

BALAKRISHNA PILLAI, CHIEF INSPECTOR OF DRUGS
INTELLIGENCE SQUAD, TRIVANDRUM AND ANOTHER

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v.
MATHA MEDICALS AND OTHERS

JANUARY 15, 1991
[B.C. RAY AND J.S. VERMA, JJ.]

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*Drugs (Price Control) Order, 1979—Paras 10-14, 18 and 21—
Collection of excess price when drug's maximum retail price fixed—
Maintainability of prosecution—'Bulk drug'—'Formulation'—Inter-
pretation of.*

Respondent No. 1 is a firm dealing in medicines and respondents 2 and 3 are its managing partner and pharmacist. In contravention of the provisions of Drugs (Price Control) Order 1979, para 21 read with para 18 they charged from a Nursing Assistant of the Medical College Hospital, Kottayam, Rs.90 in excess of the maximum retail price fixed for the sale of 15 tablets of Largactil of 100 mg each and 60p in excess for 100 tablets of Hipnotex of 5mg each. According to the prosecution this act of their's being in contravention of the provisions of the Order, was punishable under Section 7 of the Essential Commodities Act, 1955 and accordingly prosecution was initiated against the respondents. The trial court found the respondents guilty and convicted them and sentenced respondent No. 1 firm to a fine of Rs.2,000 and respondents 2 and 3 to three months simple imprisonment. On appeal, the High Court of Kerala acquitted them taking the view that none of the aforesaid two medicines, namely Largactil and Hipnotex were 'formulations' as defined in Section 2(f) of the Drugs (Prices Control) Order 1979 and as such the sale of these drugs at higher rates than the prescribed was not punishable under paras 21 read with para 18 of the order.

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The appellants have thus filed this appeal after obtaining special leave. The question for decision in the present case relates to the correctness of the construction made by the High Court of the provisions of the 'Order'.

Partly allowing the appeal, this Court,

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HELD: A bulk drug is one which may be capable of use by itself or as an ingredient in any formulation. [69G]

Formulation is a medicine which may comprise even of one bulk

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A drug by itself or more than one bulk drug. The definition of 'Formulation' is very wide and includes even one bulk drug where that one bulk drug by itself is treated as a medicine. [70B]

B The provisions of para 21 which in terms are meant to control sale prices of formulations specified in the Third Schedule as also the other provisions of the Order which in terms may be of limited application are specifically made applicable to all formulations as defined in the Order except only paragraphs 10 to 14 which have been expressly excluded. It is by virtue of para 18 that the prohibition contained in para 21 has been made applicable to formulations not specified in the Third Schedule. [70G-H]

C The High Court misconstrued the provisions of the Drugs (Price Control) Order 1979. The Court rejected that construction and held that the allegations in the present case, if proved, would amount to a contravention of para 21 read with para 18 of the 'Order' which is punishable under Section 7 of the Essential Commodities Act, 1955.

D The Court however did not interfere with the acquittal of the respondents. [72B-C]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 37 of 1991.

E From the Judgment and Order dated 7.3.1989 of the Kerala High Court in Crl. Appeal No. 321 of 1986.

P.S. Poti and T.T. Kunhikannan for the Appellants,

T.S. Krishnamoorthy Iyer and N. Sudhakaran for the Respondents.

F The Judgment of the Court was delivered by

G **VERMA, J.** The respondents were found guilty by the trial Court for contravention of para 21 read with para 18 of the Drugs (Prices Control) Order, 1979 (hereinafter referred to as 'the Order') issued under Section 3 of the Essential Commodities Act, 1955 (hereinafter referred to as 'the Act') and accordingly convicted under Section 7 of the Act. Respondent No. 1 firm was sentenced to a fine of Rs.2,000 while respondents 2 and 3 who were the managing partner and pharmacist of the firm were sentenced to three months simple imprisonment. The High Court of Kerala at Ernakulam (hereinafter referred to as 'the High Court') allowed their appeal against the con-

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viction and sentence and acquitted all of them. Hence, this special leave petition against their acquittal.

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Leave granted.

The allegation on which the prosecution of the respondents was based is that they collected Rs.90 in excess of the maximum retail price fixed for the sale of 15 tablets of Largactil of 100 mg each and 60p. in excess for 100 tablets of Hipnotex of 5 mg each from one Sepastian Joseph, a Nursing Assistant in the Medical College Hospital, Kottayam, on 4.2.1985. It is alleged that recovery of the amount in excess of the maximum retail price fixed for the sale of these medicines under the drugs (Prices Control) Order, 1979 was a contravention of the provisions contained therein which is punishable under Section 7 of the Essential Commodities Act, 1955. The trial Court rejected the several defences raised by the respondents and found them guilty of contravention of para 18 read with para 21 of the Order which is an offence punishable under Section 7 of the Essential Commodities Act, 1955. The respondents were accordingly convicted and sentenced as aforesaid.

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As earlier stated, the respondents' appeal to the High Court has succeeded and they have all been acquitted. The High Court has taken the view that on these allegations, contravention of para 18 of the Order is not made out. The High Court has summarised its conclusion as under:

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"The upshot of the above discussion is that Largactil and Hipnotex—Chlorpromazine and nitrazepam—are only bulk drugs and not formulation. The appellants, none of whom is a manufacturer or distributor, cannot be convicted for contravention of paragraph 18 of the Order. (The position is seemingly different in the Order of 1987 because paragraph 18 of the Order of 1987 contains inhibition against sale of bulk drugs also).

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In the result, I allow this appeal and set aside the conviction and sentence. The appellants are acquitted and are directed to be set at liberty.³⁷

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The real question for decision in the present case is the correctness of the construction made by the High Court of the provisions of the 'Order'. Shri P.S. Poti, learned counsel for the appellants contended that the grievance in this appeal is really to the construction

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A made by the High Court of the provisions of the 'Order' which is affecting a large number of similar matters and not to the outcome of individual matter before us. Learned Counsel contended that the appellants are not much interested in assailing the acquittal in the present individual matter, but the correct construction of the provisions of the Order is necessary for future guidance. In our opinion, it is necessary to examine the provisions of the 'Order.' and to indicate their correct meaning in view of the general importance thereof.

The Order was made by the Central Government in exercise of the powers conferred by Section 3 of the Essential Commodities Act, 1955. Para 2 of the Order contains the definitions, some of which may be referred. Clause (a) of para 2 defines 'bulk drug' to mean any substance 'which is used as such, or as an ingredient in any formulations'. 'Dealer' is defined in clause (b) to mean a person carrying on the business of purchase or sale of drugs, whether as a wholesaler or retailer and includes an agent of a dealer. 'Drug' is defined in clause (d) to include 'bulk drugs and formulations'. Clause (f) defines 'formulation' to mean a medicine processed out of, or containing 'one or more bulk drugs or drug'. Clause (q) defines 'price list' to mean a price list referred to in this Order. Clause (r) defines 'retail price' to mean the retail price of a drug arrived at or fixed in accordance with the provisions of this Order. The other clauses of para 2 contain other definitions including the definitions of 'retailer' and 'wholesaler'. It is not necessary to refer to them in detail. Para 3 contains the power to fix the maximum sale price of indigenously manufactured bulk drugs specified in First or Second Schedule to the Order. Para 19 requires every manufacturer or importer of a formulation to furnish to the dealers, State Drug Controllers and the Government, a price list showing the price at which the formulation is sold to a retailer and every dealer is required to display the price list at a conspicuous part of his business premises. Part 20 requires every manufacturer, importer or distributor of a formulation to display on label of the container the maximum retail price of that formulation. Paras 18, 21, and 22, the construction of which is in dispute, read as under:

G "18. *Certain provisions of this Order to apply to formulations not included in Category I, Category II or Category III of Third Schedule.*— The provision of this Order, other than those contained in paragraphs 10 to 14 (both inclusive), shall apply, to any formulation not specified in Category I, Category II or Category III of the Third Schedule."

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“21. *Control of sale prices of formulations specified in Third Schedule.*— No retailer shall sell any formulations specified in any of the categories in the Third Schedule to any person at a price exceeding the price specified in the current price list or the price indicated on the label of the container or pack thereof whichever is less plus the local taxes, if any, payable.

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Explanation.— For the purposes of this paragraph, “local taxes” include sales tax and octroi actually paid by the retailer under any law in force in a particular area.”

“22. *Sale of split quantities of formulations.*— No dealer shall sell loose quantity of any formulation drawn from a bottle pack of such formulation at a price which exceeds the pro-rate price of the formulation plus 5 per cent thereof.

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Provided that nothing in this behalf shall apply to any formulation compounded at the premises of the dealer.”

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The view taken by the High Court is that the two formulations, namely, Largactil and Hipnotex, the sale of which at an excess price is alleged to be the contravention of the Order, not being formulations specified in any of the categories in the Third Schedule to the Order, the prohibition contained in para 21 of the Order has no application. On this basis, the view taken is that the sale of these two formulations in excess of the retail price fixed for their sale is not a contravention of any provision of the Order to attract the punishment provided under Section 7 of the Essential Commodities Act, 1955. It has also been held by the High Court that none of these two medicines is a formulation as defined in clause (f) of para 2 of the Order but merely a bulk drug, which fact also excludes the application of para 21 of the Order. It appears that this position was not seriously contested even by the learned public prosecutor in the Courts below. In our opinion, such a view results from a mis-reading of the material provisions of the Order.

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The definition of ‘bulk drug’ given in clause (a) of para 2 shows that it means any substance ‘which is used as such’ or ‘as an ingredient in any formulations’. Thus a bulk drug is one which may be capable of use by itself or as an ingredient in any formulation. Drug is defined in clause (d) of para 2 to include ‘bulk drugs’ and ‘formulations’. Clause

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A (f) then defines 'formulation' to mean any medicine processed out of or containing one or more bulk drugs or drug. Thus formulation is a medicine which may comprise even of one bulk drug by itself or more than one bulk drug. The definition of 'formulation' is thus very wide and includes even one bulk drug where that one bulk drug by itself is treated as a medicine. It is difficult to uphold the view that the two medicines, namely, Largactil and Hipnotex, do not fall within the definition of 'formulation' contained in clause (f) of para 2 of the Order. One of the two difficulties pointed out by the High Court in applying para 21 of the Order to the present case is clearly out of the way.

C The only surviving question now is whether para 21 of the Order is rendered inapplicable merely because none of these formulations is specified in any of the categories in the Third Schedule to the Order. In other words: Is the High Court correct in taking the view that notwithstanding the fixation of the maximum retail price of these formulations in accordance with the provisions of the Drugs (Prices Control) Order, 1979, there is no provision made therein to prohibit their sale at an amount in excess of the maximum retail price fixed under the Order to attract the punishment provided in Section 7 of the Essential Commodities Act, 1955? In our opinion, it is not so. There is no controversy that by an amendment made in 1987 to which we shall refer later, the matter has been placed beyond the scope of any argument. However, even prior to that amendment, the matter is clear by the express provision contained in para 18 as it existed even then.

F Para 18 clearly says that the provisions of this Order 'other than those contained in paragraphs 10 to 14 (both inclusive)' shall apply to any formulations not specified in Category I, Category II or Category III of the Third Schedule. It is plain that the provisions of the Order except paragraphs 10 to 14 which have been expressly excluded, are specifically made applicable to formulations which are not specified in the Third Schedule. It is, therefore, clear that the provisions of para 21 which in terms are meant to control sale prices of formulations specified in the Third Schedule as also the other provisions of the Order which in terms may be of limited application are specifically made applicable to all formulations as defined in the Order except only paragraphs 10 to 14 which have been expressly excluded. It is by virtue of para 18 that the prohibition contained in para 21 has been made applicable to formulations not specified in the Third Schedule. This is also the logical view to take. The contrary view would lead to the conclusion that in spite of the price fixation made for the formula-

tions not specified in the Third Schedule, there is no prohibition made against its sale for an amount in excess thereof with the result that the price fixation would be an exercise in futility. The Drugs (Prices Control) Order, 1987, which has replaced the Drugs (Prices Control) Order, 1979, contains paras 18 and 21 differently worded to show clearly that such an argument is now not even available under the 1987 Order.

We are clearly of the opinion that the High Court misconstrued the provisions of the Drugs (Prices Control) Order, 1979, to take the view that none of the aforesaid two medicines, namely, Largactil and Hipnotex are 'formulations' as defined in Section 2(f) of the Drugs (Prices Control) Order, 1979; and that the sale of these two medicines for an amount in excess of the maximum retail price fixed is not punishable under para 21 read with para 18 of the Order.

The only question now is of the order we should make in this matter. Shri T.S. Krishnamurthy Iyer, learned counsel for the respondents very fairly stated that the construction we have made of the several provisions of the 1979 Order including paras 18 and 21 thereof cannot be seriously disputed. However, he contended that the respondents had raised several defences none of which has been considered by the High Court since it acquitted the respondents only on the construction it made of these provisions. He, therefore, argued that setting aside the High Court's order should not automatically lead to restoration of conviction and sentence made by the trial court since other defences raised by the respondents remain for consideration. He suggested that in view of the lapse of several years from the date of the alleged offence and the peculiar facts of this case, we may merely set aside the High Court's order but not restore the conviction and sentence of the respondents. He pointed out that the customer to whom the medicines are alleged to have been sold at an excess price is himself a member of the nursing staff of a hospital and it is unreasonable to take the view that he would pay Rs.99 for 15 tablets of Largactil against its retail price of Rs.9 only, particularly when he had been purchasing these drugs for a long time. We find merit in the contention of learned counsel for the respondents and we are inclined to adopt the course suggested by him in the light of peculiar facts of this case. In our opinion, it would be inappropriate after the lapse of several years to send back the case to the High Court for deciding the remaining defences raised by the respondents which would further prolong conclusion of the trial. It is also clear that without rejecting the other defences, it is not possible to uphold the conviction and sentence

A awarded by the trial court. In such a situation, the course suggested by Shri T.S. Krishnamurthy Iyer, particularly in view of the stand taken by Shri P.S. Poti on behalf of the appellants, that the appellants are more keen to know the correct meaning of the provisions of the Order, appears to be the proper course to adopt in the present case.

B Consequently, we reject the High Court's construction of the provisions of the 'Order' and hold that allegations in the present case, if proved, would amount to a contravention of para 21 read with para 18 of the Drugs (Prices Control) Order, 1979, which is punishable under Section 7 of the Essential Commodities Act, 1955. However, for the reasons already given, we do not interfere with the acquittal of the respondents. The appeal is disposed of accordingly.

C

Y. Lal

Appeal allowed partly.