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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-28246-2018

Reserved on: 07.02.2024
Pronounced on: 12.02.2024

M/s Chem Pharma Pvt Ltd and another

...Petitioners

Versus

State of Haryana

...Respondents

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. Akhilesh Kumar Sinha, Advocate
for the petitioners

Ms. Geeta Sharma, DAG, Haryana

HARPREET SINGH BRAR, J.

1. The present petition is preferred against judgment dated 20.04.2018 passed by learned Additional Sessions Judge, Gurugram whereby appeal against judgment of dated 03.09.2014 passed by learned Judicial Magistrate Ist Class, Gurugram was allowed and complaint no. 161/2009 dated 23.04.2009 titled *State of Haryana v. Chem Pharma Ltd. And Ors.* was restored and sent for retrial.

FACTUAL BACKGROUND

2. Briefly, the facts are that on 14.02.2009, complainant Anil Deswal, in the presence of witnesses including two local witnesses namely Ram Avtar

and Rajinder Singh, raided the factory of the petitioner-company. Petitioner no. 2- director of the petitioner company was also present on the factory premises along with Amit Goyal. The raid continued on the next day i.e. 15.02.2009 and it was observed that spurious counterfeit drugs were being manufactured in spite of the fact that the licences of the petitioner company was suspended. The petitioner-company had manufactured and stocked for sale and distribution multiple spurious misbranded drugs purporting to be the products of companies like Pfizer, Cadila Healthcare, FDC amongst others. The printed packing materials with other brand names were also found stocked in huge quantities.

3. The complainant presented a complaint to the police station alleging that during the survey conducted by him he found out that petitioner-company is deliberately indulging in manufacture and sale of counterfeits of a medicine called Viagra which is originally manufactured by M/s Pfizer Products. It was alleged that by doing so, the owner and person in charge of conducting business of the petitioner company has violated the copyright of M/s Pfizer and caused unlawful loss to the public while making undue gain for itself. On the basis of this statement, FIR No. 21 dated 14.02.2009 under Sections 420, 274 of the IPC, Section 63 of the Copyright Act, 1957 and Section 78 of Trade and Merchandise Marks Act, 1958 was registered at Police Station Udyog Vihar, Gurgaon. Thereafter, a complaint no. no. 161/2009 dated 23.04.2009 (Annexure P-1) under Drugs and Cosmetics Act, 1940 (hereinafter 'the Act') and Durgs and Cosmetics Rules, 1940 was lodged by the State through Senior Drug Control Officer, Gurgaon before the Chief Judicial Magistrate, Gurgaon.

4. The learned trial Court, vide order dated 03.09.2014 dismissed the complaint case for want of prosecution. Aggrieved by the same, an appeal was

preferred by the respondent before the learned lower Appellate Court which was allowed vide judgment dated 20.04.2018 and the case was ordered to be retried.

CONTENTIONS

5. Learned counsel for the petitioners submits that the complaint (Annexure P-1) was filed after lodging of the FIR on the same allegations. Petitioner no. 2 was acquitted in the FIR case, vide order dated 01.02.2016. The Drug Controller failed to appear before the learned trial Court without moving an application seeking exemption from personal appearance. Therefore, the learned trial Court has rightly dismissed the complaint and discharged petitioner no. 2 vide order dated 03.09.2014. He further submits that mere possession simplicitor of articles would not attract Section 27 and 18 of the Act, as such unless it is proven that the stocked drugs are for the purpose of sale, ingredients of Section 27 of the Act would not be satisfied. Reliance in this regard can be placed on **Mohd. Shabbir v. State of Maharashtra AIR 1979 SC 564.**

6. Learned counsel further contends that the petitioners were acquitted from the charge framed against them for commission of offences under Section 27(a), 27(c), 27(b)(ii) of the Act, identical to those in the complaint case, by the learned trial Court in the FIR case vide judgment dated 01.02.2016. The petitioner no. 2 is being harassed with a second prosecution for the same offence which is expressly forbidden by Section 300 of the Cr.P.C. and Article 20(2) of the Constitution of India. The learned lower Appellate Court has erred in holding that the complaint case and the FIR case were clubbed by the learned Chief Judicial Magistrate, Gurgaon vide order dated 13.12.2013 as the learned trial Court had specifically observed that order of clubbing has not been placed on record by the prosecution. The case has been ordered to be retried after 9 years

of acquittal of petitioner No. 2. Therefore, the learned lower Appellate Court has erred in passing the impugned judgement dated 20.04.2018 and the same deserves to be set aside.

7. Learned State counsel opposes the prayer of the petitioners and contends that the judgment dated 20.04.2018 is based on correct appreciation of facts and law. The trial for the complaint and the FIR was clubbed vide order dated 13.12.2013 passed by the learned Chief Judicial Magistrate, Gurgaon and the learned trial Court ought to have abided by the order before proceeding with adjudicating upon the FIR case.

OBSERVATIONS AND ANALYSIS

8. Having heard the learned counsel for the parties and perused the record of the case, it transpires that an application was made under Section 210 of the Cr.P.C. for clubbing of the complaint case with the FIR case which was allegedly allowed vide order dated 13.12.2013 passed by the learned Chief Judicial Magistrate, Gurgaon. However, no such order has been placed on record to prove the same. As such, the complaint case and the FIR case ought to be tried separately. On assessing all material available on record and after indulging in detailed examination of 9 prosecution witnesses, the learned trial Court arrived at a judgment of acquittal dated 01.02.2016.

9. Since the petitioners have been acquitted after a lawful trial before a competent Court the test laid down by the Constitution bench of the Hon'ble Supreme Court in *Assistant Collector of the Customs, Bombay and another v. L.R. Melwani and another AIR 1970 SC 962*, that if the accused has been absolved of all guilt, that verdict shall remain binding on his prosecutor, stands satisfied. Speaking through Justice K.S. Hegde, the following was observed:

“9. The issue estoppel rule is but a facet of the doctrine of autre fois acquit. In Sambasivan v. Public Prosecutor, Federation of Malaya, 1950 AC 458 at p. 479, Lord MacDermott enunciated the said rule thus: "The effect of a verdict of acquittal pronounced by a competent Court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim "Res judicata pro veritate accipitur" is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial. And the appellant was no less entitled to rely on his acquittal in so far as it might be relevant in his defence. That it was not conclusive of his innocence on the firearm charge is plain, but it undoubtedly reduced in some degree the weight of the case against him, for at the first trial the facts proved in support of one charge were clearly relevant to the other having regard to the circumstances in which the ammunition and revolver were found and the fact that they fitted each other."

A two Judge bench of the Hon'ble Supreme Court in **Ajay Kumar Ghosal Etc v. State of Bihar and another 2017(1) R.C.R.(Criminal) 1061**, speaking through R. Banumathi, made the following observations:

“11. Though the word "retrial" is used under Section 386(b)(i) Cr.P.C., the powers conferred by this clause is to be exercised only in exceptional cases, where the appellate court is satisfied that the omission or irregularity has occasioned in failure of justice. The circumstances that should exist for warranting a retrial must be such that where the trial was undertaken by the Court having no jurisdiction, or trial was vitiated by serious illegality or irregularity on account of the misconception of nature of proceedings. An order

for retrial may be passed in cases where the original trial has not been satisfactory for some particular reasons such as wrong admission or wrong rejection of evidences or the Court refused to hear certain witnesses who were supposed to be heard.”

CONCLUSION

10. Consequently, the present petition is allowed and the judgment dated 20.04.2018 passed by learned Additional Sessions Judge, Gurugram whereby judgment dated 03.09.2014 passed by learned Judicial Magistrate Ist Class, Gurugram were set aside and the case was ordered to be retried is hereby set aside.

11. Pending miscellaneous application(s), if any, shall also stand disposed of.

(HARPREET SINGH BRAR)
JUDGE

February 12, 2024

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Whether speaking/reasoned : Yes/No

Whether Reportable : Yes/No