
(1982) 03 BOM CK 0019

In the Bombay High Court

Case No : Criminal Application No. 292 of 1981

Smt. Kantirani Jayanarayan Mangal

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 11-03-1982

Acts Referred:

Constitution of India, 1950 — Article 19(1), 226, 227, 301

Citation : (1983) 1 BomCR 429 : (1982) CriLJ 1454 : (1982) MhLj 822

Hon'ble Judges : S.J. Deshpande, J

Bench : Single Bench

Judgement

1. This petition is filed by the original accused under Art. 226 and 227 of the Constitution of India challenging of the order of conviction passed against the accused for the contravention of the provisions under S. 7 read with S. 3(d) of the drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 (Act No. 21 of 1954) (herein after referred to as the "Drugs Act"). The conviction was recorded on November 29, 1978 in Criminal case No. 82/S of 1978 and the same was upheld in the revision by the learned Additional Sessions Judge, Greater Bombay by his judgment and order dated January 8, 1981 in Revision Applications No. 11 of 1979.

2. The accused Amt. Kamatitrani J. Mangal is the sole properties of a shop called M/s. Breast Beauty Stores. His store was established in the year 1974. The accused is selling the article known as Bust Developer and while advertising this Bust Developer which is an instrument to be used for proper development of breasts of a woman, it is alleged that the accused had advertised a booklet in the form, of Exhibit "A" depicting the photograph of a woman showing the use of bust developed with another photograph showing the instruments itself and the sketch of the supposed pump which the sketch of the supposed pump, which is to be utilised in the process of using of this booklet are sold to the customers and they are separately charged.

3. On August 10, 1977, Drug Inspector Suhas Shamrao Anyaphawar, who is the

sole witness on behalf of the prosecution in this case raided the shop of the accused situated at Dadar, Bombay and seized the following article :

(1) instruments which is called bust developer and

(2) Pamphlets in Hindi, Marathi and English containing the detailed description of the use of the instrument in one of the parts and in another part prefacing the introduction giving object and purpose of bust developer.

In Exhibit "A" first six paras show that there is general description on the importance of the developed breast as far as woman are concerned. There is a reference to Kalidas and Urvashi in relation to the description of the breast. The pamphlet which is produced in this application is in English. The first six paras, of this pamphlet can be said to be the general introduction in regard to the position of developed breast for the purpose of beauty of females. This pamphlet further gone to emphasis that in regard to muscular structure of a woman it is necessary that the breast development should be carefully followed. It has commenced on the other remedies and lastly it is stated in this pamphlets let, the material portion of which is given in para. 9 how the instrument is to be used.

4. After the seizure of the pamphlets 70 in English, 40 in Hindi and 70 in Marathi under the panchanama, the accused was prosecuted for the contravention of S. 3 of the Drugs Act. The prosecution examined only one witness i.e. Inspector in support of its case.

5. The accused admitted the fact on seizure of the pamphlet and possession of the instrument as well as pamphlets. The defense of the accused is that the alleged product is not a drug within the meaning of the Drug Act. It is the defense of the accused that the instrument was duly registered on October 18, 1975 at Sr. No. 1595. Design No. 143514 with Registrar of Trade marks and Patents and therefore the instruments is not an offending instrument. She denied to have advertised the same.

6. On the basis of these facts and the evidence of the witness for the prosecution, Suhas Shamrao Anyaphawar, the Drug Inspector, the learned trial Magistrate convicted the accused for the contravention of Section 3 of the Drug Act. However, he only sentenced her to pay a fine of Rs. 200/- in default to suffer R. 1 for two months. The learned Magistrate found that the instruments called bust developer is marked by the accused and it is a drug within the meaning of the Drugs Act. It was also advertised and therefore he convicted the accused.

7. The accused filed a revision application against this conviction before the Additional Sessions Judge and the learned Additional Sessions Judge has confirmed that conviction agreeing with the reason given by the learned Magistrate. It was also stated by the accused that it was only her shop which was singled out by the prosecution. Both the Courts have not been impressed by any of the arguments advanced on behalf of the accused and they have held that the instruments bust developer and the pamphlet Exhibit "A" which is one record are

offending article within the meaning of the Act and therefore they have convicted the accused. It is against this conviction that the present criminal application is filed by the accused. It against this conviction that the present criminal application is filed by the accused under Articles 226 and 227 of the constitution of India.

8. Mr. V. A. Gangal, the learned Advocate for the petitioner has urged the following submission in this matter. Mr. Gangal firstly urged of contravention of the provisions of section 3 of illegal because section 3 of the Drugs Act itself is ultra vires the Constitution. According to Mr. Gangal, Section 3 of the Drugs Act infringes Article 19(1)(a), 19(1)(g) and 301 of the constitution. I would have entertained this objection and issued notice to the Attorney General at the outside, but in view of the judgment of the Supreme Court, reported 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, , the challenge to vires in the above case the constitutionality of this very Act was challenged before the Supreme Court and the Supreme Court has upheld the validity of the Act. Therefore, I have not allowed Mr. Gangal to urge that point any further.

9. Second submission of Mr. Gangal was that that the alleged instrument it only a device to improve the general body of the females. Mr. Gangal referred to several authors from eastern as well as western side in order to support his contention that the development of breasts is an essential part of the nursing beauty of the females. I am not referring to any of those authors as it is not necessary to consider the historical background and the poetic imagination based on the description of the breast is an essential part of the body of a woman. We are not concerned in this case with the object and purpose of developing the beauty with regards to the breast. Mr. Gangal then contended that the instruments and the advertisement following it are not offending article within the meaning of Section 3 of the Act at all. Section 3 of the Act which is relevant reads as under :

"3. 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) to (c)

(d) the diagnosis, cure mitigation treatment or prevention of any diseased 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".

The prosecution heavily relies on the above clause (d) of Section 3 of the Act especially the words "disease, disorder or condition specified in the Schedule. The schedule attached to Act provides the name of the disease, disorder or condition and at serial No. 21 it is mentioned as under :

"21 Form and structure of the female bust"

10. Relying on this entry at serial No. 21 in the Schedule coupled with the provision of Section 3(d) of the Act, the learned Public Prosecutor, Mr. V. N. Damale, for the State has contended that the alleged instrument and the pamphlet dealing with this particular form are covered by the provisions of the Act and therefore the advertisements of this article is prohibited within the meaning of Section 3 of the Act. In this connection I will first examine the purpose and scope of the provisions of Sections 3 of the Act, which is to be given due consideration while interpreting the words used in the said section. The Act was passed in the year 1954 by the Parliament to prohibit the advertisement for certain purposes of remedies alleged to possess magic connected therewith. The contention of the learned Advocate for the petitioner was that the publication and the advertisement of the instruments and the pamphlet do not refer to any magic remedy at all and if there is no connection with the purposes of remedies alleged to possess magic qualities, the said advertisement or such article which is not used for the magic remedy will not be an offending article within the meaning of the said Act.

11. Mr. Gangal invited my attention to a judgments of Karnataka High Court reported in *The State of Karnataka Vs. R.M.K. Sivasubramanya Om*, wherein the provisions of Section 3 of the Act were considered by the Karnataka High court. The Division Bench of the Karnataka High Court has held as under :

"In a nutshell, 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 mention in clauses (a) to (d) of section 3 Since the contravention of Section has to be strictly constructed. And the prosecution must bring the act of an accused within the bring the act of an accused within the mischief of law by providing all the ingredients of that offence strictly."

In the Karnataka High Court case it was held by the learned Judges that the alleged advertisements was not published by the accused himself and further the impugned advertisements which was given in that particular case had no reference to Magic cure, and therefore, the Karnataka High Court held that the accused was not guilty and thus the appeal of the State was dismissed. Mr. Gangal relies on that portion of the judgments of the Karnataka High Court and states that a reference to the drug as suggested must relate to the preamble of the Act. In my opinion it is true that clauses (a) to (d) of the said Section 3 refer to specific instances of ailment. Clause (a) refers to the procurement of miscarriage in woman or prevention of conception in woman. Clause (b) refers the capacity of human beings for sexual pleasure. Clause (c) refers to the correction of menstrual disorder in women and Clause (d) refers to the ailment which I have quoted specified in the Schedule has to be read in the context of proceeding ailment which are mentioned in clause (a) to (c) and should be conjointly read in order to attract the prohibition of Section 3(d) of the Act. It is necessary in this case to refer to the definition of the advertisement. The

definition of the word "advertisement" is given in Section 2(a) as under :

"2. (a) "advertisement includes and notice circular, label wrapper or other document and any announcement made orally or by any means of producing or transmitting light, sound or smokes."

12. It is also necessary in this case to refer to the definition of a "drug" given in Section 2(b) of the Act, which reads as under;

"2(b) "drug includes -

(i) to (ii)

(iii) Any article other than food, intended to affect or influences in any way the structure or any organic function of the body of human beings of animals."

Relying on this sub-clause (iii) of Clause (b) of Section 2 of the Act it is contended by the learned Public Prosecutor for the State that the definition of advertisement as found in Section 2(a) of the Act does not warrant any such proposition that the alleged article which is advertised must have reference to any such drug which must provide for some magic remedy.

13. Here, the definition of magic remedy is also necessary and material in this respect. The words "magic remedy" are defined in clause (c) of Section 2 of the Act which runs as under :

"2(c) "magic remedy" includes a talisman, mantra, kavacha, and any other charm of any kind which is alleged to possess miraculous power for the diagnosis, cure mitigation, treatment or prevention of any disease in human beings or animals or for affecting or influencing in any way the structure of any organic function of the body of human animals"

Now the wording of the definition of "advertisement" while defining the word "drug" has used four categories. Section 2(b) define the word "drug" which says that "drug" includes (i) a medicine (ii) any substance intended to be used for or in the diagnosis, cure, mitigation treatment etc., (iii) any article other than food and (iv) any article intends for use as component of any medicine substances of article referred to in subclauses (i), (ii) and (iii). Different terminology in using the word medicine as given in sub-clauses (i) and any substances as mentioned in sub-clause (ii) and using the words any article other than food quoted in sub-clause (iii) and kind of any articular mentioned in sub-clause (iv) has to be given some meaning and it that meaning is to be given sub-clause (iv) of clause (b) of Section 2 of the Act is very instructive in this regard. Clause (b)(iv) of Section 2 defines as follows :

"2(b)(iv) any article intended for use as a component of any medicine substance or article, referred to sub-clauses (i), (ii) and (iii) ".

It is noticeable here that the words "article" Clause (b)(iv) has been connected with the use of medicine substances or article as used in the sub-clause (i) to (iii)

of Clause (b) of Section 2 of the Act. If the words "any article" included in sub-clause (iv) have got a reference to sub-clause (i) to (iii), I do not find any justification as to why the word "article" used in sub-clause (iv) should not have the same meaning. If the uniform meaning is given to the word "article" I think that the Act must necessarily include to certain ailments, which are described in Section 4 of the Act. Any article other than food which is intended to affect or influence in any way organic function of the body of a human being is a "drug" within the meaning of Section 2(b)(iii) of the Act. The expression "the structure or any organic function of the body of human beings or animals used in sub-clause (iii) of clause (b) of Section 2 of the Act along with the Supreme Court and the learned Public Prosecutor has invited my attention to the judgment of the Supreme Court and the reported in Zaffar Mohammad alias Z.M. Sarkar Vs. The State of West Bengal, . The learned Public Prosecutor has heavily relied on this judgment of the Supreme Court in support of his contention that the instruments and the pamphlet will answer the expression of sub-clause (iii) of Clause (b) of Section 2 of the Act and therefore in view of the above judgment of the Supreme Court the "drug" includes the impugned article in this case and on the basis of the ratio laid down in the above case, it was contended that the alleged instruments and the pamphlet are the article within the meaning of Section 2(b)(iii) and once that meaning is accepted the prosecution is well founded.

14. The Supreme Court in the above case was dealing with the advertisement under the Drugs and Magic Remedies (Objectionable Advertisement) Act 1954 and the advertisement in that case was as follows (At p. 192 of Cri LJ) :

"New life, New Vigour, New Spirit, New Wave. If you want to cure see today well known world famous experienced registered Physician. Special diseases such as oldness in youth all sorts of defects in nerves, or weakness, laziness are treated with the full responsibility with few methods new machine of science and electric treatment and are cured permanently"

It was this advertisement which was before the Supreme Court and the argument in that case which was advanced is discussed by the Supreme Court as under At p. 192 of Cri LJ)

"Any article other than food which is intended to affect or influence in any way any organic function of the body of a human beings is a "drug" within the meaning of Section 2(b)(iii) The so called "machine of science" or of electronic treatment" whose magically curative properties were advertised in a newspaper by the appellant to cure nervous diseases, and designed according to advertisement to confer on mankind the blessing of new life and new vigour, are article intended to influence the organic function of the human body. A machine is a tangible thing which can both be seen and felt and as such it answers the description of an "article" with the meaning of Section 2(b)(iii) of the Act"

The Supreme Court has further observed that the very claim of the appellant in

that case was that by the use of the machine he could cure nervous diseases amongst other ailments and that a machine is an "article" requires no great learning either to expound or to understand. Relying on these words of the advertisement that is, magically curative property as advertised by the Supreme Court referred to the statement and objects of the Act and held that the said advertisement quoted above was likely to trap the ignorant and the unwary. The main argument which was advanced in the said case before the Supreme Court was that the machine of science are "substances" intended to be used in diagnosis. Cure, or treatment of diseases in human beings were not said to be the article within the meaning of Section 2(b)(iii) of the Act. And it is against this background that the Supreme Court held that the machine of science is an article within the meaning of science is an article within the meaning of Section 2(b)(iii) of the Act and therefore in any opinion the observation of the Supreme Court will have to be read in the context of that advertisement and it is not applicable to the facts of their present case.

15. The learned Public Prosecutor invited my attention to paragraph 8 in Exhibit "A" and contended first of all that the whole reading of contents of the pamphlet Exhibit "A" by way of advertisement of this opinion I am unable to accept this contention. A fair reading of the whole contents of the pamphlet can never amount to an objectionable matter. Then the learned Public Prosecutor specifically invited my attention to paragraph 8 of Exhibit A which is as follows :

It is very woman's birthright to possess a pair of beautiful breasts. Against this background of a long expressed and unfulfilled desire for a remedy for such a deficiency felt by innumerable woman and girls that "Breast Beauty Stores" introduces a new and dependable Breast Beauty Bust Developer. It is only marked after having been subjected to rigorous tests and long research and is an advance in any appliance in the same field. With proper careful and patient use over the period it should leave very (every) underdeveloped or insufficiently developed girl or woman satisfied with the intended result"

Relying on this paragraph the words "new and dependable" Breast Beauty Bust Developer" and linking them and connecting with the advertisement which is also in the same words as quoted in the judgment of the Supreme court using the work's "New Life" New Vigor, New Spirit, New Wave, it was strongly contended by the learned Public Prosecutor that this is not a general statement of any particular theory of the above statement is not a summary of any general thought but it is a direct invitation to the customers that there is a new hope to improve their development of breasts in as much as this is an advertisement of marketable article. Relying on this specific paragraph it was also contended that this is an article which offends in terms of Item No. 21 of the schedule and therefore the accused is liable to answer.

16. In this connection it is useful to refer to the words used in entry No. 21 of the schedule "form and structure before giving item number mentions three words "disease, disorder or condition. There are as many as 54 entries in this

schedule. With the help of the learned Advocate, I had gone through the item No. 21 and other entries and they have some reference of every kinds of ailments and diseases. It is desirable to note that the person of a female is specially unique in one respect as compared to man. She is endowed with breasts. The structure and form of the breasts are matters of special form of beauty as far as females are concerned. In this connection it is useful to refer to the definition of "breasts" which is given in the directory "S is for Sex" by Robert Chartham. It reads as under :

"Breasts : The breast are cushions of fat and tissue surroundings the mammary glands. The biological purpose of the breasts is to provide nourishment for the very young baby.

In this girl, the breasts begin to develop during puberty, and this development has begun. According to the action of the glands producing the hormones that control sexual activity, which work at varying rates in different people, the breasts may develop slowly or quickly and may be over for under developed. In the male the breasts are normally unaffected by puberty and remain flat all his life. However, in rare cases the male breasts may take on famine contours during the early years of puberty The girl's breasts are connected with her sexual system and on this account they are sensitive or erogenous zones".

It can be said that the glands are in susceptible parts of the breast and the development of the breasts is essential. They have also great sexual attraction for the best men and the development of the breast during adolescence is psychologically important to a girl's reaction to her sexuality, Sucking, as breast feeding is sometime called takes place when the baby is fed from the mother's breasts. Most authorities had agree that the mother's milk provided it is of normal good quality, cannot be improved upon as a food at least during the baby's first four or five months. In view of this position if any grounds is made for the development if breasts on the lines of which it is done by the advertisement I do not think that such an advertisement would be an offending article within the meaning of S. 3 of the Act.

17. The contends of the above Exhibit A advertised and published do not relate to any of the so called magic cures I am conscious, that S. 3 of the Act does not refer to many magic cure. 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 restriction 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. Therefore the contention of the learned Public Prosecutor that a particular para in Exhibit A in regard to Breast Beauty Bust Development" is objectionable with in the meaning of the Act is rejected.

18. The next submission which was made by Mr. Gangal the learned Advocate for

the petitioner-accused is that assuming that this article is an offending article and the contents of Exh. A which are advertised amount to advertisement within the meaning of S. 3 his client is entitled to the benefit of exemption given under S. 14(b) of the Act. S. 24(b) of the Act is relevant which reads as under :-

"14(b) :- Nothing in this Act apply to

(a)

(b) any treatise or book dealing with any of the matters specified in Section 3 from a bona fide scientific or social standpoint."

Relying on this Clause (b) of S. 14 of the Act it was submitted by Mr. Gangal that the contents of Exhibit A are safe because they are expressed in words which can be said to be the expression of bona fide scientific or social standpoint. It is not necessary for me to discuss the contents and examine this point. I do not think that these contents of Exhibit A can be said to be an expression of scientific or social standpoint. The emphasis on this Exhibit A it is purely personal in the sense that it is particular marketable produce and as rightly contended by the Public Prosecutor it cannot be said that it is dealing with new point which is of general scientific or social interest. The contents are simplicities of an advertisement of particular product and that too this product is produced by the accused herself. It is not possible to say that these contents of Exh. A though there are references to certain authors and description given by them can be said to be an expression of social or scientific standpoint. There is no comparison with the other samples or products to show that it is taking a general view of the matter. Therefore, this arguments that this pamphlet is dealing with social or scientific standpoint is not acceptable to me.

19. The word "article" used in S. 2(b)(iii) of the Act, in my opinion must have a reference to certain ailments as provided by sub-clause (i) and (ii) of Clause (b) of S. 2 of the Acts in order to give full meaning of article especially in view of sub-Clause (iv) of Clause (b) of S. 2 of the Act. I think that the proper reading of the word "article" must mean that the drug as defined in S. 2 of the Act must have necessary references to curative i.e. it must have references to remedial aspects of the ailments and in this connection I propose to follow the judgment of the The State of Karnataka Vs. R.M.K. Sivasubramanya Om, where the definition and the Karnataka High Court has held that the advertisement as defined in S. 2(a) of the Act must have a reference to a drug which has been suggested as a cure for the situation mentioned in sub-clause (i), (ii) and (iii) of Clause (b) of S. 2 of the Act.

20. In this case the said advertisement and the instrument have no reference to any such ailments at all. Therefore, in my opinion, the conviction of the accused is not justified. Both the courts were in error in going by the definition and the words used in the entry No. 21 of the Schedule and relying on the statement of the prosecution witness. I am also disposal to think that the Act was passed by the Parliament in 1952 and well are living in 1982. The things and surroundings

have changed so fast that the very concept of the objectionable advertisement will have to be re-examined in the new environment of permissive culture emerging around us. It would be hazardous to regard such advertisement as objectionable. I may also refer that if Chhayagit on television can legitimately be a subject of detailed attention. I do not find any justification whatsoever to take any rigid view of the matter and therefore while interpreting the word "article" in its widest amplitude and especially relying on the provisions of S. 2(a), (b) and (c) of the Act I hold that the impugned pamphlet and the instruments cannot be said to be the objectionable article or the drug, within the meaning of the Act and therefore the conviction of the petitioner-accused is liable to be set aside.

In the result, the petition is allowed. The rule is made absolute. The order of conviction and sentence passed by the learned Magistrate, 28th Court Esplanade, Bombay, dated November 29, 1978 which was confirmed by the Additional Sessions Judge greater Bombay by his order dated January 8, 1981 is set aside. The accused is acquitted of the charge with which she was charged. Fine, if paid be refunded to the accused-petitioner.

21. Petition allowed.