
(2014) 11 BOM CK 0117

In the Bombay High Court

Case No : Writ Petition No. 1001 of 2002

Maresh Ramnath Sonawane

APPELLANT

Vs

The Union of India

RESPONDENT

Date of Decision : 27-11-2014

Acts Referred:

Cinematograph Act, 1952 — Section 5A

Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 — Section 2(b), 3, 4

Penal Code, 1860 (IPC) — Section 292, 79

Citation : (2014) 11 BOM CK 0117

Hon'ble Judges : B.P. Dharmadhikari, J;A.M. Badar, J

Bench : Division Bench

Advocate : S.B. Deshpande, Assistant Solicitor General, M.A. Deshpande, Assistant Government Pleader, S.R. Andhale, A.M. Kanade, S.B. Agrawal, S.V. Adwant, C.V. Korhalkar and R.R. Mantri, Advocate for the Respondent

Judgement

B.P. Dharmadhikari, J.

1. Matter is listed as an old matter to be taken up by according the precedence on Thursday as per roster assignment.

2. The petitioner -Shri M.R. Sonawane, a practicing Advocate of this Court now, has filed this petition in February 2002, when he was a student. The grievance in the petition is about need of taking appropriate steps to prohibit self-medication or self-treatment. The petition has been amended only once i.e. in February 2003. The prayers in the petition are as under :-

(A) It is, therefore, prayed that rule may be issued to respondents & the respondents may be directed to stop such misleading advertisements which are harmful to general public.

(A[a]) It is, therefore, prayed that, the respondent nos.2[A] and 3 may kindly be directed to initiate prosecution against the concerned advertiser as provided in

the cable television networks [regulation] Act, 1995, and Drugs and Magic Remedies [objectionable advertisements] Act, 1954.

(A[b]) It is, therefore, prayed that, the respondent nos. 1 to 2[a] may kindly be directed to ban manufacturing, selling, advertising, drug namely phenylpropanolamine throughout India with immediate effect in the interest of public at large.

3. This Court has passed a speaking order on 31st March 2003, noticing briefly the grievance made and on that day, noted statement made on affidavit by Joint Commissioner, Food & Drugs Department of Maharashtra State at Aurangabad. Certain directions were issued to respondent nos.1 and 3, as also respondent no.17, to take appropriate action against telecast of advertisements assailed by the petitioner in petition. We find it appropriate to re-produce that order :-

" Heard Shri Mahesh Sonawane party-in-person, who has filed this writ petition as public interest petition whereby the petitioner is seeking writ from this Court prohibiting the respondents from displaying advertisements in glorified forms regarding the drugs and medicines etc.

2. The respondents in this writ petition are Union of India, Government of Maharashtra, Television Channels who are telecasting the advertisements, the manufacturers of the said drugs but, the main respondents in this petition being respondent nos.1, 2, 2A, 17, this writ petition was listed for hearing on 21st February, 2003. Shri Godhamgaonkar, learned Standing Counsel appearing for respondent nos.1 and 3 had sought time of four weeks for filing affidavit. Accordingly, time was granted and the matter is placed before us for further hearing today. In the meantime, affidavit on behalf of the Joint Commissioner, Food & Drugs Department, Maharashtra State, Aurangabad, came to be filed wherein the Joint Commissioner has made a statement that, -

"4. I further say and submit that this deponent has already initiated action against the manufacturer of the Onergy capsule for issuing the warning under letter No. Takid/771/2002/16 dated 25th October 2002. The said warning letter dated 25-10-2002 is annexed herewith and marked as Exh.R-2. After receipt of the reply from the manufacturer of Onergy capsule replying Respondent will scrutinise the matter in the light of section 3 of the DMR Act and if the deponent is satisfied that the manufacturer has violated section 3 by advertising the Onergy capsule on T.V. Channel in that case, further necessary action for banning the advertisement will be initiated by the department.

5. I further say and submit that the deponent will verify the involvement of manufacturer in the advertisement of drugs which are mentioned by the petitioner in the light of section 4 of the Act and if it is found that the advertisement gives false impression regarding true character of the drug etc., in that case, appropriate action will be taken against the manufacturer and the said advertisement will be banned from exhibiting on T.V. Channel. "

In the above statements, the said respondent has assured this Court that proper steps will be taken in that behalf. We accept the statements made in the affidavit of the Joint Commissioner and permit him to take appropriate action as per the assurance given in the affidavit. For that purpose, we give two months' time. We hope and trust that within the specified time, the concerned authorities will take concrete steps and take action in accordance with law against the persons concerned.

3. Similarly, we direct the respondent nos.1, 3 and 17 to take appropriate action against the telecast of advertisements as alleged by the petitioners in the petition. Though, time was granted on 21st February 2003, no affidavit is filed and therefore, we have to pass the order that the respondent nos.1, 3 and 17 shall take concrete steps to see that such advertisements are not telecasted if the telecast of those advertisements violate any of the provisions of law and if the respondent nos.1, 3 and 17 are satisfied that those advertisements being telecasted through television channels should be stopped or should be directed to be modified, they shall do accordingly. For this purpose, we give two months' time to respondent nos.1, 3 and 17 and they are directed to file progress report in the shape of affidavit within the aforesaid time. Though, initially we thought not to adjourn the matter on account of non-filing of affidavit, but considering larger public interest in the matter, we are of the view that some more time is required to be granted. Therefore, we grant time as sought for. We hope and trust that the respondent nos.1, 3 and 17 will demonstrate before us their honest and sincere efforts in this regard.

4. We direct that the copies of affidavit / report be served to the petitioners and co-respondents well in advance. The learned Standing Counsel Shri Godhamgaonkar assures that the date of serving of the report will be intimated to the petitioners and the petitioners will personally collect the copies from the office of the Standing Counsel, Union of India.

5. Put up the matter for further hearing on 21st June 2003."

4. After this order, matter was again looked into on 10-6-2003 and thereafter Rule was issued on 26-6-2003.

5. Though the petitioner has made reference to various advertisements in relation to drugs like Tablet D" Cold total, Syrup D" Cold and Cough, Gelusil MPS antacid, Glycodin Cough Syrup, Benadryl Cough Formula, Onergy Capsule, in the present matter, we find it appropriate to refer to only one drug i.e. Tablet D" Cold total, to understand the grievance made.

6. Mr. Sonawane has invited attention to judgment of Hon"ble Apex Court, in the case of Hamdard Dawakhana and Another, Kalipada Deb and Another, Lakshman Shripati Itpure @ Lakshman Shripati Impore and A.B. Choudhri and Another Vs. The Union of India (UOI) and Others, , particularly paragraphs 20 and 21, where the Hon"ble Apex Court has considered challenge to constitutional validity of Section 3 of the Drugs and Magic Remedies (Objectionable Advertisements) Act,

1954 [For short, hereinafter referred to as "1954 Act"]. He contends, that the entire Act has been found to be valid and the Hon''ble Apex Court has held that the Act covers all advertisements which may promote self-medication or self-treatment. He has also invited attention to the pleadings in petition about tablet D'' Cold total. According to him, the advertisement misleads a common man and contains false and misleading material. He further submits, that the positive impact or aspect of said drug is written in English as well as in Hindi, on one side of the package of the tablet, while the precautions to be taken are written only in English. According to him, this is misleading and suppression of fact or then, giving of half truth and, therefore, prohibited under Rule 6(1)(d) of Cable Television Network Rules, 1994.

7. Mr. Sonawane has also invited attention to a Division Bench judgment of this Court, in the case of GMT Teleshopping Private Limited Vs. Union of India and others, , to show that the above mentioned 1960 judgment of Hon''ble Apex Court has been followed. He further contends that respondent no.2A i.e. Food & Drug Administration has till date, not taken any coercive action against any manufacture or against any television cable network or channel for telecast of or for publishing the advertisements which violate above mentioned 1954 Act. He has also urged that some of the medicines so advertised contain harmful ingredients. According to him, those chemicals or their use as a component of any medicine is already prohibited elsewhere in other countries and still the same are advertised and a common man, who is impressed after watching telecast, purchases it directly from the medicine shop and falls prey to it.

8. He also invites attention to the fact that this Court has called for a report from respondent no.2A -Food and Drug Administration, and the report submitted before this Court, on 20th June 2003, by the said authority, does not look into any of these challenges.

9. He contends, that in India, sale of medicines directly to customer or across the counter is not open and it is regulated. The drugs are either required to be supplied on prescription of a Doctor or then, administered under supervision of a Doctor. Hence, manufacturers have rightly employed or taken services of Salesmen / Medical Representatives to contact such Doctors. Mr. Sonawane submits that thus, there is no need of having such advertisements for viewing by general public on any television channel.

10. Adv. Mr. Mantri appearing for respondent nos.10 and 11, and Adv. Mr. Korhalkar for respondent no.9, state that the petition has been filed under wrong impression. According to them, medicines are being manufactured after proper license in country and hence, no objection to their components or ingredients can be raised. They further submit that 1954 Act does not cover all medicines and hence, reference thereto or recourse thereto is also not open. Judgment delivered by the Hon''ble Apex Court in the case of Raj Kapoor Vs. Laxman, , is relied upon, to urge that once it is shown that drug is being manufactured under a valid license, and the advertisement is allowed to be shown on television, by a

competent authority, the contentions of present nature are not available and cannot be looked into.

11. Adv. Mr. Mantri submits, that the Drugs and Cosmetics Act, 1940 [For short, hereinafter referred to as "1940 Act"] vide its Schedule H, gives list of drugs which can be sold only on prescription and vide its Schedule G, enlists drugs which need to be taken under medical supervision. He contents, that there are several medicines or drugs which need not be purchased under prescription or which need not be taken by a patient under medical supervision. He has invited attention to the medicines like Vicks, Balm, some Ointments and other Ayurvedic preparations. His submission is, in this situation, when respondent no.2A has given a report to this Court, the present grievance, which is too general in nature, cannot be entertained.

12. Both learned Counsel submit, that if the petitioner is offended or aggrieved by any particular advertisement, he can make grievance in relation thereto, but in the present matter, no cognizance can be taken by this Court.

13. The learned AGP Mrs. M.A. Deshpande appearing for respondent nos.2 and 2A -State of Maharashtra, relies upon reply affidavit, as also report submitted by respondent no.2A to oppose the challenge.

14. The learned ASGI Mr. S.B. Deshpande has appeared for respondent no.1. Mr. Sonawane has submitted that he was asked to collect a copy of reply from the office of Counsel then representing respondent no.1 and accordingly he has collected it. However, when he collected the copy, it was not sworn. No such reply is placed on record in the present matter. We find that the respondent no.1 does not appear to have filed any reply before this Court.

15. It is, in this background, that we have considered the controversy. The judgment of Hon''ble Apex Court, in the case of Hamdard Dawakhana and another (supra), shows that there the validity of 1954 enactment has been upheld. While so doing, Hon''ble Apex Court has observed, that the Act read as a whole, does not merely prohibit advertisement relating to drugs and medicines connected with diseases expressly mentioned in Section 3 of the Act, but they cover all advertisements which are objectionable or unethical and are used to promote self-medication and self-treatment. Hon''ble Apex Court has observed, that "This is the content of the Act". It is, therefore, obvious that no argument to the contrary can be entertained by this court. Section 2(b) thereof, which defines ""drug"", is an inclusive definition which has got very wide sweep. It, therefore, does not restrict itself to any particular type of medicine or drugs. Thus, advertisements cannot be used to promote self-medication or self-treatment of any drug.

16. At this stage, it is necessary to refer to the judgment relied upon by Adv. Mr. Mantri, in the case of Raj Kapoor Vs. Laxman (supra). There, Hon''ble Apex Court has found prosecution under Section 292 of Indian Penal Code, unsustainable. The Hon''ble Apex Court has found that the film ""Satyam Shivam Sundaram""

had a valid certification under Section 5A of Cinematograph Act, 1952. In the light of said provision, Section 79 of IPC was found to be exculpatory and, therefore, prosecution under Section 292 was quashed. Thus, this judgment shows that the film had necessary certification from Censor Board and, therefore, a provision in IPC which helped a holder of such certificate as he was acting in good faith or was justified by law in exhibiting the film, was found relevant. In the present matter, the certification of advertisement by Censor Board under Cinematograph Act by itself cannot be decisive. If self-medication or self-treatment is to be avoided, and the advertisement is aimed at encouraging it or contains that potential, the advertisement may be required to be considered by some other expert Agency or Board before it is so released. The judgment of Hon"ble Apex Court, therefore, has no application in the present matter.

17. Section 3 of 1954 Act deals with prohibition of advertisement of certain drugs for treatment of certain diseases and disorders. The said Section prohibits a person from taking part in the publication of any advertisement referring to any drug which suggests or is calculated to lead to the use of that drug for the purposes which are stipulated in clauses (a) to (d). Section 4, subject to other provisions of the 1954 Act, prohibits a person from taking part in such publication if the advertisement contains any matter which directly or indirectly gives a false impression regarding the true character of the drug or makes a false claim for the drug, or is otherwise false or misleading in any material particular. Thus, when Section 3 may be read as restricted to particular type of disorders or drugs, Section 4 appears to be a general prescription with wider scope. Though some arguments were advanced before us, about the phrase ""regarding the true character of the drug"" employed in Section 4(a), for the present adjudication, we do not find it necessary to go into it as none of the respondents have suggested that the advertisements pointed out by the petitioner are permitted by any provision under 1954 Act.

18. The Division Bench judgment of this Court, in the case of GMT Teleshopping Private Limited (supra), shows that, there, the advertisement was of product "STEP-UP Body Growth Formula" on various television channels. The Division Bench was considering Section 3 of 1954 Act, and was not required to look into Section 4 thereof. However, the object of 1954 Act i.e. to prevent self-medication finds reiteration there by this Court. Again, further observations show, that television being very powerful media and viewers include illiterate, nibe or innocent people likely to accept advertisement to be true, the telecast of such advertisement may have adverse effect. These observations, though made while considering provisions of Section 3 of 1954 Act, also hold good in the present matter. It cannot be disputed, that all such advertisements to which Mr. Sonawane has invited our attention, are aimed at ultimate consumer. His contention, that the marketing of such drugs or medicines has to be by trained persons like Medical Representatives and that too, by contacting the qualified Doctors, also cannot be likely brushed away. Whether, such advertisements showing capacity to grant instant relief give a false impression regarding the true

character of the drug or contains a false claim for the drug or is otherwise false or misleading in any material particular necessitates perusal of concerned advertisements. But, petitioner himself has stated that since last about two weeks such advertisements are not appearing on any channel. If the respondents want to further direct sale of drugs without any prescription, or its use without any intervention of Doctors, the situation may warrant its viewing to find out whether it attracts bar under S. 4 of 1954 Act.

19. The question, whether particular drug or medicine can be allowed to be advertised so as to make the masses aware about its availability or impact, or then, the advertisements should not be allowed and the canvassing thereof may be restricted only to qualified medical practitioners, definitely has some policy implications. The present petition has been filed in the year 2002 and advertisements then available on channel had been pointed out. Mr. Sonawane has fairly stated that thereafter, some manufacturers have withdrawn their advertisements.

20. The issues raised in the present Writ Petition, treated as Public Interest Litigation, are of vital importance for common man and society at large. During arguments, Mr. Sonawane has attempted to invite our attention to certain documents to show that in recent past, some new advertisements were appearing on different channels. In the light of observations made above, we find that a telecast of such advertisements in relation to drugs or medicines only after clearance thereof, by Censor Board under Cinematograph Act, 1952, may not be in public interest. There is no material on record, to show that the Cinematograph Act empowers Censor Board to consider the provisions of 1954 Act. Similarly, as Censor Board is not party, it is not clear, whether the Members thereof consider breach of said enactment. Coupled with this, may be a question of their technical competence to understand the exact nature or impact of such advertisements on masses.

21. The report filed by respondent no.2A on record, on 26-6-2003, does not deal with all these facets or aspects. It only speaks of opportunity of hearing extended to various manufacturers and then a general remark, that the television channels and manufacturers of the formulations would be directed by the respondent, to display the static or crawling warning throughout length of advertisement wherever required. Again, what result such warning would achieve, is doubtful. Whether it offers immunity from violation of S. 4 of 1954 Act. The legislative object behind avoiding self-medication or self-treatment by using drugs must be kept in mind while undertaking this exercise. The report of respondent no.2A before this Court ignores this object.

22. In this situation, after hearing all learned Counsel as also Mr. Sonawane, we find it necessary for respondent nos.1, 2 and 2A, to evolve a comprehensive policy. The authorities have to first decide whether all drugs or medicines can be allowed to be advertised on such channels and if such advertisement is to be permitted, what should be the content thereof. The contents cannot be contrary

to provisions of 1954 Act, be it Section 3 or Section 4. If advertisements can be permitted, the fact that such advertisements encourage self-medication or self-treatment, will also be required to be kept in mind and adequate safeguards in that respect may be required to be provided. Perhaps, a regulatory authority may also then be essential. Such regulatory authority may, on lines with Censor Board, also clear the advertisements of a particular drug or medicine, if such advertisement is not contrary to law & is permitted by the respondents. But as all these questions need a deeper scrutiny and a case specific study is essential, we are not inclined to issue any positive directions at this stage. We direct respondent nos.1 and 2 to consider these issues and to take suitable decision upon it within a period of six months from today.

23. However, if petitioner or any citizen comes across any such advertisement on any channel and finds it violating any statutory provision, including bar under Sections 3 and 4 of 1954 Act, such aggrieved person can make appropriate representation in relation to that advertisement, to respondent no.2A or to the Drug Controller of India, as also to respondent no.17. If such grievance is received by any of these authorities, the authority shall be duty bound to take suitable decision upon it, within a period of two months of its receipt. The decision reached shall be communicated to the complainant by R.P.A.D. within said period.

24. The petition also contains a prayer which has got bearing on manufacturing activity and, therefore, contents of a particular drug. Again, complaint of this nature can be made by any citizen in relation to any drug which is found to contain the prohibited or injurious ingredient. The aggrieved person, therefore, must make a suitable representation even in this respect, to competent authorities and then approach a competent court and seek necessary relief therefor. If petitioner is still aggrieved by any such particular medicine or drug, like "phenylpropanolamine". we give him liberty to place his grievance before competent authority similarly. Said authority & competent forum shall examine it, and take a responsible decision upon it, within 4 weeks of its receipt. We hereby caution such authority & forum that any breach of this direction will be viewed as contempt of this Court & any negligence in taking the decision, may be viewed as dereliction of duty towards society at large.

25. With these observations and directions, we partly allow the Writ Petition. Rule made absolute in the above terms. No costs.

26. Before parting with judgment, we place on record, our appreciation for services rendered by Mr. Sonawane to the Society.

27. The amount deposited by Mr. Sonawane, in this petition, with interest accrued upon it, shall be refunded to him.