

(2016) 09 MP CK 0035

MADHYA PRADESH HIGH COURT (INDORE BENCH)

Case No: M.A. No. 1379 of 2016

M/s. Tele World Marketing

APPELLANT

Vs

Entorr-10 Television Pvt. Ltd.

RESPONDENT

Date of Decision: Sept. 2, 2016

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1, Order 39 Rule 2
- Constitution of India, 1950 - Article 19(1)(g)
- Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 - Section 3, Section 4

Citation: (2016) AIR(MP) 212 : (2017) 1 JabLJ 92 : (2017) 2 MPLJ 394

Hon'ble Judges: Mr. Alok Verma, J.

Bench: Single Bench

Advocate: Shri A.K. Chitale, Learned Senior Counsel with Shri Vijay Tulsiyan, Learned Counsel, for the Appellant; None, for the Respondent

Final Decision: Allowed

Judgement

Mr. Alok Verma, J. - This Miscellaneous Appeal is filed against the order passed by learned 8th Additional District Judge, Indore in Civil Suit No.7-A/16 dated 12.07.2016 whereby the learned Additional Sessions Judge dismissed the application filed by plaintiff-appellant under Order 39 Rules 1 and 2 r.w.s. 151 C.P.C. The defendant/respondent remained ex-parte before the lower court as well as before this court even after receiving the notice sent by this court.

2. The plaintiff-appellant filed a suit for declaration and injunction. According to averments made in the plaint, respondent No.6 issued a letter to respondents No.1 to 4 where he directed them to stop telecast of advertisement in respect of the product marketing by plaintiff-appellant named "Asthi-jeevak" as in view of respondent No.6, the advertisement was violating the provisions of The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 (hereinafter called the

"Act").

3. According to plaintiff-appellant his business is solely depends upon receiving orders telephonically in response to the advertisement telecast on various T.Vs. Channel. The consumers directly contact the appellant and place their orders and the drug is directly supplied to the address given by them. By stopping the advertisement, the business and commercial interest of the appellant were adversely effected, and therefore, he has prima-facie case and also if no injunction is issued then the plaintiff-appellant would suffer irreparable injury. The balance of inconvenience also lies in favour of the plaintiff-appellant, and therefore, it was prayed by submitting the application that an injunction be issued against the directions issued by respondent No. 6 to respondents No. 1 to 4 and respondents No. 1 to 4 may be allowed to continue telecasting of the advertisement.

4. As stated earlier, as the respondent No.6 remained ex-parte before the lower court as well as before this court, no reply has been filed on his behalf. No notice was issued to remaining respondents being formal parties.

5. Before further examining the arguments raised by learned counsel before this court, the relevant provisions of the Act may be reproduced below. Section 3 of the Act provides 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 improvement 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.

6. Entry-43 of the Schedule appended to the Act includes "Rheumatism" as one of the disease against which no advertisement can be issued in which it was claimed and an impression is given that the drug would diagnose, cure, mitigate or prevent the disease. Section-4 of the Act provides as under :-

4. Prohibition of misleading advertisements relating to drugs. - Subject to the provisions of this Act, no person shall take any part in the publication of any advertisement relating to a drug if the advertisement contains any matter which -

(a) directly or indirectly gives a false impression regarding the true character of the drug; or

(b) makes a false claim for the drug; or

(c) is otherwise false or misleading in any material particular.

7. This apart, a procedure of scrutiny of an advertisement is given in rule-3 of the Drugs and Magic Remedies (Objectionable Advertisements) Rules, 1955 (hereinafter called the "Rule"). Rule-3 of the rules provides as under :-

3. Scrutiny of misleading advertisements relating to drugs. -

Any persons authorised by the State Government in this behalf may, if satisfied, that an advertisement relating to a drug contravenes the provisions of section 4, by order, require the manufacturer, packer, distributor or seller of the drug to furnish, within such time as may be specified in the order or such further time as may be allowed in this behalf by the person so authorised information regarding the composition of the drug or the ingredients thereof or any other information in regard to that drug as he deems necessary for holding the scrutiny of the advertisement and where any such order is made, it shall be the duty of the manufacturer, packer, distributor or seller of the drug to which the advertisement relates to comply with the order. Any failure to comply with such order shall, for the purposes of Section 7, be deemed to be a contravention of the provisions of section 4:

Provided that no publisher or advertising agency of any medium for the dissemination of any advertisement relating to a drug shall be deemed to have made any contravention merely by reason of the dissemination by him or if any such advertisement, unless such publisher or advertising agency has failed to comply with any discretion made by the authorised person in this behalf calling upon him or it to furnish the name and address of the manufacturer, packer, distributor, seller or advertising agency, as the case may be, who or which caused such advertisement to be disseminated.

8. Counsel for the appellant places reliance on judgement of Hon"ble Apex Court in case of **Deoraj v. State of Maharashtra reported at (2004) 4 SCC 697**, order of Co-ordinate Bench of this court in case of **Rajesh Gupta v. Urvashi Marwaha reported at AIR 2012 MP 137** and the order of High Court of Bombay in case of **Kantirani Jaynarayan v. State of Maharashtra reported at 1982 Law suit (Bom.) 55**.

9. This case was based on conviction under the provisions of the Act. He also places reliance on judgement passed by Co-ordinate Bench of this court in case of **Awdhesh Singh v. Union of India reported at 2013 law suit (MP) 202**. In this case, it was held that it cannot be disputed that by putting curb on the advertisement of the petitioner, there is curtailment of right of freedom of business and occupation and freedom of speech.

10. A drug inspector working under respondent No.6 issued a letter dated 03.06.2016 to various T.Vs. Channel for stopping the advertisement in respect of product of the appellant. No doubt when there is a violation of Sections 3 and 4 of the Act, such embargo on telecast of the advertisement can be placed by respondent No.6. However, it is apparent that for putting such embargo, the scrutiny as provided under rule-3 of rules must be done. There is no provision in the Act or the rules to place interim bar on the telecast of the advertisement pending such scrutiny. Rule-3 of rules further provides that the person who scrutinise such advertisement should be authorised by the State Government. Needless to say that the power exercised by the authorised person should be after following principle of natural justice because when the order passed by an authorised person under sections 3 & 4 of the rules would curb the rights of the petitioner, and therefore, principle of natural justice should be followed and the appellant should be given an opportunity to put up his case and also to place such evidence to show that the advertisement is not violating any provision of the Act. Accordingly, in considered opinion of this court, the learned lower court erred while not taking into consideration the fact that the principle of natural justice was not followed by respondent No.6 while issuing the directions to the T.Vs. Channel telecasting advertisement of the appellant. It may further be mentioned that as mentioned earlier such directions can be issued by the person authorised by the State Government by a notification. As no one appeared on behalf of respondent No.6, it is not clear whether the person issuing the direction was an authorised person or not.

11. Accordingly, I find that there is a prima-facie case in favour of the appellant.

12. So far as balance of convenience is concerned, without violating the principle of natural justice, the fundamental rights of the appellant cannot be curtailed, and therefore, there appears to be irreparable injuries and also balance of convenience in favour of the appellant.

13. Accordingly, this appeal is allowed. The impugned order passed by learned lower court dated 12.07.2016 is set-aside. The operation of directions issued by respondent No.6 dated 03.06.2016 to respondents No.1 to 4 is stayed subject to the condition that the appellant shall appear within one week from the date of issuing of this order before the Joint Commissioner (G.M.) Food and Drug Administration, Mumbai from whose office the directions were issued and file the entire documents and material showing that he is not violating any provisions of the Act. The Joint Commissioner is directed to forward his case to the authorised person who shall conduct the scrutiny as provided under rule- 3 of the rules and pass a reasoned order thereon by following rules of natural justice within one month. It is further directed that the authorised person after hearing the petitioner and taking into consideration the evidence and other material filed by him is at liberty to issue suitable direction to respondents No.1 to 4 in accordance with law. Respondents No.1 to 4 are permitted to telecast the advertisement of the appellant till final order of the authorised person is passed, however, a notice in clearly legible letter should be given to the consumers in Hindi and English language that the product is not intent to diagnose, cure, mitigate or prevent rheumatism.

14. With aforesaid observations and directions, this appeal stands disposed of.

15. Certified copy, as per rules.