

(2011) 05 DEL CK 0056

In the Delhi High Court

Case No : Criminal M.C. No. 648 of 2011

Shri Amit Singh and Another

APPELLANT

Vs

The State and Drugs Control Department

RESPONDENT

Date of Decision : 06-05-2011

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 482
Drugs and Cosmetics Act, 1940 — Section 3
Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 — Section 2, 3, 7

Citation : (2011) 05 DEL CK 0056

Hon'ble Judges : A.K. Pathak, J

Bench : Single Bench

Advocate : A.J. Bhambhani, Nisha Bhambhani and Victor Ahanthem, for the Appellant; Arvind Gupta, APP, for the Respondent

Judgement

A.K. Pathak, J.—By way of above noted petitions u/s 482 of the Code of Criminal Procedure, 1973 read with Article 227 of the Constitution of India Petitioners seeks quashing of summoning order dated 28th October, 2010 passed by Metropolitan Magistrate as also the complaint u/s 3(d) read with Section 7 of Drugs And Magic Remedies (Objectionable Advertisements) Act, 1954 (hereinafter referred to as "the Act") filed by the Respondent.

2. Both the above petitions arise out of the same complaint, summoning order, inasmuch as, facts involved therein are same, thus, are being disposed of together.

3. It was alleged in the complaint that an advertisement was got published by "Centre for Sight" in the "Hindustan Times" dated 31st October, 2009 claiming cure for cataract by Breakthrough Innovation in cataract surgery through a drug named Akreos(R) AO Micro Incision lens by Bausch & Lomb Company. It may be noted here that "Centre for Sight" is running eye hospitals across the city. M/s HT Media Limited was the publisher of the newspaper "Hindustan Times". The

offending advertisement was published in contravention of Section 3(d) of the Act, thus, Petitioners were liable to be punished u/s 7 of the Act.

4. Relevant it would be to refer Section 3 of the Act at this stage which reads as under:

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 improvements 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;

Provided that no such rule shall be made except -

(i) in respect of any disease, disorder or condition which requires timely treatment in consultation" with a registered medical practitioner or for which there are normally no accepted remedies, and

(ii) after consultation with the Drugs Technical Advisory Board constituted under the Drugs and Cosmetics Act, 1940 (23 of 1940), and, if the Central Government considers necessary, with such other persons having special knowledge or practical experience in respect of Ayurvedic or Unani systems of medicines as that Government deems fit.

5. Section 3(d) envisages that no person shall take 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 the diagnosis, cure, mitigation, treatment or prevention of any disease, disorder or condition be specified in the Schedule, or any other disease, disorder or condition which may be specified in the rules made under the Act. Perusal of serial No. 11 of the Schedule shows that diseases and disorders of "optical system" would fall within the meaning and scope of Section 3(d) of the Act. Section 7 of the Act encompasses the penal consequences in case of contravention of any of the provisions of the Act or rules made thereunder.

6. Sole question which has to be answered in this case is whether the offending advertisement amounts to advertising a "drug" within the meaning of Section 3 of the Act or is it only informative of the improved methodology and improved

equipment availability of the procedure involved in a cataract surgery.

7. In this context it would be relevant to refer the offending advertisement with advantage, which reads as under:

Breakthrough Innovation in Cataract Surgery

Award Winning Technology Reviving The Joys of Vision

With the advent of newer technologies and modern innovations, cataract surgery has come a long way. It has been a long journey from the traditional extra capsular cataract surgery to small incision cataract surgery to Phacoemulsification surgeries. We have gone ONE STEP AHEAD and achieved ways to reduce the incision size of the cataract surgery (making it less than 1.8 mm) there by speeding the wound healing and wound stability and decreasing the post operative corneal astigmatism.

This has been made possible by a combination of improved methodology and improved equipment availability. The combination of high vacuum flow restrictive tubing, STELLARIS MICS needle, the Stellar is Microsurgical System and the MICROINCISIONAL lenses by Bausch and Lomb provide us just that. In Stellar is Micro Incision Cataract Surgery system, cataract can be removed through a very small incision of 1.8mm followed by an implantation of AKREOS AO MIL.

Cataract Surgery at Centre For Sight is now being done routinely through 1.8/2 mm incision. Cataract Surgery/Micro Coaxial Cataract surgery) using the Bausch & Lomb Stellar is MICS.

Another important development, which has taken place, is the development of AKREOS AOMIL. The Bausch & Lomb Micro Incision IO Ls provide the advantage of being able to pass through a very tiny incision 1.8/2mm. These lenses are also aspheric lenses, aberration free which can increase the contrast sensitivity and the visual acuity for the patient.

Providing ways and means to make the incision small while doing Phaco would be fruitless if we had to increase the incision in order to place the lens. Thus with increasing popularity of micro Phaco came the need of modify the lenses and their delivery system to make the effort worth while With AKREOS AO MIL (B&L), Centre for Sight provides just that.

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THE PATIENT CAN WALK IN AND WALK OUT OF THE OPERATION THEATRE

8. A perusal of the above quoted advertisement which, in fact, is in the shape of "an advertorial" clearly shows that it was informative in nature about the latest technology and methodology in the field of cataract surgery where incision size of the cataract surgery has been reduced to less than 1.8 mm thereby speeding the wound healing and wound stability and decreasing the post operative corneal astigmatism which had been made possible by a combination of improved

methodology and improved equipment availability. It appears to have been published to disseminate the information about new and latest technology and methodology of "cataract surgery". Overall reading of the advertisement clearly indicates that "Centre for Sight" had made an attempt to bring to the notice of public at large about the new technology which had been innovated and the same in no manner can be termed as an advertisement to the sale and use of any particular "drug", inasmuch as, "Centre for Sight" was neither the manufacturer nor dealer nor retail seller of such devices including the lenses. It was simply using the equipment developed by Bausch & Lomb. Thus, in my view offending advertisement does not infringe the provisions of Section 3(d) of the Act.

9. There is yet another angle with which matter has to be looked into. It is to be seen as to whether the offending advertisement violates Section 3(d) of the Act in the context of aims and object for what law makers thought in its wisdom to promulgate the Act. It appears that there had been influx of number of objectionable advertisements published in the newspapers, magazines or otherwise relating to cures for variety of diseases in general including the alleged cures for diseases and conditions peculiar to the women resulting in self medication with harmful drugs and appliances. To curb such harms, in the interest of public, the Act had been promulgated to protect the ignorant and unwary public. In *K.S. Saini and Another Vs. Union of India (UOI) and Others*, it was held that the object of the Act is to avoid self medication by people or their being misled by various advertisements. The necessary condition, therefore, is that the advertisement must induce others into using the "drug" advertised. In *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*, Supreme Court has observed that the object of the Act is to prevent self-medication or treatment by prohibiting instruments which may be used to advocate the same or which tend to spread the evil. Thus, it is clear that the whole object of the Act is to save ignorant people from being duped to purchase medicines just because their effect is advertised in eloquent terms. The publication of an advertisement, to amount to an offence, should have reference to a "drug" and that "drug" should have been suggested as a cure for certain ailments mentioned in Clauses (a) to (d) of Section 3 and advertisement should be of such nature that ignorant people will be misled into self-medication or self-treatment. In the present case, if the contents of advertisement are read and understood in the context of aims and objects for which the Act has been brought in force, it cannot be said that the advertisement violates Section 3(d) of the Act. The lenses, with the help of devices as mentioned in the advertisement, cannot be used by an individual himself after buying the same from the market to cure the "cataract". A patient has to visit a hospital and undergo eye operation by a registered medical practitioner in the field, thus, it cannot be said that the public at large can resort to self-medication by using the alleged lens as mentioned in the advertisement.

10. As I have already held that the offending advertisement was aimed at educating the general public about the advancements in the field of cataract surgery, I need not dwell on the issue whether Micro Incision lens and other devices as referred therein would fall within the ambit and scope of "drugs" as defined u/s 2(b)(iii) of the Act. However, it may be noted that the notification No. S.O. 1468 (E) dated 6th October, 2005 issued by the Ministry of Health & Family Welfare, wherein Intra Ocular lenses had been defined as "drugs", reliance whereupon has been placed by learned APP, has been issued in pursuance of Section 3 of the Drugs and Cosmetics Act, 1940 and not under the Act which is involved in this case. This notification, otherwise, is of no help to the facts of the present case.

11. For the foregoing reasons, in my view, the allegations in the complaint, even if taken on their face value, do not disclose any offence as alleged in the complaint. Therefore, both the petitions are allowed and summoning order as well as complaint case titled "State v. Amit Singh and Ors." pending in the court of Metropolitan Magistrate is quashed.

12. Petitions are disposed of in the above terms.