
(1995) 08 BOM CK 0026

In the Bombay High Court

Case No : Criminal Miscellaneous Application No. 272 of 1994 and 1 of 1995

Anand Mohan Chhaparwal and etc.

APPELLANT

Vs

State and another

RESPONDENT

Date of Decision : 03-08-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 397, 468, 482

Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 — Section 3, 7

Citation : (1996) CriLJ 597

Hon'ble Judges : T.K. Chandrashekhara Das, J

Bench : Single Bench

Advocate : M.S. Usgaoncar and V. Menezes, for the Appellant; G.U. Bhobe, Public Prosecutor, for the Respondent

Judgement

1. These applications were filed by the accused in Criminal Case No. NC/87/91/D of 1991 on the file of the Judicial Magistrate F.C., Panaji. Criminal Misc. Application No. 272/94 was filed by accused No. 2 and Criminal Misc. Application No. 1/1995 was filed by accused No. 1. The accused No. 1 is the Advertising Agent and accused No. 2 is the manufacturer of the drug.

2. The respondent No. 1 had filed a complaint before the J.M.F.C., Panaji u/s 200 of Cr.P.C. alleging that certain advertisement appeared in the Navhind Times, English Daily, Panaji on 18th February, 1990 which contained objectionable advertisement punishable u/s 7(a) of the Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954 (hereinafter called the Act). The learned Magistrate has taken cognizance of the complaint and issued process to the petitioners. On receipt of the process of the Court both the petitioners herein filed application before the learned Magistrate contending inter alia that the application is barred by limitation. They contended before the learned Magistrate that though the advertisement in question appeared on 18th February, 1990 the complaint was filed only on 21st February, 1991 which is three days beyond one year as prescribed u/s 468 of Cr.P.C. The learned Magistrate rejected the

objections finding that the complaint was within time. The learned Magistrate based his finding on the fact that though, if time computed from the date of advertisement is beyond three days, the actual time spent for finding out the actual identity and address of the persons if excluded the complaint was within time.

3. Against this order the petitioner in Criminal Misc. Application No. 272/94 filed a revision application u/s 397 of Cr.P.C. as Criminal Revision Application No. 18/94 before the learned District and Sessions Judge, Panaji. The learned Sessions Judge also took the same view of the learned Magistrate and confined the order passed by the learned Magistrate and dismissed his revision application.

4. The petitioner in Criminal Misc. Application No. 272/94 approached this Court to challenge both the orders of the learned J.M.F.C. and the learned Sessions Judge u/s 482, Cr.P.C., whereas the petitioner in Criminal Misc. Application No. 1/1995 has filed this application u/s 482, Cr.P.C. challenging the order passed by the learned Magistrate dated 21st February, 1991. That is how these two revision applications have come up for consideration before this Court jointly.

5. At the time of issuing rule, this Court has restricted it only on the point of limitation in Crl. Misc. Application in 272. But at the time of issuing notice on rule in Criminal Misc. Application No. 1/95 this restriction was not imposed. Therefore the learned Senior counsel for the petitioners, Shri Usgaoncar has been permitted to argue these petitions both on merit and also on limitation.

6. Though I find no illegality in the reasoning and finding of the Courts below which they have taken on the question of limitation, I find considerable force in the argument of the learned counsel Shri Usgaoncar on the merit of the case. He strenuously argued that the complaint before the learned Magistrate did not constitute the offence against the petitioner u/s 3(b) punishable u/s 7(a) of the Act.

7. In order to appreciate the argument of Shri Usgaoncar I have to deal with it in a little length. To begin with, we have to refer to the advertisement itself in question. The advertisement runs as follows :-

"For Men Only 303 Capsules (Three not three)

contains highly potent and time tested HERBS & MINERALS in combination with the celebrated ingredients MOTIBHASMA, KESHAR, KASTURI traditionally known for their efficacious therapeutic properties for enhancing vigour and vitality. Now this ancient AYURVEDIC formula can be used by you too as once used by RAJAS, MAHARAJAS AND NAWAB for ADULT MALES only. Available at all leading Chemists.

303

SHATAKARAM PHARMACEUTICALS P.O. BOX. NO. 25 GWALIOR 474001
STOCKIST : SURAJ PHARMA Station Road Hubli."

The learned counsel submits that the advertisement in question did not attract the mischief of Section 3(b) read with Section 7(a) of the Act as it does not suggest or calculate to lead to the use of that drug for any of the clause enumerated in Section 3(a) to (d) of the Act. For convenience Section 3 of the Act is extracted below :

"3. Prohibition of advertisement of certain drugs for treatment of certain diseases and disorders. - Subject to the provisions of this Act, no person shall take any part in the publication of any advertisement referring to any drug in terms which suggest or are calculated to lead to the use of that drug for -

(a) the procurement of miscarriage in women or prevention of conception in women; or

(b) the maintenance or improvement of the capacity of human beings for sexual pleasure; or

(c) the correction of menstrual disorder in women; or

(d) the diagnosis, cure, mitigation, treatment or prevention of any disease, disorder or condition specified in the Schedule, or any other disease, disorder or condition (by whatsoever name called) which may be specified in the rules made under this Act."

In this case we are concerned only with sub-clause (b) of Section 3 of the Act. If we glance through the section it can be seen that in order to attract the said section, the advertisement should suggest or calculate to lead to the use of a particular drug for the maintenance or improvement of the capacity of human beings for sexual pleasure. On a plain reading of this sub-section (3)(b) of the Act it is easily discernible that unless the advertisement creates an impression the readers of the advertisement and influence their mind that the drug is intended to suggest or calculated to lead to the use of the same for sexual pleasure, the section will not be attracted. As we have seen in the advertisement, it is nowhere mentioned about sex. It is of course mentioned that the drug is confined only to the menfolk to improve their vigour and vitality. It is common knowledge that an advertisement either visual or audio may create different reaction in different men and women. In normal case if an advertisement is susceptible or possible to convey to the general public more than one idea, the criminal jurisprudence will take cognizance only of those impressions which are capable of interpretation in favour of the accused. If the advertisement is capable to convey an idea different from what the complainant had and the same is in favour of the accused undoubtedly the advertisement should be interpreted in favour of the accused. Therefore upon the psychology and mental fabric of an individual reader, it may not perhaps be ruled out the possibility of having the impression about advertisement like one had in the mind of the respondent. But that alone will not lay a foundation to sustain a criminal complaint before a Criminal Court against an accused. In other words the Court cannot take cognizance of a criminal offence merely on conjectures or surmises.

The learned counsel, Shri Usgaoncar in fortifying his argument has cited a decision in Chander Bhan Harbhajan Lal Vs. State of Punjab, , where it is established that an ingredient of a criminal offence is not established in a complaint, this Court can interfere u/s 482 of Cr.P.C. He contended that based on paragraph 102 of the aforesaid decision the case in hand has not satisfied the 7 important points to be borne in mind in entertaining a criminal complaint. The Supreme Court in paragraph 102 dealt with it exhaustively, which said (para 552 Cri LJ 108 :

"... the inherent powers u/s 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised." The learned counsel for the petitioners vehemently argued that even one point in the list shown by the Supreme Court has not been made out in the complaint.

8. The learned counsel for the petitioners then took me through a decision of the Karnataka High Court which deals with the very same Act in a case in The State of Karnataka Vs. R.M.K. Sivasubramanya Om, . Certain observations in that judgment are very relevant to be referred to in this case in hand also. In discussing the implication of the advertisement in question in that case in the background of Section 3(b), the Division Bench of the Karnataka High Court has observed thus in paragraph 14 :-

"..... The publication of an advertisement, to amount to an offence, should have reference to a drug and that should have been suggested as a cure for certain ailments mentioned in Cls. (a) to (d) of Section 3 The whole object of the Act is to save ignorant people from being duped to purchase medicines just because their effect is advertisement in eloquent terms.

But while making that act punishable the law has laid down certain norms. To bring the act of an accused within the mischief of law all the ingredients of that offence will have to be strictly proved by the prosecution."

Then the Division Bench of the Karnataka High Court continued to hold in paragraph 15 as under :-

"In Ex. P-1(a) though it was advertised that "Amazatone" is a special invigorative nervine tonic useful for all and will help to restore, regain and retain vim, vigour and vitality, it is nowhere even obliquely stated that it is a cure for impotence or that it helps the maintenance or improvement of the capacity of human beings for sexual pleasure."

Shri Usgaoncar then drew my attention to another decision of this Court reported in Smt. Kantirani Jayanarayan Mangal Vs. The State of Maharashtra, . It is also a

case coming under the Act. The learned single Judge of this Court was examining the scope of Section 3(b) of the Act. In paragraph 17 the learned Judge observed thus :-

"But in view of the aims and objects of the Act mentioned in the preamble, I am inclined to think that the main purpose of the Act is to prohibit such magic remedies and so restrictions will have to be made on such advertisements containing reference to magic cure. Remedies provided for health, sociability or developing beauty are not hit by the section. The remedies referred for immediate and forthwith cure giving hopes to the customers in a magic fashion are prohibited."

9. In view of the above proposition of law with regard to the scope of Section 3(b) of the Act propounded by the High Courts including our High Court, I find that there is considerable force in the contention of the learned senior counsel. Shri Usgaoncar. Section 3(b) does not prohibit any advertisement which may suggest or calculate to lead to the use of that drug or medicine to improve his vitality or vigour. Going by the dictum laid down by this Court, the sociability and beauty is not a thing that is prohibited under the Act. The advertisement in question only deals with the vitality and vigour of men. It is common knowledge that man's beauty lies in his vigour and vitality also. Therefore this advertisement in question however deals with only the beauty of the men and speaks nothing about sexual pleasure of the men in order to attract the application of Section 3(b) of the Act.

10. In view of the above discussions I find that even though the complaint is maintainable on the point of limitation as observed by the learned Magistrate and the learned Sessions Judge, on merits I find that the complaint did not constitute an offence to attract Section 3(b) read with Section 7 of the Act. Therefore, the issue of process by the Magistrate against the petitioners is clearly an abuse of the process of the Court. It is needless to say that when a complaint does not constitute necessary legal ingredients for an offence it is illegal for a Magistrate to take cognizance of that offence. Therefore in my view the complaint filed before the Magistrate does not disclose any offence under the Act. Therefore the process issued against the petitioners has to be set aside.

11. In the result the petitions are allowed. The order under revision are set aside and the process issued by the learned Magistrate stands cancelled.

12. In the circumstances of the case there will be no order as to costs.

13. Petition allowed.