जाती है।

पत्रावली अभियुक्तगण की उपस्थिति हेतु जरिये सम्मन नियत दिनांक 16.12.2024 को पेश हो।"

8. A close look of the summoning order would reveal that there is no recital about the fact whether the applicants have been put to notice at the pre-cognizance stage or not. In **Prateek Agarwal (supra)**, the following was observed.-

"8. Proviso of Sub Section (1) of Section 223 of the B.N.S.S. mandates that a Magistrate while taking cognizance of an offence, on a complaint, shall examine upon oath, the complainant and the witnesses present, if any, and reduce it into writing. The Proviso further mandates that no cognizance of an offence shall be taken by the Magistrate without giving an opportunity to the accused of being heard. Section 227

of the B.N.S.S. deals with the issuance of process which is akin to Section 204 of the Cr.P.C.

9. Relevant part of the order dated 27.9.2024 passed in Criminal Petition No.7526 of 2024 (Sri Basanagouda R. Patil Vs. Sri Shivananda S. Patil) passed by High Court of Karnataka is as under:-

"8. The obfuscation generated in the case at hand is with regard to interpretation of Section 223 of the BNSS, as to whether on presentation of the complaint, notice should be issued to the accused, without recording sworn statement of the complainant, or notice should be issued to the accused after recording the sworn statement, as the mandate of the statute is, while taking cognizance of an offence the complainant shall be examined on oath. The proviso mandates that no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard.

9. To steer clear the obfuscation, it is necessary to notice the language deployed therein. The Magistrate while taking cognizance of an offence should have with him the statement on oath of the complainant and if any witnesses are present, their statements. The taking of cognizance under Section 223 of the BNSS would come after the recording of the sworn statement, at that juncture a notice is required to be sent to the accused, as the proviso mandates grant of an opportunity of being heard.

10. Therefore, the procedural drill would be this way:

A complaint is presented before the Magistrate under Section 223 of the BNSS; on presentation of the complaint, it would be the duty of the Magistrate / concerned Court to examine the complainant on oath, which would be his sworn statement and examine the witnesses present if any, and the substance of such examination should be reduced into writing. The question of taking of cognizance would not arise at this juncture. The magistrate has to, in terms of the proviso, issue a notice to the accused who is given an opportunity of being heard. Therefore, notice shall be issued to the accused at that stage and after hearing the accused, take cognizance and regulate its procedure thereafter.

11. The proviso indicates that an accused should have an opportunity of being heard. Opportunity of being heard would not mean an empty formality. Therefore, the notice that is sent to the accused in terms of proviso to sub-section (1) of Section 223 of the BNSS shall append to it the complaint; the sworn statement; statement of witnesses if any, for the accused to appear and submit his case before taking of cognizance. In the considered view of this Court, it is the clear purport of Section 223 of BNSS 2023.

12. Swinging back to the facts of the case the concerned Court has passed the following order:

"This complaint is filed against the Accused alleging the offence P/U/Sec.356(2) of

BNS, 2023.

Issue notice to the Accused as per proviso to section 223 of BNSS, 2023.

For hearing.

Call on 13.08.2024."

The moment complaint is filed, notice is issued to the accused. This procedure is erroneous. Therefore, the petition deserves to succeed on this short ground of procedural aberration and the matter is to be remitted back to the hands of the concerned Court to redo the exercise from the beginning, bearing in mind the observations made in the course of the order.

13. For the aforesaid reasons the following:

ORDER

(i) Criminal Petition is allowed.

(ii) Impugned order dated 16-07-2024 passed by the XLII Additional Chief Judicial Magistrate, Bengaluru in PCR No.9136 of 2024 stands quashed.

(iii) Matter is remitted back to the learned Magistrate to redo the exercise afresh, from the stage of entertainment of the complaint, bearing in mind the observations made in the course of the order.

(iv) The said exercise shall be undertaken within 4 weeks from the date of receipt of the copy of this order.

Consequently, I.A.No.2 of 2024 stands disposed."

9. Apart from the same, the summoning order is cryptic, non speaking and unreasoned and it does not recite the case of the complainant and less to say about the attraction of the penal sections even on *prima facie* basis. In **JM Laboratories (supra)**, the following was observed.-

"9. In the present case also, no reasons even for the namesake have been assigned by the learned Magistrate. The summoning order is totally a non-speaking one. We therefore find that in light of the view taken by us in criminal appeal arising out of SLP (Crl.) No. 2345 of 2024 titled "INOX Air Products Limited Now Known as INOX Air Products Private Limited and Another v. The State of Andhra Pradesh", and the legal position as has been laid down by this Court in a catena of judgments including in the cases of Pepsi Foods Ltd. and another Vs. Special Judicial Magistrate and others, Sunil Bharti Mittal Vs. Central Central Bureau of Investigation, Mehmood U Rehman Vs. Khazir Mohammad Tunda and others and Krishna Lal Chawla and

others Vs. State of Uttar Pradesh and another, the present appeal deserves to be allowed."

10. Since the summoning order does not test the mandate of Hon'ble Apex Court in **JM Laboratories (supra)**, thus, it cannot be sustained.

11. Accordingly, the application is being decided in the following terms.-

(a) the order dated 15.11.2024 passed in Complaint Case No. 3654 of 2024 summoning the applicants under Section 18 and 27 of the Drugs and Cosmetics Act passed by learned Additional Sessions Judge, VIII, Aligarh is set aside; (b) matter stands remitted back to the court below to pass a fresh order.

September 12, 2025
Rajesh

(Vikas Budhwar,J.)