

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

Crl.P. No.6841 OF 2018

ORDER:

This criminal petition is filed under Section 482 Cr.P.C. by A1 and A2 in C.C.No.841 of 2016, pending on the file of II Additional Chief Metropolitan Magistrate, Hyderabad, registered for the offence under Section 8 punishable under Section 7(a) for contravention of Section 3(d) of Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954 and the Rules, 1955 (for short 'the Act').

The 2nd respondent filed complaint against the petitioners alleging that the accused are violated Section 3(d) of the Act read with 8 and 7(a) of the Act for manufacturing and selling Temfix Kold (Cetirizine, Phenylephrine, Paracetamol and Caffeine Tablets), which was labeled on the outer carton box/primary packing material as reduces pain and fever and also printing on it as 'allergy, pain, fever and nasal congestion'. Thus, the petitioners committed the above referred offences.

It is the specific case of the 2nd respondent that on 27.02.2016 on receipt of information about the commission of such irregularities by the petitioners visited the firm M/s Sree Pavithra Agencies, situated at Door No.4-4-213/D, Ground Floor, Inderbagh, Hyderabad along with B.Praveen, LW.2, Drug Inspector, Secunderabad Zone, Hyderabad and two other employees, found stock of 110 x 20 x 10 tablets of Temfix Kold (Cetirizine, Phenylephrine, Paracetamol and Caffeine Tablets) of B.No.KO5D22G, Manufacturing date: APR.15, Exp.Date: MAR, 17, Manufactured by: Helios Pharmaceuticals (Div.of P.K.T.P.Pvt.Ltd.), Vill. Malpur, District Solan, H.P. – 173205, for sale. The label of the outer carton box/primary packing material was printed as "Reduces Pain and Fever" and also printing on it as 'allergy, pain, fever and nasal congestion', which is in violation of Section 3(d) of the

Act and Rules framed thereunder. The above items were seized and registered Crime and filed private complaint.

The present petition is filed on the ground that printing on the label of the outer carton box/primary packing material as 'reduces pain and fever' and also 'allergy, pain, fever and nasal congestion' do not constitute a advertisement with in the definition of Section 2(a) of the Act and the packing was found only inside the premises of Sree Pavithra Agencies and it is not exposed to the public to use tablets without any medical advise. Therefore, the allegations made in the complaint do not constitute any offence.

The main endeavour of the petitioners is that the object of the Act is to prevent the innocent people to use these medicines based on the advertisement. But when the boxes were not exposed and sold to the public, the question of using the tables for any specific purpose on the basis of advertisement printed on the carton boxes does not arise and consequently, filing complaint against the petitioner is a matter of serious concern, which would affect the trade of the petitioners and cause dent to the business being carried on by the petitioners and prayed to quash the proceedings.

During hearing, learned counsel for the petitioners contended that mere printing on the outer part of the carton or primary packing material that reduces allergy, pain, fever and nasal congestion is not advertisement within the definition of Section 2(a) of the Act and to substantiate his contention, he placed reliance on judgment of the Punjab and Haryana High Court in **K.S.Saini and another v Union of India through Secretary, Ministry of Health, New Delhi and others**¹ . On the strength of the

¹ 1967 CrL.L.J. 917

principles, learned counsel for the petitioners requested to quash the proceedings against the petitioners.

Whereas, learned Public Prosecutor opposed the petition on the ground that whether printing on the outer cover of the carton or primary packing constitute advertisement within the definition under Section 2(a) of the Act is a question of fact to be decided during trial and at this stage the proceedings against the petitioners cannot be quashed and prayed to dismiss the petition.

Inspection of premises and finding stock of 110 x 20 x 10 tablets of Temfix Kold (Cetirizine, Phenylephrine Paracetamol and Caffeine Tablets) of batch No.KO5D22G, Manufacturing date of APR.15, Expiry Date: MAR, 17, Manufactured by the Helios Pharmaceuticals (Div.of P.K.T.P.Pvt.Ltd.), Vill. Malpur, District Solan, H.P. – 173205 and printing on the outer cover of the carton as 'reduce pain and fever' and also printing on it as 'allergy, pain, fever and nasal congestion is not in dispute and those boxes were found in the shop or godown of Sree Pavithra Agencies and the same was reduced into writing by way of mediators report on 27.02.2016 and inspection report in Form 35. These two documents *prima facie* establish that the complainant along with others found tablets referred supra with Sree Pavithra Agencies.

The only short question fall for consideration is:

Whether printing on the outer cover of the carton boxes/primary packing would constitute offence punishable under Section 8 and Section 7(a) for contravention of Section 3(d) of the Act?

POINT:

Section 2(a) of the Act defined the word 'advertisement'. 'Advertisement' includes any notice, circular, label, wrapper, or other document, and any announcement made orally or transmitting light, sound

or smoke. Therefore, any label or wrapper etc. also constitute advertisement. Here, the word reduced pain and fever and also printing on it as 'allergy, pain, fever and nasal congestion on the outer cover of the carton and it is in violation of Section 3(d) of the Act. Section 3(d) says that 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 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 the Act.

Here printing on outer cover of the carton or primary packing shows that the tablets reduce pain, fever, allergy and nasal congestion. According to Section 19 of the Schedule of diseases and ailments fever (in general) is also included. Therefore, making advertisement on the outer cover of the carton or primary packing that reduce pain, fever, allergy and nasal congestion, which is contravention of Section 3(d) of the Act, *prima facie*.

The main endeavour of learned counsel for the petitioners is that when the specific words are printed on the outer cover of the carton, unless it is published, it cannot be termed as an advertisement within the Section 2(a) of the Act. The Division Bench of Punjab and Haryana High Court in **K.S.Saini and another** referred supra in para 4 held that the first offending portion, according to Mr Shankar, occurs at page 4 of the Urdu pamphlet. When translated the statement at page 4 is: "we have treated thousands of men and women for the last 15 years with the help of science which has resulted in their getting children and making their home a heaven. We under take every treatment with the latest methods of science and we have got proof that those sisters who did not get any issue for 20/25 years have

got children with our treatment". The address of those persons are given below. In our hospital the following diseases are treated with the latest methods of science and the aid of electricity. Thereafter, certain diseases are mentioned and some of those do fall under the Schedule mentioned in Section 3(d) of the Act as amended. The question, however, is does this passage refer to any drug and in its language such as suggests or is calculated to lead to the use of any drug for any of the diseases mentioned in the schedule? No drug is mentioned in this part of the pamphlet and all it says is that 'we undertake the treatment of various diseases by latest methods of science and with the aid of electricity. Therefore, it cannot be suggested that this part of the pamphlet refers to any drug or suggests to anyone the use of any drug. The object of the Act is to avoid self medication by people or their being misled by various advertisements.

In the facts of the above judgment, the matter printed that they are curing diseases with the aid of electricity since the electricity is not a drug, the Court held that it does not amount to advertisement. But this is contrary to the law laid down by the Apex Court in **Jaffar Mohammad @ Z.M.Sarkar v The State of West Bengal**². In facts of the above judgment, the word definition of drug came up for consideration. The Magistrate as well as the High Court have taken a view that advertisement in question refers to a drug as defined by Section 2(b) (ii) above as 'machines of science' are a 'substance' intended to be used in the diagnosis, cure or treatment of diseases in human beings. They do not propose to examine the correctness of this view because it seems to clear that, in any event, the impugned part of the advertisement refers to a drug as defined under Section 2(b)(iii). Any article, other than food, which is intended to affect or influence in any way any organic function of the body of a human being is a drug within the meaning of that provision. The so called 'machines of

² 1976 AIR 171

science' or of 'electric treatment' whose magically curative properties were advertised by the appellant are Articles intended to influence the organic function of the human body. Therefore, the judgment of the Punjab and Haryana High Court is contrary to law laid down by the Apex Court in **Jaffer Mohammad's** case referred supra. Hence, the principles laid down in the judgment of the Punjab and Haryana High Court cannot be applied.

Learned counsel for the petitioners further relied on judgment of the Full Bench of Karnataka High Court in **The State of Karnataka v Dr. R.M.K.Sivasubramanyam**³ wherein the accused was charged under Section 3(b) and (d) of the Act for having got published an advertisement in a newspaper of drugs which were to be used for increasing sexual pleasures and curing Tuberculosis, on the basis of an advertisement appearing in a newspaper and seizure of certain bottles and tins containing drugs and literature connected therewith from his hotel room. From para 12 onwards, the Court had considered what amounts to advertisement and held that finding such drug in a hotel room would not amount to advertisement since there is no evidence to show that it is outside the room for the public. On the basis of the principle laid down by Full Bench of Karnataka High Court, learned counsel contended that if it is not exposed to the public for use of the medicine it would not amount to violation of Section 3(d) of the Act. Section 3(d) specifies any advertisement referring to any drug in terms in terms which suggest or are calculated to lead to the use of that drug for diagnosis, cure, mitigation, treatment for prevention of any disease, disorder or condition specified in the Schedule, or any other disease, disorder or condition which can be specified in the rules made under the Act.

Here in this case, the printing material that cures pain and fever, allergy amounts to advertisement since it is not exposed to the public. But

³ 1978 Cr.L.J.853

as per Section 14 of the Act which deals with savings. According to Section 14 of the Act nothing in this Act shall apply to any sign board or notice displayed by a registered medical practitioner on his premises indicating that treatment for any disease, disorder or condition specified in Section 3, the Schedule or the rules made under this Act is undertaken in those premises; or any treatise or book dealing with any of the matters specified in Section 3 from a bona fide scientific or social standpoint; or any advertisement relating to any drug sent confidentially in the manner prescribed under section 16 only to a registered medical practitioner; or any advertisement relating to a drug printed or published by the Government; or any advertisement relating to a drug printed or published by any person with the previous sanction of the Government granted prior to the commencement of the Drugs and Magic Remedies (Objectionable Advertisement) Amendment Act, 1963 (42 of 1963).

On conjoint reading of Section 3(d), 7, 8 and 14 of the Act advertisement specified under Section 14 are exempted from application of provisions, but none others. In an identical situation **Dr Yash Pal Sahi v Delhi Administration**⁴, the Supreme Court held that sending journals by post specifically mentioning that it is for the clerk of the doctor. But even if the material is sent confidentially by post, it would attract offence punishable under Section 3(d) of the Act since it is not covered by Clause (c) Sub-section (1) of Section 14 of the Act. Medicines are sent to a medical practitioner confidentially, such sending to any medical practitioner by any advertisement would not come within the purview of the Act, but when it is sent to clerk of the doctor, would fall within the provisions of the act and thereby, it is an offence and upheld the conviction recorded by the Magistrate.

⁴1964 AIR 784

At best the petitioner may claim any of the exemptions contained under Section 14 of the Act, but not beyond that. Mere failure to expose to the public for self medication itself is not a ground, in view of law declared by the Apex Court.

It is contended by learned counsel for the petitioners that when the advertisement is not published such act complained does not constitute any offence. Section 2(a) of the Act defined the word advertisement. Sections 7 and 8 of the Act are such penal provisions of violation of Section 3(d) of the Act reads diagnosis, cure etc. There is a vast different between the publication and advertisement. Advertisement means any statement made to a public to attract the attention with regard to any article, but publication means publication of any literary or any advertisement. Therefore, advertiser is different from publisher. Therefore, printing on the outer cover or box containing tablets is an advertisement published to attract the public for self medication. Exposure of the box containing such advertisement prohibited under Section 3(d) of the Act, but it is exposed to the employees working in Sree Pavithra Agencies and the persons, who packed etc and possibility of self medication attracting to the advertisement, printed on the outer cover or carton or primary packing cannot be ruled out. Therefore, it is difficult to sustain the contention of the counsel for the petitioners at this stage that it is not an advertisement within the definition of Section 2(a) of the Act, in turn violation of Section 3(d) of the Act, which is punishable under Section 7 and 8 of the Act since it would not fall within the exemptions i.e. savings under Section 14 of the Act. At this stage, it is difficult for this Court to exercise power under Section 482 Cr.P.C. as the allegations made in the complaint, if accepted on face value constitute above referred offences, *prima facie*. The Magistrate is directed to dispose of C.C.No.841 of 2016 uninfluenced by any of the observations made herein since the findings or observations made herein above are for limited

purpose to decide the criminal petition. The petitioners are given liberty to raise all these objections before the Magistrate.

At this stage, learned Public Prosecutor submitted that it is a compoundable offence and that the petitioners readily agreed to compound the offences and requested to grant liberty to the petitioners to compound the offences.

In view of my foregoing discussion, the criminal petition is dismissed, giving liberty to the petitioners to compound the offences before the trial Court in accordance with law.

Pending miscellaneous petitions in the petition, if any, shall stand closed.

09.08.2018
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M.SATYANARAYANA MURTHY,J