

Criminal Revision No. 2270 of 2018

203/2

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Criminal Revision No. 2270 of 2018

Reserved on: 07.02.2024
Pronounced on:12.02.2024

Satish Chander Bhardwaj

...Petitioner

Versus

State of Haryana

...Respondents

CORAM: HON'BLE MR.JUSTICE HARPREET SINGH BRAR

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

Ms. Geeta Sharma, DAG, Haryana

HARPREET SINGH BRAR, J.

1. The present revision petition is preferred against judgment dated 20.04.2018 passed by learned Additional Sessions Judge, Gurugram whereby appeal against judgment of acquittal dated 01.02.2016 passed by learned Judicial Magistrate Ist Class, Gurgaon in FIR No,. 21 dated 14.02.2009 under Section 420, 274 of the IPC, Section 63 of the Copyright Act, 1957, Sections 18,24 of the Drugs and Cosmetics Act, 1940 (hereinafter referred to as 'the Act') and Section 78 of the Trade and Merchandise Mark Act, 1958 (hereinafter referred to as 'TM Act') registered at Police Station Udyog Vihar, Gurgaon, was allowed and the matter was remanded back to the learned trial Court.

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(PW1) and Rajinder Singh(PW7), 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, the instant FIR was registered at Police Station Udyog Vihar, Gurgaon.

4. On assessing all the material available on record, the learned trial Court, acquitted the petitioner vide judgment dated 01.02.2016. Aggrieved by the same, an appeal was preferred by the respondent-State before the learned lower Appellate Court which was allowed vide judgment dated 20.04.2018 and the case was remanded back to the trial Court.

CONTENTIONS

5. Learned counsel for the petitioners submits that the learned trial Court has correctly appreciated the facts of the case over a long trial of 7 years and acquitted the petitioner on merits. Now, vide judgment dated 20.04.2018, after 9 years of lodging the FIR, the learned lower Appellate Court has ordered retrial of the case merely because an order was allegedly passed by the learned Chief Judicial Magistrate directing the clubbing of the FIR case and the compliant case. However, as noted by the learned trial Court, the prosecution failed to place the said order on record. Further, the State has not raised a plea regarding clubbing of the cases in its appeal dated 10.04.2016 before the learned lower Appellate Court and has merely prayed for setting aside of the judgment dated 01.02.2016. As a matter of fact, while only notices were issued in the complaint case, all of the 9 prosecution witnesses had already been examined and cross-examined in the FIR case.

6. Furthermore, offence under Section 63 of the Copyright act is not made out as the same do not apply to cases involving medicines. Moreover, in the instant case, the Inspector Inderjit Singh, Investigating Officer conducted all proceedings including search and seizure without obtaining any opinion from the Registrar. Section 115 of the TM Act specifically forbids the Court from taking cognizance of offences punishable under Sections 107, 108 and 109 of the TM Act except on a written complaint by Registrar or an authorised officer. The Investigating Officer, the most material witness, did not appeared in Court to get cross-examined, which leaves a big lacuna in the prosecution case. Also, PW1- Ram Avtar who was joined as an independent witness has appeared as a witness for the police in about 400 cases in the last 10 years. There is also nothing on

record to indicate that the petitioner indulged in manufacturing or selling of the counterfeit medicines or that the alleged recovery was in fact counterfeited. Reliance in this regard can be placed on *Mohammad Shabbir v. State of Maharashtra 1979 AIR SC 564*.

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 with their able assistance, it transpires that an application under Section 210 of the Cr.P.C. for clubbing of the complaint case with the FIR case was allegedly allowed vide order dated 13.12.2013 passed by the learned Chief Judicial Magistrate, Gurgaon. However, this order has not seen the light of the day. The said order has not been placed on record to prove the same. As such, the complaint case and the FIR case ought to be tried separately. The learned trial Court has meticulously examined 9 prosecution witnesses and after duly considering all material available on record rendered a judgment of acquittal dated 01.02.2016.

9. Further, a perusal of the record indicates that the complainant-Amit Deswal was not examined and the Investigating Officer was only examined partially as he did not appear in the Court for cross-examination which creates a serious dent in the prosecution case in view of *Balwant Singh v. State of*

Haryana 2007(4) R.C.R(Criminal) 927 where this Court has categorically held that in absence of cross-examination, the entire evidence remains unproven. It is pertinent that the defence gets an opportunity to cross-examine the witnesses to ensure a free and fair trial, which was not granted in the present case. The alleged contraband was apparently sent to the Government Analyst and a report was rendered regarding the same. However, the Analyst who prepared the report was not examined to prove the same. Therefore, it cannot be conclusively said that the alleged recovery was in fact counterfeit medicine. The exact quantity of the recovery is also not discernible from the material available on record.

10. The alleged recovery was made over a raid that lasted two days- 14.09.2009 and 15.09.2009. However, PW1-Ram Avtar, who was joined as an independent witness, has admitted in his cross examination that his signature on the recovery memo were only taken on 15.09.2009. The failure to take the signature of the witness on 14.09.2009 raises suspicion regarding the veracity of the alleged recovery. Furthermore, PW1-Ram Avtar appears to be a stock witness as he has admitted to having deposed in favour of police in about 400 case in the last decade. The other independent witness i.e. PW7-Rajinder Singh also does not support the prosecution case as he had specifically denied giving a statement to the police and claimed that he was at the bank when certain police officials took his signatures on some papers without informing him what they were about. Additionally, nothing has been placed on record to indicate that the petitioner indulged in manufacture, stocking or selling of any drugs.

11. Finally, Section 115 of the TM Act clearly dictates that no Court can take cognizance of an offence under Section 107, 108 or 109 of the TM Act

except on a written complaint by the Registrar or an authorised officer, which is absent in the instant case. Further, Section 115(4) of the TM Act specifically states that only a police officer of the rank of DSP or above can conduct search and seizure regarding offences under the TM Act. Admittedly, the search and seizure in the present case was conducted by the Investigating Officer- Inderjit Singh, which is in direct violation of Section 115(4) of the TM Act. Furthermore, the TM Act is a special statute and it is trite law that if a special enactment lays down the provisions regarding procedure that must be adopted for investigation and adjudication of an offence that falls in its purview, general provisions of the IPC or the Cr.P.C. will not be attracted. Reliance in this regard can be placed on on the judgment of the Hon'ble Supreme Court in ***Jeewan Kumar Raut and another versus C.B.I (2009) 7 SCC 526*** and this Court in ***Ajay Kumar Sandhu vs. State of Haryana in CRM-M-29708-2014***. As such no offence is made out under the TM Act against the petitioner.

12. The power of the Appellate Court to unsettle the order of acquittal on the basis of re-appreciation of the evidence is subject to the settled law that where two views are possible and out of the two, one points towards the innocence of the accused, the view which favours the accused should prevail over the other pointing towards his guilt. Furthermore, the trial Court has the additional advantage of closely observing the prosecution witnesses and their demeanour, while deciding about the reliability of the version of prosecution witnesses as held by the Hon'ble Supreme Court in ***Kali Ram v. State of Himachal Pradesh (1973) 2 SCC 808*** and ***Chandrappa and others v. State of Karnataka (2007) 4 SCC 415***. A Division bench of this Court in the judgment passed in ***State of Haryana Vs. Ankit and others*** passed in CRM-A No.3 of

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2022 decided on 06.07.2023 has held that presumption of innocence further gets entrenched on the acquittal of accused by the trial Court. 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.” (emphasis added)

CONCLUSION

13. In view of the facts and circumstances of the case, the present revision is allowed and the judgment dated 20.04.2018 passed by learned Additional Sessions Judge, Gurugram whereby judgment dated 01.02.2016 passed by learned Judicial Magistrate Ist Class, Gurugaoan was set aside and the case was ordered to be retried, is set aside.

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

February 12, 2024
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(HARPREET SINGH BRAR)
JUDGE

Whether speaking/reasoned : Yes/No
Whether Reportable : Yes/No