

(1990) 04 MAD CK 0032

In the Madras High Court

Case No : Writ Petition No. 5437 of 1981

T.K. Kuppuswamy

APPELLANT

Vs

The Union of India and others

RESPONDENT

Date of Decision : 06-04-1990

Acts Referred:

Constitution of India, 1950 — Article 226

Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 — Section 13, 3, 8

Citation : AIR 1991 Mad 17

Hon'ble Judges : Kanakaraj, J

Bench : Single Bench

Advocate : Mr. O.V. Balaswami, for the Appellant; Mr. P. Narasimhan, Sr. Central Govt. Standing Counsel on behalf of the 1st Respondent and Mr. Fathimanathan, Govt. Advocate, for the Respondent

Judgement

1. This writ petition coming on for hearing on Monday, the 26th and Friday, the 30th days of March, 1990 upon perusing the petition and the

affidavit filed in support thereof the order of the High Court, dt. 21-7-1981 and made herein, and the counter-affidavit filed herein and the records

relating to the order in relevant to the prayer aforesaid comprised in the return of the respondents, to the writ made by the High Court, and upon

hearing the arguments of Mr. O. V. Bala-swami. Advocate for the petitioner, and of Mr. P. Narasimhan, Senior Central Government Standing

Counsel on behalf of the 1st respondent and of Mr. Fathimanathan, Govt. Advocate on behalf of the respondents 2 and 3, the Court made the

following order :--

The writ petitioner claims to be a dealer in a particular wooden tumbler called ""Durka Ayurveda Tumbler"" which is said to be marketed by one

Apsara Agencies at Bangalore. On 25-6-1981, the petitioner gave an advertisement in a Tamil Weekly called ""Kalkandu"" wherein it was claimed

that the Durka Ayurveda Tumbler is capable of controlling diabetes, blood pressure, rhuematism, weakness, nervous debility and piles. The

second respondent issued a notice dt. 29-6-1981 (served on the petitioner on 9-7-1981) invoking S. 3(d) of the Drugs and Magic Remedies

(Objectionable Advertisements) Act, 1954, hereinafter referred to as "the Act" directing the petitioner to show cause why action should not be

taken against him for contravention of S. 3[d) of the Act. It is the further case of the petitioner that before he could send a reply to the show cause

notice on 14-7-1981, the third respondent along with certain others, raided the shop trading under the name of Sri Mahalakshmi Agnecy at T.

Nagar and seized 10 numbers of wooden tumblers, a bill book and an advertisement notice. The petitioner proceeds to say that under the

circumstances, he did not think it fit to reply to the show cause notice and has filed this writ petition challenging the validity of the Act and claiming

that even if the Act is valid, the impugned advertisement does not contravene any of the provisions of the Act. Under the circumstances, the

petitioner prays for a writ of mandamus or any other appropriate writ to direct the respondent not to enforce the provisions of the Act. Pending

disposal of the writ petition, there was an interim order, restraining the respondents from taking any action.

2. Mr. O. V. Balaswami, learned counsel appearing for the petitioner, contends that the Act is beyond the powers of the first respondent, since it is

not covered by any of the entries in List I of the Seventh Schedule to the Constitution of India. The entire averment with reference to the validity of

the Act in the affidavit of the petitioner is as follows :--

The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 is ultra vires the powers of the first respondent herein inasmuch as the

subject matter of legislation is not within the field of the Central Legislature.

3. The counter affidavit filed on behalf of respondents 2 and 3 with reference to the above allegations is equally brief. The counter-affidavit says

that ""the framing of this Act is within the legislative power of Central Government"". The validity of an enactment cannot be challenged in such a light

hearted manner. It may be argued that it is enough for the petitioner to say that

the Act has no legislative competence and it is for the respondents

to substantiate their contentions that the Parliament has got powers to enact the law is question. But the petitioner forgets that there is a residuary

entry in List I which runs as follows :--

97. Any other matter not enumerated in List II or List III including and tax not mentioned in either of those Lists.

Therefore, it is incumbent on the part of the petitioner to say that the subject matter of the enactment falls under any one of the entries in List II or

List III. In the absence of such clear particulars, it may not be proper to examine the validity of the Act. However, at the time of argument, Mr. O.

V. Balaswami, learned counsel, appearing for the petitioner refers to entries 6, 54 and 64 of List II and entries 19, 26 and 39 of List III of the

Seventh Schedule to the Constitution of India. I have carefully gone through the said entries and I am not convinced that the subject matter of the

enactment can be brought under any of the above entries. The preamble to the Act is as follows :--

An Act to control the advertisement of drugs in certain cases, to prohibit the advertisement for certain purposes of remedies alleged to possess

magic qualities and to provide for matters connected therewith.

The Act does not relate to Drugs as such but relates to the prohibition of advertisement of certain drugs for treatment of certain diseases and

disorders, the prohibition of misleading advertisements relating to drugs, the prohibition of advertisement of magic remedies for treatment of certain

diseases and disorders and the prohibition of import into, and export from India of certain advertisements. Viewed in this angle, I am of the opinion

that the enactment can be justifiably brought under Entry 97 of List I. In *Rustom Cavasjee Cooper Vs. Union of India (UOI)*, , it was laid down

that a law relating to a business of a Corporation is not a law with respect to a regulation of a Corporation. Applying the said principles, in *S. P.*

Mittal v. Union of India, : [1983]1SCR729 , it was held that the *Auroville (Emergency Provisions) Act, 1980* can be brought under Entry 97 of

List I, even if the subject matter of the said Act is not covered by any specific entry of List I or List III of the Seventh Schedule of the Constitution

of India. Dealing with the *Commissions of Inquiry Act, 1952*, the Supreme Court of India, in *State of Karnataka Vs. Union of India (UOI)* and

Another, , observed that even if the subject matter of inquiries against Ministers in State Governments is not mentioned specifically either in any of

the articles of the Constitution or in the legislative lists, it does not follow from it that legislation covering such inquiries is incompetent except by

means of a constitutions amendment. On the contrary, such a subject would be prima facie covered by the wide terms of Art, 248 for the very

reason that the Constitution contains no express or implied bar which could curtail the presumably plenary powers of legislation of the Parliament.

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 constitutionality of the very Act was challenged, but on the ground that the same

violates the fundamental rights guaranteed under Part III of the Constitution of India. Section 8 of the Act was struck down by the Supreme Court

of India in the said judgment. Therefore. Section 8 of the Act in the present modified form has found place in the statute book. Though the

Supreme Court of India was not concerned with the legislative competence of the Central Government to enact the law, there is a volume of

discussion regarding the circumstance under which the Act came into being. The following passage is relevant for our purpose :--

They had also warned against the dangers of self-medication and of the consequences of unethical advertisements relating to proprietary

medicines particularising those diseases which were more likely to be affected by the evil. There is reason therefore, to assume that the state of

facts existed at the time of the legislation which necessitated the Act.

On the arguments addressed before me, I am satisfied that the Act in question is intra vires the powers of the Parliament.

4. Mr. O. V. Balaswami, learned counsel appearing for the petitioner then argues that the impugned advertisement does not refer to any Drug as

such. According to him, the advertisement only conveys that drinking water from the said tumbler will control the diseases mentioned in the

advertisement. The argument is that water can never be a medicine or drug. The advertisement taken as a whole seems to suggest that the tumbler

is made from Bijosol wood brought from the Himalayas and is an Ayurvedic tumbler. It is for the authorities to consider the explanation of the

petitioner and come to the conclusion whether the advertisement contravenes the provisions of the Act and whether any further action should be

taken or not. As already stated, in this case, the petitioner did not tender his explanation at all but has rushed to this Court.

5. So far as the seizure of the articles from the business premises of the petitioner, I am of the opinion that it cannot be sustained because when one

Drug Inspector namely, the second respondent had chosen to issue a show cause notice, another Drug Inspector cannot proceed to raid and seize

the articles. Further, the Government Pleader has not been able to furnish any material to prove that the third respondent is a person authorised to

seize and tender any document or article under S. 8 of the Act. Mr. O. V. Balaswami, learned counsel appearing for the petitioner also contends

that the second respondent has no jurisdiction to issue a show cause notice inasmuch as there is no specific provision in this regard. I am afraid that

such a contention cannot be accepted because before taking action under the Act, there is nothing wrong in the second respondent giving an

opportunity to the petitioner to show cause against the action. I am therefore of the view that the petitioner should tender his explanation if he wants

to avoid any further action.

6. Mr. O. V. Balaswami, learned counsel appearing for the petitioner also refers to Section 13 of the Act and says that the Act is an appendage to

certain other enactments and there is no indication as to which enactment the present Act is a supplement. It is not the concern of the Court at this

stage to find out as to how the impugned Act will be implemented. As and when any further action is taken and the petitioner is able to find any

infirmity, it is always open to the petitioners to attack such further action.

7. Under the circumstances, I am not inclined to issue a writ in the manner sought for by the petitioner. I hold that the show cause notice dated 29-

6-1981 is valid and the petitioner is bound to give an explanation to the show cause notice. I further hold that the seizure of the articles is illegal and

the seized articles should be returned to the petitioners. There will be a direction to the third respondent to return the articles seized on 14-7-1981

from the business premises of the petitioner. In other respects, the writ petition is dismissed. There will be, however, no order as to costs. The

articles shall be returned within one month from today. The explanation to the

show cause notice shall be given within the same time of one month.

8. Order accordingly.