

(1990) 08 MP CK 0036

In the Madhya Pradesh High Court

Case No : Criminal Revision No. 89 of 1990

Impha Labs and Others

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 31-08-1990

Acts Referred:

Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 468, 470, 471, 473, 482
Drugs and Cosmetics Act, 1940 — Section 18, 19(2), 25(2), 25(3), 25(4)
Limitation Act, 1963 — Section 5
Penal Code, 1860 (IPC) — Section 279, 304A, 338
Prevention of Food Adulteration Act, 1954 — Section 13(2), 17
Prevention of Food Adulteration Rules, 1955 — Rule 9A

Citation : (1991) JLI 39

Hon'ble Judges : K.L. Shrivastava, J

Bench : Single Bench

Advocate : K.K. Gandhe, for the Appellant; S.S. Swami, for the Respondent

Final Decision : Dismissed

Judgement

K.L. Shrivastava, J.—This revision petition is directed against the order dated 16.1.1990 passed by the 2nd Additional Chief Judicial Magistrate, Indore in Criminal Case No. 33 of 1987 extending the period of limitation u/s 473 of the Code of Criminal Procedure, 1973 (for short "the Code").

2. Facts giving rise to this revision petition are these. On 1.2.83, the Drug Inspector Ambala drew sample of Chloroquine Phosphate Injection (British Pharmacopeia) Batch No. 8202 (date of manufacture January 1982 and date of expiry January 1984) from M/s Khanna Medical Hall, Ambala City, this was manufactured by the applicant No. 1 which is a firm at Indore. The rest of the applicants are its partners.

3. One part of the sample was sent to the Government Analyst, Haryana who, in his report dated 28.6.83, declared the drug to be of not standard quality because the sample contained particles of foreign matter. The Controller, Food and Drugs,

M.P. Bhopal sent a show cause notice to the applicant No. 1 along with a copy of the analysis report on 26.9.84.

4. The applicant No. 1 replied to the Controller by its letter dated 8.10.84 stating that it has the control samples and there were no particles in them and the same will be produced before him. It was also stated in the reply that the drug had expired long back in January 1984.

5. On 7.8.85 the Controller, Food & Drugs granted permission to prosecute the applicant firm within 15 days u/s 27(d) of the Drugs and Cosmetics Act, 1940 (for short "the Act") which carries with it the maximum punishment of two years.

6. The Drug Inspector Indore launched the prosecution on 14.1.1987.

7. On 26.5.89 the applicants moved an application u/s 468 of the Code contending that the prosecution launched on 14.1.87 was barred by limitation.

8. By the impugned order, with recourse to Section 473 of the Code, the period of limitation has been extended placing reliance on this Court's decision in Bhanwarlal's case Cr. Revn. No. 223 of 1986; decided on 13.3.1987.

9. The submission of the learned Counsel for the applicants is that the learned lower Court failed to appreciate that the decision in Bhanwarlal's case (supra) was distinguishable on facts. It is urged that in the instant case, unlike in the said decision show cause notice was served after the date of expiry of the medicine and the prosecution was launched more than two years thereafter. It is contended that the applicants have been deprived of their valuable right to get the sample analysed by the Central Drugs Laboratory as provided u/s 25(4) of the Act and they were thus prejudiced.

10. It is next submitted that the test report is that the drug contained "foreign particles" but there is no evidence to show that any test was applied to find out whether those were really foreign particles or particles created due to inter-mixture of the medicines.

11. Learned Counsel for the applicants further contended that the decision dated 5.5.89 in Misc. Cr. Case No. 2000 of 1987 (Prem Pharmaceutical's case) is binding on all the subordinate Courts in Madhya Pradesh and the case should have been dropped on the ground that the test report was vague.

12. The point for consideration is whether the impugned order extending the period of limitation deserves to be interfered with.

13. Sections 470 and 471 of the Code provide for exclusion of time in computing the period of limitation. Section 472 *ibid* relates to continuing offences and feeling the need regarding extension of period of limitation in deserving cases, the Legislature has provided thus in Section 473 of the Code giving it wider ambit than that u/s 5 of the Limitation Act, 1963.

Notwithstanding anything contained in the foregoing provisions of this Chapter,

any Court may take cognizance of an offence after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice.

14. It may be noted that Section 473 of the Code contemplates extension of the period of limitation on two grounds. In the instant case the period of limitation has been extended on the ground that it is necessary to do so in the interests of justice and not on the ground of explained delay.

15. On Section 473 of the Code the decision in Madan Mohan's case 1990(I) MPWN 128 : 1990 MPLJ 165 makes an illuminating reading.. Therein the Apex Court's decision in Bhagirath Kanoria and Others Vs. State of M. P., has been adverted to and it has been pointed out that as is clear from the words employed in Section 473 of the Code, it has overriding effect on all earlier sections of Chapter XXXVI. According to the decision the jurisdiction under the provision may be exercised by any Court, at any stage and even suo motu.

16. The decision in Srinivas Gopal Vs. Union Territory of Arunachal Pradesh (Now State), relates to delayed prosecution under Sections 279, 304A and 338 of the IPC. Therein with reference to its earlier decisions, the Apex Court has pointed out that the provisions pertaining to limitation have legislative policy behind them and the object of the Code in putting a bar of limitation on prosecution was clearly to prevent the parties from filing cases after a long time, as a result of which material evidence may disappear and also to prevent abuse of the process of the Court by filing vexatious and delayed prosecutions long after the date of occurrence and that this object is clearly in consonance with the concept of fair trial as enshrined in Article 21 of the Constitution providing that no person shall be deprived of his life or liberty except according to the procedure established by law. It may be stated here that Article 21 of the Constitution has a wide sweep and it has been interpreted as guaranteeing fundamental rights of speedy trial and free legal aid.

17. From what has been discussed above it is clear that by lapse of the period of limitation a valuable right accrues to the accused and he is not to be deprived of it unless the Court comes to the conclusion that the delay has been properly explained as required by law or that interests of justice necessitate the extension of the period of limitation. Where the Court, in accordance with the provision in Section 473 of the Code rightly extends the period of limitation there can be no question of infraction of Article 21 of the Constitution.

18. It may be noted that the provision in Section 473 of the Code does not enjoin that whenever the interests of the citizens or the society are involved the period of limitation must invariably be extended. The Legislature has very wisely left the question of extension of the period of limitation in the domain of the Court's discretion which it has to exercise in a judicial manner on a balanced consideration of the facts and circumstances of a given case.

19. The contention of the learned Counsel for the applicants is that the copy of the Govt. Analyst's report was not delivered by the Drug Inspector who alone is authorised by law to launch prosecution as required u/s 25(2) of the Act and in the instant case the Court's discretion u/s 473 of the Code must not be exercised in favour of the prosecution because the inordinate delay on the part of the prosecution has deprived the applicants of their valuable right to take recourse to the provision embodied in Section 25(4) of the Act and the prejudice caused to them is quite clear. Reliance was placed on the decision in *Vilco Laboratories v. State of Gujarat* 1975 Cr.L.J. 965.

20. The contention of the learned Counsel for the State is that the applicants by their reply did not notify in writing within 28 days of the receipt of the copy of the report that they intend to adduce evidence in contravention of the report of the Government Analyst and, therefore, the report of the Government Analyst is conclusive as provided u/s 25(3) of the Act and the Petitioners cannot complain of any prejudice. He too placed reliance on the decision in *Vilco Laboratories's* case (*supra*).

21. The ends of justice are higher than the ends of law and must reign supreme. Justice has to be done to all the contending parties. and its dispensation by the Courts must be based on a consideration of the entirety of the facts and circumstances of the case and has to be even handed. Negligence of public servants, unless it has caused prejudice to the accused, must not be allowed to defeat the object of the Statute. Where the accused is prejudiced it is certainly not proper to permit his prosecution. The decision in *Dalchand Vs. Municipal Corporation, Bhopal and Another*, is pertinent on this point.

22. The contention of the learned Counsel for the applicants is that as already stated in the instant case the copy of the report of the Government Analyst was sent not by the Inspector as required by Section 25(2) of the Act but by the Controller and that too only to the applicant No. 1 and there was no occasion for them to reply to the Inspector or to the Court as envisaged u/s 25(4) of the Act. The learned Counsel urges that it is because of the inordinate delay on the part of the prosecution that the applicants could not take recourse to their valuable right to get a report from the Central Drugs Laboratory which could have superseded the report of the Government Analyst.

23. The learned Counsel further urges that even on merits the chances of success of the prosecution are bleak in view of the decision in *Prem Pharmaceuticals's* case (*supra*).

24. The contention of" the learned Counsel for the applicants is that presence of particulate matter in the drug in question in spite of best precautions and manufacturing practice, is a foreseen circumstance as is clear from Section 19(2) (b) of the Act. He urges that it is not the prosecution's case that the ingredients of the injunction were not as prescribed and according to the report of the Government Analyst the only reason assigned for the drug being sub-standard is

that foreign particles were seen in the injection. It is further urged that the Government Analyst ought to have described what foreign matter he had detected and as he has failed to do so it has to be taken to be particulate matter of the medicine itself. He goes on to urge that in the absence of an analysis of the particles the mere use of the word "foreign" does not imply that the particles in the medicine were of extraneous substances and not of the requisite contents thereof coming into existence during the period of storage.

25. With reference to the provision in Section 19(2)(b) of the Act the learned Counsel for the applicants next contended that even on the assumption that the particles in the medicine were of extraneous substance, the drug could not be said to be substandard within the meaning of Section 18 of the Act in the absence of allegation by the prosecution of awareness on the part of the applicants of the intermixture.

26. It has lastly been contended by the learned Counsel for the Petitioners that a perusal of Section 34 of the Act which relates to offences by companies show that it is only on the basis of requisite allegations and proof of the same that partners of a firm can be held criminally liable.

27. In support of the submission that where no offence is disclosed the proceeding may be quashed u/s 482 of the Code, reliance was placed on the decision in Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, The decision also relates to the provision in Section 17 of the Prevention of Food Adulteration Act, 1954. Similar to that u/s 34 of the Act.

28. The provision in Section 19(2)(b) of the Act reads thus:

19(2). For the purposes of Section 18 a drug shall not be deemed to be misbranded or adulterated or spurious or to be below standard quality nor shall a cosmetic be deemed to be misbranded or to be below standard quality only by reason of the fact that-(b) In the process of manufacture, preparation or conveyance some extraneous substance has unavoidably become intermixed with it; provided that this clause shall not apply in relation to any sale or distribution of the drug or cosmetic occurring after the vendor or distributor became aware of such intermixture.

29. On a careful consideration of the arguments and the relevant provisions of the Act, I am of the view that the contention that in the absence of analysis of the particles found in the medicine it cannot be held that they were of extraneous substance and not particulate matter of the contents of the medicine coming into existence during storage subsequent to its manufacture must be accepted. Further, in view of the provision in Section 19(2)(b) of the Act, even on "the assumption that the particles were of extraneous matter the drug cannot, in the absence of allegation of awareness of the intermixture, be said to be sub-standard merely on the ground of their presence therein. Absence of such allegation knocks the bottom out of the prosecution case.

30. Regarding the liability of the Petitioners other than the Petitioner No. 1, the learned Counsel for the Petitioners has invited my attention to Section 34 of the Act. According to the explanation appended to the section "company" includes a firm and "Director" in relation to firm means a partner in the firm and the partner is criminally liable only on fulfilment of the requirements of the section.

31. In Ram Kishan Rohtagi's case (supra) it has been held that vicarious liability is an incidence of an offence under the Act and as pointed out in Municipal Corporation of Delhi v. Des Raj 1985 CrLJ 618 it is only on the fulfilment of specified conditions that a partner may be liable. In the instant case, it has nowhere been stated that any of the partners (Petitioners 2 to 5) at the relevant time was incharge of and responsible to the company (Petitioner No. 1) for the conduct of its business and thus in the absence of allegations which constitute pre-condition for fastening vicarious liability on the partners, they cannot be held liable for the offence in question.

32. As a result of the foregoing discussion I am of the view that this is not a fit case where the period of limitation should be extended by taking recourse to the provision in Section 473 of the Code.

33. Before parting with the case I consider it apposite to refer to what the Full Bench observed in the decision in Food Inspector, Mandsaur v. Devilal 1985 J LJ 195 : 1985 MPLJ 14. Therein holding that the provision in Section 13(2) of the Prevention of Food Adulteration Act and Rule 9-A of the Rules framed thereunder are directory and non-compliance thereof is not per se fatal to the prosecution case, it has been stated as under in paragraph 27:

We may like to add that the view which we have taken should not be construed to mean that those who are entrusted with the duty of implementing the provisions of the Act and the rules may not do their duties as laid down by the provisions of the Act and the rules and any lapse on their part must be dealt with at administrative level. They must bear in mind that the procedural provisions made in the Act and the rules are meant to be complied with and their omission to follow the dictates of these provisions may cause prejudice to the accused and in such a case even if the accused had indulged in the act of adulterating articles of food he may have to be acquitted of the offence charged with and thus the salutary object of the Act may be defeated.

34. In the ultimate analysis I find that the revision petition deserves to be allowed. It is, therefore, allowed. The impugned order is set aside and the complaint is dismissed as time barred.