

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH**

Sr. No.105

CRR-328-2018 (O&M)
Date of decision : 08.03.2018

Rajan Bhardwaj and others

..... Petitioners

VERSUS

State of Haryana

..... Respondent

CRR-355-2018 (O&M)

Subhash Chander and another

..... Petitioners

VERSUS

State of Haryana

..... Respondent

CORAM: HON'BLE MR. JUSTICE SUDHIR MITTAL

Present: Mr. Vikram Chaudhari, Sr. Advocate with
Mr. Rahil Mahajan, Advocate
for the petitioners in CRR-328-2018.

Mr. Vikram Khatri, Advocate
for the petitioners in CRR-355-2018.

Mr. Munish Sharma, AAG, Haryana.

SUDHIR MITTAL, J.

This order shall dispose of abovementioned two revision petitions as they have arisen out of the same impugned judgment and common question of law is involved therein.

2. On 22.12.2014, the premises of M/s Amit Medicine Centre, Bus Stand Road, Near Norang Ice Factory, Uklana Mandi, District Hisar, was inspected by the competent authority under the Drugs and Cosmetics Act, 1940 (hereinafter referred to as 'the Act'). Four types of drugs were taken for test and analysis out of which one sample was of Bonorwin

Injection (Buprenorphine Injection), which was manufactured by Willmark Pharmaceutical Pvt. Ltd., Amritsar (accused No.3). This sample shall be referred to as the 'sample in question' hereinafter. After completion of formalities, the 'sample in question' alongwith other samples was sent to the Government Analyst Haryana, Chandigarh for analysis under a covering letter dated 23.12.2004. A test report of the 'sample in question' was received on 22.02.2005, according to which, the sample was declared as 'not of standard quality' on account of following reasons:-

- a) Sample contains suspended matter compromising of white particles and fibre.
- b) Ext. Vol./ampoule is less than claim/I.P limit.
- c) Assay of Buprenorphine/ml is found to be less than I.P. limit.
- d) Address of the 'Mfgd. by' not labeled completely on ampoule No. label on outer pack of 10 ampoules.

3. Notice dated 23.02.2005 was issued to accused No.2 and served upon it on the same date. Accused No.1 was present at the time of service, but he could not disclose from whom he acquired the drug in question. On 26.02.2005, a report was sent to the State Drugs Controller, Haryana and request was made for permission to investigate the matter at the level of manufacturer. Pursuant to grant of permission, the complainant visited Amritsar on 21.03.2005 and a copy of the test report dated 14.02.2005 with a sealed sample portion was handed over to the Managing Director of accused No.3. Certain documents were collected from the premises of accused No.3. Reply was also obtained and after

perusal of the same the following observations were made by the complainant:-

1. “As per label drug in question contains Buprenorphine Hydrochloride IP equivalent to 0.3 mg of Buprenorphine while the test report of the manufacturer itself dated 03.07.2004 shows that ‘Each ml. contains Buprenorphine Hydrochloride 0.29 mg.’ At the same the revised test report of manufacturer dated 22.03.2005 shows each ml contains Buprenorphine HCl eq. Buprenorphine 0.288 mg. Thus the reports of the manufacturer are self contradictory and the product manufactured by the firm is not as per IP. Indian Pharmacopoeia states that Buprenorphine injection IP is a sterile solution of Buprenorphine Hydrochloride contains not less than 90.0 per cent and not more than 110.0 per cent of states amount of Buprenorphine Hydrochloride.
2. The firm has not supplied the records of the labels deliberately and their version in reply regarding past of the label on the paper tray of the ampoules laps on the part of the manufacturer. Moreover, no differences were noticed in the label of control sample and ampoules of the sealed sample portion opened by accused No.4 at the time of investigation. As per record submitted to the investigation team on 21.03.2005 by the accused Firm (through accused No.4) was bearing labels pasted on the Analytical Report of finished goods and manufacturing record. There was no difference in the labels on these reports and the sampled drugs, the sample portion was opened by the accused firm during investigation and compared with labels of the control sample not difference was noticed. As per the record supplied, the manufacturing of the drug was completed on 08.07.2004 while finished

goods were tested on 03.07.2004 well before the completion of the batch.

3. The firm has mentioned differences in its reply about the neck and length of the ampoules it can be a case of repeat batch or readjustment of the ampoules filling machine. No difference regarding thickness was pointed out at the time of investigation.

4. The manufacturer plea regarding nature of glass ampoules and difference in labels is concerned no such discrepancy was pointed out at the time of investigation neither it was observed by the team.

5. The record submitted to the investigation team regarding analysis of the raw material is fake since as per raw material register (Pg. 25) 90 gms. of Buperinorphine raw material was found in stock and whole quantity was used in Batch No.1634, 1643, 1654 and record does not shows that any quantity was taken for testing analysis of raw material.'

4. Thereafter, permission for prosecution was sought from the State Drugs Controller, Haryana, which was granted vide letter dated 08.08.2005. Consequently, a criminal complaint was filed in the Court of Chief Judicial Magistrate, Hisar, whereupon the accused were summoned to face the trial. Accused Nos.1 and 2 were charge-sheeted for violation of Section 18 (a)(i) read with Section 17B, 17, 16 and 18A of the Act, whereas accused Nos.3 to 5 were charge-sheeted for violation of Sections 18(a)(i), 17B, 17, 16 and 18B of the Act. On the basis of evidence on the record, the learned Chief Judicial Magistrate, Hisar, held the petitioners guilty of manufacturing/sale of spurious and mis-branded drugs.

Consequently, sentence of RI for three years was imposed under Section 27(c) of the Act apart from other sentences.

5. The judgment of conviction and order of sentence was challenged by way of appeal, however, the appeal was dismissed by the A.S.J, Hisar vide judgment dated 17.01.2018. This has led to the filing of the present revision petitions.

6. Learned Senior counsel for the petitioners has raised two substantive contentions namely, (i) the trial is vitiated because it was conducted by a Court, which did not have the jurisdiction to try such an offence under the Act, and (ii) the conviction under Section 17B of the Act is illegal because at best only a case of mis-branding has been made out in the trial.

7. In support of the contention that the Court of the Chief Judicial Magistrate, Hisar, did not have jurisdiction to try the offence, the learned Senior counsel has drawn my attention to Section 36(AB) of the Act, which is reproduced below for ready reference:-

‘Section 36AB, Special Courts:- The Central Government, or the State Government, in consultation with the Chief Justice of the High Court, shall, for trial of offences relating to adulterated drugs or spurious drugs and punishable under clauses (a) and (b) of section 13, sub-section (3) of section 22, clauses (a) and (c) of section 27, section 28, section 28A, section 28B and clause (b) of sub-section (1) of section 30 and other offences relating to adulterated drugs or spurious drugs, by notification, designate one or more Courts

of Session as a Special Court or Special Courts for such area or areas or for such case or class or group of cases as may be specified in the notification.’

8. It is submitted that vide Act No.26 of 2008, Section 36 AB was inserted, according to which, trial of offences relating to adulterated or spurious drugs is to be done by ‘Special Courts’ only and one or more Court of Sessions are to be designated as ‘Special Court’ for the said purpose. The amended provision came into force w.e.f. 10.08.2009 and on that date the petitioners had not even been served in the complaint although summoning order had been issued. Thus, the contention is that the amendment being procedural in nature is retrospective and will apply even to pending cases. Reliance has been placed upon the judgment of the Hon’ble Supreme Court of India in **‘Hitendra Vishnu Thakur Vs. State of Maharashtra, 1994(3) RCR (Crl.) 156’.**

9. Learned State counsel, on the other hand, submits that Section 36 AB of the Act will be applicable only to complaints filed on or after 10.08.2009 i.e. the date on which the amendment came into force and not to complaints which were instituted prior in point of time.

10. By now it is well settled that an amendment which affects vested rights is prospective in nature unless the legislature makes it retrospective expressly or by necessary implication. On the other hand, an amendment which relates to procedure only is presumed to be retrospective unless such a construction is textually impossible. In **‘Anil**

Kumar Goel Vs. Kishan Chand Kaura 2008(1) RCR (Crl.) 290, the

Hon'ble Supreme Court of India has held as follows:-

‘All laws that affect substantive rights generally operate prospectively and there is a presumption against their retrospectivity if they affect vested rights and obligations, unless the legislative intent is clear and compulsive. Such retrospective effect may be given where there are express words giving retrospective effect or where the language used necessarily implies that such retrospective operation is intended. Hence the question whether a statutory provision has retrospective effect or not depends primarily on the language in which it is couched. If the language is clear and unambiguous, effect will have to be given to the provision is question in accordance with its tenor. If the language is not clear then the Court has to decide whether, in the light of the surrounding circumstances, retrospective effect should be given to it or not. (See: **M/s Punjab Tin Supply Co., Chandigarh etc. etc. Vs. Central Government and Ors., 1984 (1) RCR (Rent) 168.**)’

11. In **Hitendra Vishnu Thakur's** case (supra) the Hon'ble Supreme Court was examining whether Section 20(4)(bb) of Terrorist and Disruptive Activities Act, 1987, introduced vide Amendment Act No.43 of 1993 w.e.f. 22.05.1993 was prospective or retrospective. The principles regarding prospective and retrospective operations of statutes were laid down as follows:-

‘25. The Designated Court has held that the amendment would operate retrospectively and would apply to the pending cases in which investigation was not complete on the date on which the Amendment Act came into force and

the challan had not till then been filed in the Court. From the law settled by this Court in various cases, the illustrative though not exhaustive, principles which emerge with regard to the ambit and scope of an Amending Act and its retrospective operation may be culled out as follows:-

(i) A statute which affects substantive rights is presumed to be prospective in operation, unless made retrospective, either expressly or by necessary intendment, whereas a Statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning, and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal, even though remedial, is substantive in nature.

(iii) Every litigant has a vested right in substantive law, but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively, where the result would be to create new disabilities or obligations, or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities, shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.'

12. Ultimately, it was held that the amendment being procedural in nature would operate retrospectively.

13. In view of the above, a provision relating to forum is procedural in nature and therefore, Section 36 AB of the Act would apply retrospectively i.e. it would even apply to pending complaints. From the

facts of the instant case, it is evident that the petitioners had not even been served when the amended provision came into force. The petitioners put in appearance after service on or about 27.09.2012, whereas the amendment came into force w.e.f. 10.08.2009. Thus, the Court of learned Chief Judicial Magistrate, Hisar had no jurisdiction to try this complaint as the petitioners were inter alia accused of manufacturing/selling spurious drugs.

14. The issue can be viewed from another perspective. It is evident from the judgment of the learned trial Court that when the petitioners were charge-sheeted, the amendment had already come into force. The charges included alleged violation of Section 17B of the Act and the said provision relates to spurious drugs. At that stage, the learned trial Court should have taken note of the amendment and should have transferred the case to the appropriate forum. However, the trial Court failed to notice the amended provision resulting in the present situation.

15. For the aforementioned reasons, it has to be held that the trial in the present case has been conducted by a Court without jurisdiction and therefore, the trial is vitiated. The judgment of the learned Chief Judicial Magistrate, Hisar, is nullity as he did not have the authority to decide the present complaint.

16. The second contention of learned Senior counsel for the petitioners does not require to be considered, since the trial has been held to be nullity and nonest.

17. The question that now arises for determination is the relief to which the petitioners are entitled. Learned Senior counsel for the petitioners has contended that the complaint pertains to the year 2007 and eleven years have elapsed since the institution of the complaint. The petitioners have suffered immense mental tension and trauma on account of the protracted trial

and thus, prosecution should not be permitted to continue any longer. Reliance has been placed upon the judgment of Hon'ble Supreme Court in **'Chandrawati Vs. Ramji Tiwari, 2011 (5) RCR (CrL.) 95'** in support of his contention. In that case, the Hon'ble Supreme Court had held that the trial was vitiated on account of non-framing of relevant charge, and the request of the prosecution for remand was turned down on the ground that a long period had elapsed since the inception of the trial.

18. It is not in doubt that a long period has elapsed since the complaint was instituted. The petitioners cannot be held responsible for the long trial because the prosecution is to blame for the delay. It failed to bring the correct provision of law to the notice of the Court and therefore, the petitioners cannot be made to suffer on account of the inefficiency of the prosecution. Moreover, charge under Section 17B of the Act is not sustainable in law as none of the ingredients of the said section are made out in the present case. The learned State counsel was repeatedly asked whether the allegations of impurities in the sample were true but he always replied in the negative. It would therefore, not be justified to subject the petitioners to another trial by a competent Court of law.

19. The judgments of the trial Court as well as that of the appellate Court are consequently set aside and the petitioners are acquitted.

20. A photocopy of this judgment be placed on the file of other connected case.

(SUDHIR MITTAL)
JUDGE

08.03.2018

Ramandeep Singh

Whether speaking / reasoned

Yes / No

Whether Reportable

Yes/ No