
(1955) 07 CAL CK 0031
In the Calcutta High Court
Case No : Criminal Revision No. 456 of 1955

Nibaran Chandra Das

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 29-07-1955

Acts Referred:

Evidence Act, 1872 — Section 105

West Bengal Undesirable Advertisements (Control) Act, 1948 — Section 3, 6

Citation : AIR 1956 Cal 90 : (1956) CriLJ 513 : 60 CWN 392

Hon'ble Judges : Debabrata Mookerjee, J

Bench : Single Bench

Advocate : N.C. Sen, for the Appellant; Jatish Chandra Guha, for the Respondent

Judgement

Debabrata Mookerjee, J.—This is a petition for revision of an order dated 20-1-1955, made by a Presidency Magistrate, Calcutta convicting the petitioner u/s 5, West Bengal Undesirable Advertisements (Control) Act, 1948, and sentencing him to pay a fine of Rs. 200/-, in default to suffer rigorous imprisonment for 2 months.

2. The facts briefly stated are that the petitioner is the printer and publisher of a monthly journal known as "The Modern Review" which in its issue of June 1954 printed and published an advertisement under the heading "Outstanding Products of Hering and Kent". It was a full-column advertisement in which several products of Hering and Kent were advertised. One item related to a medicine called "Novum" which was advertised in these words,

"The most potent and effective" "period regulator" for females, indicated in the treatment of Amenorrhoea (Periodic Disorders). Restores the female periodic cycle surely, quickly, safely. NOVUM SIMPLEX, Rs. 12-8, NOVUM PORTE. Rs. 50/-; NOVUM SUPER CONCENTRATED indicated only for menopausal trouble & estrogenic hormone deficiency Rs. 21 CIVITA: MUST BE TAKEN tonic with NOVUM to prevent side reactions and hasten results. Rs. 19 per packet of 100; Rs. 4-12 per packet of 25. Also available".

3. The excerpt which I have set out above is from a list of several other medicaments which were advertised in that issue of the Journal. The prosecution alleged that the advertisement was printed without the previous sanction of the Government of West Bengal in the Department of Public Health who are the appointed authority in that behalf u/s G(c) of the Act. Evidence was adduced to prove that the petitioner was the printer and publisher of the Modern Review, six copies of which were seized from the Prabashi Press where the journal was printed.

A witness from the Department of Public Health was called to depose that permission had not been granted by the Department to the printing and publishing of the advertisement in question. In these circumstances, the petitioner was charged u/s 5, West Bengal Undesirable Advertisement (Control) Act 1948 for having contravened the provisions of Section 3 of that Act.

4. The petitioner pleaded not guilty to the charge preferred against him and his defence appear to be that he obtained the advertisement from Messrs. Hering and Kent of Bombay, Manufacturers, Chemists and Druggists through an advertisement agency.

It was further the defence case that the manufacturers of the drug, namely, Messrs. Hering and Kent, held a licence under the Drugs Ad 1940 for its manufacture, and that they are recognized in the All India Pharmaceutical Directory published by the Bombay Branch of the Indian Pharmaceutical Association, as manufacturers, chemists and Druggists.

5. The learned Magistrate while convicting the petitioner of the offence charged, did not believe or discountenance the defence case that Novum is the product of a recognised Manufacturing Chemist but nevertheless he held that the petitioner had failed to discharge the onus which lay heavily upon him of proving that it was an advertisement or the instructions contained therein were permitted under the Drugs Act, 1940 or the rules thereunder and in that view he convicted and sentenced the petitioner as stated above.

6. The object of the Act as set out in the Act itself is to control the publication of advertisement relating to contraceptives and the medical treatment of certain diseases and disorders. Section 3 of the Act contains prohibition against issue of certain types of advertisements. Sub-s. (2) of 8. 3 pre-vides,

"No person shall print or publish, or cause to be printed or published for distribution or exhibition to the public, or circulate or cause to be circulated, or exhibit or cause to be exhibited, to the public or to any person any advertisement referred to in Sub-section (1)".

7. Clause (b) of Sub-section (1) of Section 3 which to the relevant provision is in these words,

"No person shall by means of any advertisement offer to treat any person for, or indicate the line of treatment of any venereal disease, sexual disorder,

irregularity of menstruation or any other prescribed disease, infirmity or abnormality or offer to prescribe, any remedy therefore or give or offer to give any advice in connection with the treatment thereof".

8. Section 5 of the Act provides the penalty and it says,

"Whoever contravenes any of the provisions of Section 3 shall, on conviction, be punishable with imprisonment which may extend to one year, or with fine which may extend to one thousand rupees, or with both".

9. The citations above make it clear that the offence of which the petitioner has been convicted in the present case is the offence defined in Section 3. Therefore Section 3 is self-contained so far as the elements or ingredients of the offence are concerned.

10. In Section 6 certain exceptions are provided which when proved will repel application of the Act. Clause (d) of that section is relevant to the present purpose and it reads thus,

"Nothing in this Act shall apply to any advertisement, label or set of instructions which is permitted under the Drugs Act, 1940 (23 of 1940), or any rules made thereunder.

11. As I have already observed, the learned Magistrate convicted the petitioner holding that the defence had failed to discharge the onus that lay upon it to prove that the advertisement in question was one permitted under the Drugs Act of 1940 or any rules made thereunder.

12. Mr. Sen appearing on behalf of the petitioner has argued two points, first, that the learned Magistrate misdirected himself in holding that the burden of proving that the advertisement in question was permitted under the Drugs Act lay upon the accused; in the second place, he has argued that the West Bengal Undesirable Advertisements (Control) Act itself contravenes the provisions of Article 19(1)(g) of the Constitution and consequently ultra vires of the Constitution of India and is consequently of no effect.

In my view, it would not be necessary to examine the larger question of constitutional validity of the Act inasmuch as I consider the first ground to be sufficiently substantial.

13. Mr. Guha appearing on behalf of the State has argued that taking the Act as a whole the intention seems to be that undesirable advertisements relative to contraceptives or to the manner of treatment of certain diseases and disorders were intended to be controlled and, therefore, if a person charged under the Act pleaded circumstances which would lift the case out of the purview of the Act, it was the duty of such person to place before the Court facts and circumstances, by way of discharge of that duty.

14. The learned Magistrate has proceeded mainly on the footing that the petitioner failed to discharge the onus which lay upon him of proving that the

advertisement in question was permitted under the Drugs Act or the rules made thereunder. As a matter of fact, there has been no discussion by the learned Magistrate as respects the merits of the matter and there is no express finding reached that the advertisement is such as could reasonably be brought within the mischief of the Act.

15. Reliance has been placed by the learned Magistrate upon Section 105, Indian Evidence Act which reads as follows:

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence is upon him, and the Court shall presume the absence of such circumstances".

16. In this case we are concerned only with the latter part of the section which provides that a Court shall presume the absence of circumstances bringing a case within any special exception or proviso in any law defining an offence. As a matter of language, it is quite clear that the burden of proving circumstances bringing a case within any special exception or proviso contained in any law defining the offence is upon the person charged.

The position therefore seems to me that the onus would have been upon the accused to prove that the advertisement or the instructions contained in it were permitted under the Drugs Act, only if cl. (d) of Section 6 was a part of the offence as defined in Section 3 of the Act. But the citations above make the position perfectly clear that Section 3 prohibits an advertisement which offers to treat a person suffering from certain kinds of diseases enumerated in Clause (b) of Sub-section (1) of that section.

The offence defined is thus complete. No further reference is required to be made to any other part of the Act for the purpose of "defining the offence" which is thus defined in Section 3(1)(b). The offence charged in this particular case is one u/s 3 which is self-contained requiring no reference to any other part of the statute. The view I take is re-inforced by the language used in Section 5 of the Act. That section punishes the offence of contravention of the provisions of Section 3.

That being so, Section 3 must be held as containing all the ingredients or elements of the offence which is punished by Section 5. What Section 6 does is merely to provide certain exceptions which when proved will lift the case out of the purview of the Act. One of such cases is contemplated by Clause (d) of Section 6. If the advertisement is permitted under the Drugs Act or the Rules thereunder, no action can be taken against any one for publication of such advertisement.

That being so, it must be held that this is no part of the offence itself. This is only by way of exception wholly unrelated to the law defining the offence and

consequently the prosecution was called upon to prove that this exception did not apply or was not available to the accused petitioner". If the exception provided in Section 6(3) was a part and parcel of the offence defined u/s 3 within which the petitioner was charged, it would not have been open to the petitioner to avoid discharging the onus which in that event would have been lain heavily upon him.

Section 105, Indian Evidence Act lays down that if a special exception or proviso was part of the law defining the offence and was consequently integrated into it, the burden would be on the person charged to prove the existence of circumstances bringing the case within the exception. In the present case, as I have indicated, Clause (d) of Section 6 is no part of Section 3 of the Act. Consequently, the view taken by the learned Magistrate must be held to be erroneous, viz., that it lay upon the accused petitioner to discharge the burden of proving that the advertisement in question was permitted under the Drugs Act or the Rules made thereunder.

17. Reference may be made to the case of "Anil Kumar Ghosh v. The State", AIR 1963 Cal 408 (A), which dealt with a similar matter in which it was held that if any exception or proviso was attached to the definition of the offence itself, the burden of proving the existence of circumstances bringing the case within the exception would" clearly be on the accused.

18. There can be no doubt whatever that the charge against the petitioner was contravention of Section 3 of the Act and it related to the printing and publication of the advertisement which offer-ed to treat sexual disorder or to Indicate the line of treatment of such disorder. It was, therefore, incumbent upon the prosecution to prove all the elements of this offence. If Section 6(d) was a part of the offence, which it is not, the onus would have been on the accused. That being so, the onus lay on the prosecution to prove facts and circumstances which would clearly establish the charge preferred by repelling application of exceptions which were no part of the law defining the offence. I do not think the prosecution succeeded in doing that and the learned Magistrate completely misdirected himself in placing the onus on the petitioner of proving the existence of circumstances which would entitle him to the benefit of Section 6 of the Act.

19. The result, therefore, is that this conviction and sentence must be set aside. The Rule is accordingly made absolute. The fine, if paid, will be refunded.