

(2007) 07 BOM CK 0019

In the Bombay High Court

Case No : Criminal Application No. 599 of 2005

Radhika alias Shashikala Rameshwarrao Upasane

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 02-07-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482

Evidence Act, 1872 — Section 45

Maharashtra Medical Practitioners Act, 1961 — Section 2, 2(2), 33(2), 35(1), 36

Citation : (2008) CriLJ 681

Hon'ble Judges : A.P. Lavande, J

Bench : Single Bench

Advocate : H.R. Dhumale, for the Appellant; T.A. Mirza, Assistant Public Prosecutor, for the Respondent

Judgement

A.P. Lavande, J.—Heard Mr. Dhumale, learned Counsel for the Applicant and Mr. Mirza, learned A.P.P. for the Respondent.

2. By this application u/s 482 of the Code of Criminal Procedure (hereinafter referred to as "the Code") the applicant takes exception to the judgment and order dated 8-11-2005 passed by 1st ad hoc Additional Sessions Judge, Buldhana in Criminal Revision Application No. 98/2005 dismissing the revision application against order dated 26-4-2005 in Criminal Case No. 213/2003 by the Chief Judicial Magistrate, Buldhana.

3. The facts leading to filing of the present application are as under:

The applicant who has been practicing in the field of Acupuncture arranged camps during the period 5-3-2003 to 15-3-2003 at Buldhana and large number of patients attended the said camp. The applicant charged Rs. 20/- per person. According to the prosecution, the act of practicing in Acupuncture is covered by Section 2(2) of the Maharashtra Medical Practitioners Act, 1961 (hereinafter referred to as "the Act"). It is further the case of the prosecution that the applicant was affixing the title "Dr." before her name on her letterheads and she

had also given advertisement in newspaper styling herself as "Dr." and was running Acupuncture Centre at Akola, P.S.I. Buldhana lodged F.I.R. against the applicant at Police Station Buldhana which was registered under Cr. No. 3046/2003. After completing the investigation, the charge-sheet was filed against the applicant for offences under Sections 36 and 37 of the Act. During the investigation, this Court by order dated 2nd May 2003 had granted anticipatory bail to the applicant.

4. In Criminal Case No. 213/2003 before the Chief Judicial Magistrate the applicant contended that Sections 36 and 37 of the Act were not attracted in the present case and further that the practice of acupuncture is not covered by Section 2(2) of the Act. Learned Chief Judicial Magistrate by order dated 26-4-2005 negated the contentions of the applicant. The Revisional Court concurred with the findings given by learned Magistrate and held that prima facie offences u/s 33(2) read with Section 36(2) of the Act have been made out against the applicant. The applicant has invoked Section 482 of the Code against both judgments and orders.

5. Mr. Dhumale, learned Counsel for the applicant submitted that no prima facie case has been made out against the applicant for offences punishable under Sections 33(2), 36 and 37 of the Act. He further submitted that practice of acupuncture is not covered by Section 2(2) of the Act but on the contrary it is covered by Clause (iii) of Proviso to Section 2(2) of the Act. Mr. Dhumale submitted that practice of acupuncture does not amount to practice of medicine and as such there is no question of the applicant registering her name in the register maintained under the Act. He, therefore, urged that Section 33(2) of the Act is not attracted in the present case as against the applicant. He further submitted that Section 36 of the Act is also not attracted inasmuch as merely affixing title "Dr." would not attract Section 36 of the Act. In support of this submission, Mr. Dhumale relied upon the judgment of this Court in *The State of Maharashtra Vs. Mrs. Paulin P. Picardo*, . He then urged that Section 37 of the Act is not a penal provision and as such the charge-sheet could not have been filed u/s 37 of the Act. Mr. Dhumale further submitted that the applicant is entitled to practice in acupuncture since the applicant holds valid registration issued by Indian Academy of Acupuncture (Science). It was further submitted that the Ministry of Health & Family Welfare (Central) vide order dated 25th November, 2003 has recognized acupuncture as a therapy and practice of acupuncture by registered practitioners or appropriately trained personnel has been allowed. Mr. Dhumale also placed reliance upon certain passages from the book written by Anton Jayasurya & Lasath Wijesinghe as well as an article written by Dr. Swati P. Lohiya Administrator, Indian Academy of Acupuncture Science, Aurangabad, India on Legal Status of Acupuncture in India and Role of Indian Academy of Acupuncture Science, published in a booklet published on the occasion of 5th International Congress of Medical & Cosmetic Acupuncture- Acupressure, 2004, Aurangabad (India). Mr. Dhumale also placed reliance upon passages in book titled "Clinical Acupuncture" authored by Anton Jaya-surya. Mr. Dhumale,

therefore, submitted that prosecution against the applicant under the provisions of the Act is not maintainable and, therefore, the proceedings against the applicant in Regular Criminal Case No. 212/2003 pending before the Chief Judicial Magistrate, Buldhana be quashed.

6. Per contra, Mr. Mirza, learned A.P.P. submitted that practice of acupuncture is squarely covered by Section 2(2) of the Act and proviso (iii) to Section 2(2) of the Act is not attracted in the present case. He further submitted that this Court while dealing with the anticipatory bail application of the applicant has given a finding that Clause (2) of Section 2 of the Act is, prima facie, attracted upon careful analysis of the relevant provisions of the Act. He further submitted that since the applicant has not registered her name in the register maintained under the Act, prima facie, offence u/s 33(2) of the Act is attracted. Insofar as Section 36 of the Act is concerned, Mr. Mirza has placed reliance upon several documents which have been collected during the course of the investigation and which form part of the charge-sheet. According to Mr. Mirza, several documents which have been produced along with the charge-sheet disclose that the applicant has affixed the title "Dr." before her name not only in her letterhead but also in the advertisement published in the newspaper. Mr. Mirza has also invited my attention to letterhead of the applicant in which it is claimed that the applicant holds several degrees which are not recognized by the Medical Council of India. He, therefore, urged that Section 36 of the Act is prima facie attracted. Insofar as Section 37 of the Act is concerned, Mr. Mirza fairly conceded that Section 37 of the Act is not attracted and the Investigating Officer has wrongly invoked Section 37 of the Act.

7. I have carefully considered the submissions advanced by learned Counsel for the applicant and learned A.P.P. I have perused the records and the judgment relied upon by Mr. Dhumale.

8. In order to appreciate the rival contentions, it would be appropriate to quote Section 2(2) of the Act. The same reads as under:

Section 2(2): For the purposes of Chapter VI, a person shall be deemed to practice any system of medicine who holds himself out as being able to diagnose, treat, operate, prescribe medicine or other remedy or to give medicine for any ailment, disease, injury, pain, deformity or physical condition or who, by any advertisement, demonstration, exhibition or teaching offers or undertakes, by any means or method whatsoever to diagnose, treat, operate or prescribe medicine or other remedy or to give medicine for any ailment, disease, injury, pain, deformity or physical condition:

Provided that, a person who-

(i) mechanically fits or sells lenses, artificial eyes, limbs or other apparatus or appliances; or

(ii) is engaged in the mechanical examination of eyes for the purpose of

constructing or adjusting spectacles, eye-glasses or lense; or

(iii) practices physiotherapy or electrotherapy or physiotherapy or naturopathy or hydropath or yogic healing; or

(iv) without personal gain furnishes medical treatment or does domestic administration of family remedies; or

(v) being registered under the Dentists Act, 1948, limits his practice to the art of dentistry; or

(vi) being a nurse, midwife or health visitor registered or enlisted under the Bombay Nurses, Midwives and Health Visitors Act, 1954, or any other corresponding law for the time being in force in the State or a Dai attends on a case of labour, shall not be deemed to practice medicine.

8.1 From a bare reading of Section 2(2) of the Act, it is clear that for the purpose of Chapter VI, any person who holds himself out as being able to diagnose, treat, operate or prescribe medicine or other remedy or to give medicine for any ailment, disease, injury, pain, deformity or physical condition or who, by any advertisement, demonstration, exhibition or teaching offers or undertakes, by any means or method whatsoever to diagnose, treat, operate or prescribe medicine or other remedy or to give medicine for any ailment, disease, injury, pain, deformity or physical condition, shall be deemed to practice in system of medicine. Proviso to Section 2(2) of the Act excludes certain categories from practice of medicine and in terms of Clause (iii) of Proviso practice of physiotherapy, electro-therapy, physiotherapy, naturopathy, hydropath, and yogic healing have been excluded.

A careful reading of Section 2(2) of the Act makes it clear that a person who holds himself out as being able being able to diagnose, treat, operate or prescribe medicine or other remedy or to give medicine for any ailment, disease etc. shall be deemed to be practiced any system of medicine. In terms of Clause (iii) of Proviso to Section 2(2) of the Act certain therapies have been excluded. In my opinion, the practice of acupuncture is squarely covered by Clause 2(2) of the Act and it is not covered by Clause (iii) of the proviso as contended by Mr. Dhumale. In my opinion, a person practicing acupuncture shall be deemed to be practicing in medicine. Therefore, prima facie, Section 33(2) of the Act is clearly attracted in the present case. Insofar as the opinion expressed by authors Anton Jayasurya and Lasath Wijesinghe are concerned, I am unable to place reliance upon the same. u/s 45 of the Evidence Act, the Court is entitled to form an opinion based upon the opinion of persons specially skilled in any field or the persons who are experts in the field. In order to attract Section 45 of the Evidence Act, the Court must be first satisfied that the persons whose opinions are relied upon are experts in the said fields. The applicant has not placed any material before this Court to establish that authors whose articles/opinions have been relied upon are experts in the fields. I am, therefore, unable to place any reliance upon the said articles/opinions. Insofar as the order dated 25th

November, 2005 issued by the Joint Secretary, Ministry of Health & Family Welfare, Government of India is concerned, the same does not in clear terms say that the practice of acupuncture is not covered u/s 2(2) of the Act. Therefore, the said order does not advance the case of the applicant in view of the clear provisions of the Act.

9. Having considered the submissions advanced by Mr. Dhumale and Mr. Mirza, I am of the considered opinion that the submission of Mr. Mirza that prima facie Section 33(2) of the Act is attracted in the present case has to be accepted. Moreover, this Court, while granting anticipatory bail to the applicant in its order dated 2nd May, 2003 held that the case of the applicant is covered by Section 2(2) of the Act and, therefore Section 33(2) of the Act is attracted. Although this finding has been given while disposing of anticipatory bail application, nonetheless, I am in respectful agreement with the reasons given by the learned Judge of this Court while disposing of the anticipatory bail application.

10. I therefore, hold that prima facie Section 33(2) of the Act is attracted in the present case inasmuch as admittedly the name of the applicant has not been entered in the register maintained under the Act.

11. Insofar as offence u/s 36 of the Act is concerned, as stated above, the prosecution has relied upon several documents in which title "Dr." has been added to the name of the applicant not only on the letterheads of the applicant but also in the advertisement published in the newspaper. In the letterhead of the applicant, the applicant has claimed that she holds the following degrees:

M.D. (Acu.) D. Ac. F.I. Ac. S. (India)

M.I. Ac. S.M. Ac. F., D.A. M. P. (Sri Lanka)

M.C. Ac. A.M.C., Ac. S. (U.K.)

Doctor of Science (I.M.A.)

12. It is the case of Mr. Mirza that none of the degrees mentioned in the letterhead are recognized by Medical Council of India. Mr. Dhumale is not in a position to controvert this statement. Therefore, prima facie, Section 36 of the Act is attracted. Section 36 of the Act reads as under:

Section 36: (1) No person shall add to his name any title, description, letters or abbreviations which imply that he holds a degree, diploma, licence or certificate or any other like award as his qualification to practice any system of medicine unless-

(a) he actually holds such degree, diploma, license or certificate or any other like award; and

(b) such degree, diploma, licence or certificate or any other like award-

(i) is recognised by any law for the time being in force in India or in part thereof, or

(ii) has been conferred, granted or issued by a body or institution referred to in Sub-section (1) of Section 35, or

(iii) has been recognised by the Medical Council of India, or

(iv) has been recognised by the Central Council of Indian Medicine.

(2) Any person, who contravenes the provisions of Sub-section (1) shall, on conviction, be punished with rigorous 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 one thousand rupees but which may extend to five thousand rupees; and when the contravention is a continuing one, with further fine which may extend to two hundred rupees for every day during which such contravention continues after conviction for the first such contravention).

13. Insofar as the judgment of this Court in Paulin P. Picardo's case (supra) relied upon by the learned Counsel for the applicant is concerned, I find that the same does not advance the case of the applicant. In the said case the Additional Sessions Judge, Bombay while acquitting the respondent for offence u/s 36 of the Act had given finding that the respondent was practicing naturopathy and as such was covered by proviso to Section 2(2) of the Act and as such not guilty of offence u/s 36(2) of the Act by addition of title "Dr." to his name. While concurring with the finding given by the Additional Sessions Court, this Court held that Section 36 of the Act was not attracted against the applicant. The facts in the said case are entirely different and, therefore, the judgment in the said case cannot come to the rescue of the applicant. I am of the considered opinion that the act of the applicant of affixing title "Dr." to her name when she is not registered Medical Practitioner or otherwise not entitled to use title "Dr." prima facie, attracts Section 36(1) of the Act and as such offence u/s 36(2) of the Act is made out.

14. Insofar as Section 37 of the Act is concerned, as rightly conceded by Mr. Mirza, learned A.P.P. for the respondent, the same is not a penal provision and as such the same is not attracted as against the applicant. It is pertinent to note that Section 37 of the Act has been deleted from the Act by Amendment Act of XL of 2005 from 25th August, 2005.

15. For the reasons aforesaid, the application is partly allowed. It is held that Sections 33(2) and 36 of the Act are prima facie attracted against the applicant. However, Section 37 of the Act is not attracted against the applicant. Needless to mention that interim order dated 5-4-2006 granted by this Court stands vacated. Since the matter is of the year 2003, hearing of Criminal Case No. 212/2003 is expedited and learned Chief Judicial Magistrate is directed to dispose of the case expeditiously. The applicant to appear before the Chief Judicial Magistrate, Buldhana on 31st July, 2007 at 11.00 a.m. for further directions. Needless to mention that the findings recorded in this order are only prima facie findings and the learned Chief Judicial Magistrate shall dispose of the case on its own merits in accordance with the evidence on record uninfluenced by the observations

made in this order.