

A

STATE OF ORISSA

v.

JANMEJOY DINDA

FEBRUARY 20, 1998

B

[M.K. MUKHERJEE AND K.T. THOMAS, JJ.]

*Drugs and Cosmetics Act, 1940 :*

- C Sections 18-A, 27(b)(ii) and 28—Search and seizure—Nursing Home—  
Stock of medicinal drugs for sale—No valid licence—Purchase invoice not  
produced—Failure to disclose name and address of the person from whom  
the drugs were acquired—Conviction and sentence passed by the Trial  
Court—Appeal to High Court—Acquittal for offence under section 28 on the  
ground that section 18-A not applicable to accused as he was neither a  
manufacturer nor an agent—On appeal, Held, section 18-A applies to any  
D person other than manufacturer or agent of drug—Acquittal based on faulty  
premise—Hence set aside.

- E Section 27(b)(ii)—Held, High Court has jurisdiction to reduce sentence  
of imprisonment, below the period of six months—However adequate and  
special reasons to be recorded in the judgment—Even reduced sentence  
should have a term of imprisonment and fine.

- F The respondent was prosecuted for the offences under sec. 27(b)(ii)  
and Section 28 of the Drugs & Cosmetics Act, 1940. The case of the  
prosecution was that the Drugs Inspector conducted search of the premises  
of the nursing home run by the respondent. It was found that the respondent  
had stocked for sale medicinal drugs without any valid licence. Thus the said  
drugs were seized by the Drugs Inspector. The respondent was not able to  
produce the purchase invoice for the drugs seized and also failed to disclose  
the name and address of the person from whom he acquired the drugs. The  
Magistrate after trial, convicted the respondent under sec. 27(b)(ii) and  
section 28 of the Act and sentenced him to undergo and year simple  
G imprisonment and a fine of Rs. 5,000 and also simple imprisonment for a  
period of one month. The appeal filed by the respondent before, the Sessions  
Court was dismissed. On revision, the High Court acquitted the respondent  
for the offence under sec. 28 of the Act on the ground that sec. 18-A of the  
Act was not applicable as the accused was neither manufacturer nor agent.  
The High Court also reduced the sentence and fine imposed for the offence  
H under sec. 27(b)(ii). Hence the present appeal by the State.

The contention of the appellant was that the High Court committed an error in holding that the offence under sec. 28 of the Act was not made out. It was also contended that the judge has acted without jurisdiction in reducing the sentence for the offence under section 27(b)(ii) of the Act.

Allowing the appeal, this Court

**HELD :** 1.1. The acquittal of the respondent for the offence under section 28 of the Drugs and Cosmetics Act, 1940 is based on a basically faulty premise. The Section would apply to any person other than the manufacturer of a drug or cosmetic or his agent. Therefore, the acquittal is set aside and conviction of the respondent under Section 28 of the Act is restored. [1038-G-H; 1039-A]

1.2. For application of section 18-A of the Act, the person concerned shall not be a manufacturer of drug or his agent. In other words, the person to whom the section applies is anyone other than a manufacturer or his agent for distribution thereof. The *raison d'être* of it is that, if he is the manufacturer or his agent he cannot disclose the name of the person from whom he acquired the drug because he himself is its manufacturer. Hence there is no question of requiring him to disclose the identify of the person from whom he acquired the drug. Exclusion of manufacturer and his agent from the purview of sec. 18-A is, therefore, on understandable premise. The High Court, would have missed the monosyllable 'not' in Section 18A of the Act while considering the amplitude of the provision. The position of law when the word 'not' is remaining in the provision, is just the other way around. [1038-E-F-G]

2. For failure to disclose the name of the person from whom he had acquired the drugs, respondent need not be sent to jail as, such a failure could have happened perhaps because he was oblivious of the name and address of the person from whom he purchased the drug. That apart, there is no case for the Drugs Inspector or for the prosecution that any drug seized from the nursing home was either a spurious drug or a misbranded one or even a time expired medicine. It means that the drug seized would have been otherwise genuine medicine. Thus in the circumstances a sentence of fine of Rs. 1000, would be sufficient to meet the ends of justice as sentence of imprisonment is not compulsory for an offence under section 28 of the Act. [1039-B-D]

3. In view of the proviso to sec. 27(b)(ii) the High Court has jurisdiction

- A to reduce the sentence of imprisonment below the period of six months. If the conditions specified in the proviso are present, the Court, has the power to reduce the sentence even further down. For that there must be adequate and special reasons and such reasons should be recorded in the judgement and there will be a term of imprisonment and fine in the reduced sentence.
- B In the instant case the Judge has given some reasons for reducing the sentence of imprisonment. Thus this Court is not inclined to enhance the term of imprisonment or the quantum of fine further upward for the offence under sec. 27(b)(ii) of the Act. [1040-C-E]

- C *Ram Shankar Mishra v. State of UP, AIR (1979) SC 727; and M/s Rajasthan Pharmaceutical Laboratory, Bangalore and Ors. v. State of Karnataka, AIR (1981) SC 809, referred to.*

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 219 of 1998.

- D From the Judgment and Order dated 25.8.95 of the Orissa High Court in CrI. R. No. 482 of 1994.

Janakalyan Das for the Appellant.

Bijan Kumar Ghosh for the Respondent.

- E The Judgment of the Court was delivered by

- F **THOMAS, J.** A Drugs Inspector conducted search of the premises of a nursing home run by the respondent under the name 'Kalicharan Poly Clinic' at Naya Bazar in Jaleswar (Orissa) on 7.8.1996. He was accompanied by one Deputy Drugs Controller and an Assistant Drugs Controller. In the search it was detected that medicinal drugs were stocked for sale in two almirahs kept in the front room of the nursing home. As respondent had no licence to stock or exhibit for sale such drugs, the Drugs Inspector seized 22 items of drugs. Respondent was not able to produce the purchase invoice concerning those drugs and he failed to disclose the source from which he
- G purchased them.

- H On the aforesaid facts respondent was prosecuted before a Court of Judicial Magistrate of First Class for offences under Section 27(b)(ii) and Section 28 of the Drugs and Cosmetics Act, 1940 (for short the 'Act'). The magistrate, on conclusion of the trial, convicted respondent under both counts and sentenced him to undergo simple imprisonment for one year and a fine

of Rs. 5,000 on the first count and to simple imprisonment for one month on the second count. A

Appeal filed by the respondent was dismissed by the Sessions Court which confirmed the conviction and sentence under both charges. But when he filed a revision before the High Court of Orissa a learned Single Judge found that conviction under Section 28 of the Act was unsustainable and hence respondent was acquitted of that offence. In the matter of sentence for the offence under Section 27(b)(ii) of the Act learned Single Judge reduced it to the period of imprisonment which had already been undergone and the fine was reduce to Rs.3,000. B

State of Orissa has filed this special leave petition challenging the aforesaid alteration and modification made by the High Court. Leave is granted. C

The concurrent findings of facts arrived at by the trial court and the appellate court which are not liable to be re-opened are: (1) respondent stocked for sale the drugs seized from his nursing home on 7.8.1986 without any valid licence as required under clause (c) of Section 18 of the Act, and (2) respondent did not disclose to the Drugs Inspector, even after he was required to do so, the name and address of the persons from whom he acquired those drugs. D

Learned counsel for the appellant contended that the High Court committed an error in holding that the offence under Section 28 of the Act has not been made out. That Section reads thus:- E

“Penalty for non-disclosure of the name of the manufacturer, etc. - whoever contravenes the provisions of Section 18-A or Section 24 shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.” F

Learned Single Judge of the High Court took the view that Section 18A of the Act would have application “only if the person from whom the requisite information is sought for, is either the manufacturer or an agent for distribution” and since the respondent was neither of them he could not have contravened the Section. The reasoning of the learned Single Judge in reaching the aforesaid conclusion, in his own words, are the following:- G

“Section 18-A deals with disclosure of the name of the manufacturer, H

A etc. It requires that every person, being the manufacturer of a drug or cosmetic or his agent for the distribution thereof, shall, if so required, disclose to the Inspector the name address and other particulars of the person from whom he acquired the drug or cosmetic.

B In order to attract application of Section 18-A, a person, who is either the manufacturer of the drug or cosmetic or agent for distribution thereof is required to disclose to the inspector the name and address and other particulars of the person from whom he acquired the articles. If a person does not fall within either of the two categories, Section 18-A will have no application."

C In this context it is necessary, to see how Section 18A of the Act is worded which is extracted below:-

18-A Disclosure of the name of the manufacturer, etc. - Every person, *not* being the manufacturer of a drug or cosmetic or his agent for the distribution thereof, shall, if so required, disclose to the Inspector the name address and other particulars of the person from whom he acquired the drug or cosmetic."

(emphasis supplied)

E It is obvious that for application of the Section, the person concerned shall not be a manufacturer of drug or his agent. In other words, the person to whom Section 18A applies is anyone other than a manufacturer or his agent for distribution thereof. The *raison d'être* of it is that, if he is the manufacturer or his agent he cannot disclose the name of the person from whom he acquired the drug because he himself is its manufacturer. To expect the other way is to expect the impossible. Hence there is no question of requiring him to disclose the identity of the person from whom he acquired the drug.

F Exclusion of manufacturer and his agent from the purview of Section 18A is, therefore, on understandable premise.

G It seems to us that learned Single Judge of the High Court would have missed the monosyllable '*not*' in Section 18A of the Act when he considered the amplitude of the provision. The position of law when the word '*not*' is remaining in the provision, is just the other way around. The Section, therefore, would apply to any person other than the manufacturer of a drug or cosmetic or his agent. Hence, there is much force in the contention of the State that acquittal of the respondent of the offence under Section 28 of the Act is based on a basically faulty premise. Such acquittal is, therefore, liable to be

H set aside and the conviction of the respondent under Section 28 has to be

restored. We do so. A

However, while dealing with the sentence we are of the opinion that for failure to disclose the name of the person from whom he acquired the drugs, he need not be sent to jail as we feel that such failure could have happened perhaps because he was oblivious of the name and address of the person from whom he purchased the drug. That apart, there is no case for the Drug Inspector, or for the prosecution itself, that any of the drugs seized from the nursing home was either a spurious drug or a misbranded one or even a time expired medicine. It means that the drug seized would have been otherwise genuine medicine. B

We also notice that the offence under Section 28 is punishable with either imprisonment or with fine which may extend to Rs.1,000 or with both. In other words, sentence of imprisonment is not compulsory. In such circumstances, a sentence of fine of Rs.1,000 would be sufficient to meet the ends or justice for Section 28 of the Act so far as the facts in this case are concerned. C D

The remaining contention is that learned Single Judge has acted without jurisdiction when he reduced the sentence for the offence under Section 27(b)(ii) of the Act to imprisonment for the period which respondent had already undergone and to a fine of Rs. 3,000/-. For considering the above contention it is necessary to extract the material portion of the said sub-clause: E

"27. Penalty for manufacture, sale, etc., of drugs in contravention of this Chapter.- Whoever, himself or by any other person on his behalf, manufactures for sale or for distribution, or sells, or stocks or exhibits or offers for sale or distributes,- F

(a).....

(b) any drug-

(i)..... G

(ii) Without a valid licence as required under clause (c) of Section 18,

shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than five thousand rupees: H

A        Provided that the Court may, for any adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a term of less than one year and of fine of less than five thousand rupees;"

B        This Court has held in *Ram Shankar Misra v. State of UP*, AIR (1979) SC 727 that the sentence under Section 27 of the Act cannot be reduced to one of fine only. Again in *M/s Rajasthan Pharmaceutical Laboratory Bangalore and others v. State of Karnataka*, AIR (1981) SC 809, this Court pointed out that a sentence of imprisonment is compulsory under Section 27 (b)(ii) of the Act. But in view of the proviso to the Section (as quoted above)

C        it cannot be said that the Court has no jurisdiction to reduce the sentence of imprisonment below the period of six months. If the conditions specified in the proviso are present, the Court has the power to reduce the sentence even further down. For that there must be adequate and special reasons and such reasons should be recorded in the judgment and there shall still be a term of imprisonment and fine in the reduced sentence.

D        Learned Single Judge has given some reasons for reducing the sentence of imprisonment "to the period already undergone" and to a fine of Rs.3,000. Appellant-State has not even mentioned in the special leave petition that the reasons shown by the learned Single Judge are neither adequate nor special.

E        We are, therefore, not inclined to enhance the term of imprisonment or the quantum of fine further upward for the offence under Section 27(b)(ii) of the Act.

F        In the result, we allow this appeal by setting aside the acquittal under Section 28 of the Act. We restore the conviction of the respondent of the said offence. We impose a fine of Rs. 1,000 on him for the said offence and direct that in default of payment of such fine within two months respondent shall undergo simple imprisonment for one month. Appeal is thus, allowed to that extent.

S.V.K.I.

Appeal allowed.