Hamdard Dawakhana (Wakf) Lal Kuan, Delhi and Another

Vs

Union of India and Others

Petition Nos. 81, 62, 63 & 3 of 18

(CJI B. P. Sinha, Syed Jafar Imam, J. L. Kapur, K. N. Wanchoo, K. C. Das Gupta JJ)

18.12.1959

JUDGMENT

KAPUR, J. -

These petitions under Art. 32 of the Constitution raise the question of the constitutionality of the Drug and Magic Remedies (Objectionable Advertisement) Act (XXI of 1954) hereinafter referred to as the Act. As the petitions raise a common question of law they may conveniently be disposed of by one judgment.

The allegation of the petitioners was that various actions had been taken against them by the respondents which violated their fundamental rights under Art. 19(1)(a) and 19(1)(f) and (g). They also challenged the Act because it contravened the provisions of Art. 14 and Arts. 21 and 31.

The Act passed on April 30, 1954, came into force on April 1, 1955, along with the rules made thereunder. As provided in its preamble it was

> "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 petitioners in Writ Petition No. 81 of 1959, the Hamdard Dawakhana (Wakf) and another, alleged that soon after the Act came into force they experienced difficulty in the matter of publicity for their products and various objections were raised by the authorities in regard to their advertisements. On December 4, 1958, the Drugs Controller, Delhi, intimated to the petitioners that the provisions of s. 3 of the Act had been contravened by them and called upon them to recall their products sent to Bombay and other States. As a result of this, correspondence ensued between the petitioners and the authorities. On December 4, 1958, the Drugs Controller, Delhi State, stopped the sale of forty of their products set out in the petition. Subsequently, objection was taken by the Drugs Controller to the advertisements in regard to other drugs. Similarly objections were taken by the Drugs Controllers of other States to various advertisements in regard to medicines and drugs prepared by the petitioners. They submitted that the various advertisements which had been objected to were prepared in accordance with the Unani system and the drugs bore Unani nomenclature which had been recognised in the whole world for several centuries past. The Act is assailed on the ground of discrimination under Art. 14, excessive delegation and infringement of the right of free speech under Art. 19(1)(a) and their right to carry on trade and business under Art. 19(1)(f) & (g). Objection is also taken under Arts. 21 and 31. The petitioners therefore prayed for a declaration that the Act and the Rules made thereunder were ultra vires and void as violative of Part III of the

Constitution and for the issuing of a writ of Mandamus and Prohibition and for quashing the proceedings and the notices issued by the various authorities-the respondents.

In their counter affidavit the respondents submitted that the method and manner of advertisement of drugs by the petitioners and others clearly indicated the necessity of having and Act like the impugned Act and its rigorous enforcement. The allegations in regard to discrimination and impairment of fundamental rights under Art. 19(1)(a), (f) & (g) and any infringement of Arts. 21 and 31 were denied and it was stated :-

> "The restriction is about the advertisement to the people in general. I say that the main object and purpose of the Act is to prevent people from self-medicating with regard to various serious diseases. Self-medication in respect of diseases of serious nature mentioned in the Act and the Rules has a deleterious effect on the health of the community and is likely to affect the well-being of the people. Having thus found that some medicines have tendency to induce people to resort to self-medication by reason of elated advertisements, it was thought necessary in the interest of public health that the puffing up of the advertisements is put to a complete check and that the manufacturers are compelled to route their products through recognised sources so that the products of these manufacturers could be put to valid and proper test and consideration by expert agencies."

It was also pleaded that the advertisements were of an objectionable character and taking into consideration the mode and method of advertising conducted by the petitioners the implementation of the provisions of the impugned Act was justified. Along with their counter-affidavit the respondents have placed on record Ext.-A, which is a copy of the literature which accompanied one of the various medicines put on sale by the petitioners and/or was stated on the cartons in which the medicine was contained. In their affidavit in rejoinder the petitions reiterated that Unani and Ayurvedic systems had been discriminated against; that self-medication had no deleterious effect on the health of the community; on the contrary it -

> "is likely to affect the well-being of the people, in the context of effective household and domestic remedies base on local herbs popularly known to them in rural areas. Self-medication has its permission (?) limits even in America and Canada where unlicensed itinerant vendors serve the people effectively."

For the petitioner in all the petitions Mr. Munshi raised four points :

> (1) Advertisement is a vehicle by means of which freedom of speech guaranteed under Art. 19(1)(a) is exercised and the restrictions which are imposed by the Act are such that they are not covered by cl. (2) of Art. 19;
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> (2) That Act, the Rules made thereunder and the schedule in the rules impose arbitrary and excessive restrictions on the rights guaranteed to the petitioners by Art. 19(1)(f) and (g);
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> (3) Section 3 of the Act surrenders unguided and uncanalised power to the executive to add to the diseases enumerated in s. 3;
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> (4) Power of confiscation under s. 8 of the Act is violative of the rights under Arts. 21 and 31 of the Constitution.

In Petitions Nos. 62 and 63 of 1939 which relate to two branches of Sadhana Ausadhalaya at Poona and Allahabad respectively, Mr. N. C. Chatterjee, after giving the peculiar facts of those petitions and the fact that the petitioners' Poona branch was raided without a warrant, a number of medicines had been seized, and a complaint filed against the petitioners in that petition, submitted that s. 3(b) of the Act was meant to strike down abnormal sexual activities, that advertisements in that case merely mentioned the names of the diseases and suggested the drug for the treatment of those diseases, that the prohibition of such advertisements was an unreasonable restriction on their fundamental right; that there was nothing indecent in saying that their medicine was a cure for a particular disease and that the Act was an undue interference with cure and treatment of disease.

We now proceed to consider the vitality of the arguments raised on behalf of the petitioners. Firstly it was submitted that the restriction on advertisements was a direct abridgment of the right of free speech and advertisements could not be brought out of the guaranteed freedom under Art. 19(1)(a) because no dividing line could be drawn and freedom of speech could not be curtailed by making it subject to any other activity. The learned Solicitor-General on the otherhand, contended that it was necessary to examine the pith and substance of the impugned Act and if it was properly considered it could not be said to have in any way curtailed, abridged or impaired the rights guaranteed to the petitioners under Art. 19(1)(a). He is also contended that the prohibited advertisement did not fall within the connotation of "freedom of speech". The doctrine of pith and substance, submitted Mr. Munshi, was created for the purpose of determining the legislative competence of a legislature to enact a law and he sought to get support from the following observation of Venkatarama Aiyar, J., in A. S. R. 399, 406, 410) :-

> "..... and the Privy Council had time and again to pass on the constitutionality of laws made by the Dominion and Provincial legislatures. It was in this situation that the Privy Council evolved the doctrine, that for deciding whether an impugned legislation was intra vires regard must be had to its pith and substance."

Though the doctrine of 'pith and substance' was evolved to determine the constitutionality of an enactment in reference to the legislative competence of a legislature particularly under a federal constitution with a distributive system of powers it has been used in other contexts in some cases, e.g., in connection with the determination of the constitutionality of statutes restricting the rights to carry on certain activities and the consequent infringement of Art. 19(1)(g) : by Mahajan, C.J., in Cooverjee B. Bharucha v. The Excise Commissioner & The Chief Commissioner of Ajmer ([1954] S.C.R. 873, 877) in the case of Excise Regulation I of 1915 regulating the import, export, transport, manufacture, sale and possession of intoxicating drugs and liquor and imposing duties thereon; by Das, C. J., in State of Bombay v. R. M. D. Chamarbughwala ([1957] S.C.R. 874) in connection with a statute which was held not to be interference with trade, commerce or intercourse as such but to save it from anti-social activities.

> "It is unnecessary to decide in the present case whether in its scope it extends to the determination of the constitutionality of an enactment with reference to the various sub-clauses of cl. (1) of Art. 19. A more appropriate approach to the question is, in our opinion, contained in the dictum of Mahajan, J. (as he then was) in M/s. Dwarka Prasad Laxmi Narain v. The State of Uttar Pradesh ([1954] S.C.R. 674, 682). There he held that "in order to decide whether a particular legislative measure contravenes any of the provisions of Part III of the Constitution it is necessary to examine with some strictness the substance of the legislation in order to decide what the legislature has really done. Of course the legislature cannot bypass such constitutional

> prohibition by employing indirect methods and therefore the Court has to look behind the form and appearance to discover the true character and nature of the legislation."

Therefore, when the constitutionality of an enactment is challenged on the ground of violation of any of the articles in Part III of the Constitution, the ascertainment of its true nature and character becomes necessary, i.e., its subject matter, the area in which it is intended to operate, its purport and intent have to be determined. In order to do so it is legitimate to take into consideration all the factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy; Bengal Immunity Company Ltd. v. The State of Bihar ([1955] 2 S.C.R. 606, 632, & 633); R. M. D. Chamarbaughwala v. The Union of India ([1957] S.C.R. 930, 935); Mahant Moti Das & Ors. v. S. P. Sahi (A.I.R. (1959) S.C. 942,948).

Another principle which has to borne in mind in examining the constitutionality of a statute is that it must be assumed that the legislature understands and appreciates the need of the people and the laws it enacts are directed to problems which are made manifest by experience and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment. Charanjit Lal Chowdhuri v. The Union of India & Ors. ([1950] S.C.R. 869); The State of Bombay v. F. N. Bulsara ([1951] S.C.R. 682, 708); Mahant Moti Das v. S. P. Sahi (A.I.R. (1959) S.C. 942, 948).

What then was the history behind the impugned legislation and what was the material before the Parliament upon which it set to enact the impugned Act.

> (1) In 1927 a resolution was adopted by then Council of State recommending to the Central and Provincial Governments to take immediate measures to control the indiscriminate use of medical drugs and for standardisation of the preparation and for the sale of such drugs. In August 1930, in response to the public opinion on the subject and in pursuance of that resolution the Government of India appointed the Drugs Enquiry Committee with Sir R. N. Chopra as its Chairman to enquire into the extent of the quality and strength of drugs imported, manufactured or sold in India and to recommend steps for controlling such imports, manufacture and sale in the interest of the public. This Committee made a report pointing out the necessity of exercising control over import, manufacture and sale of patent and proprietary medicines in the interest of the safety of the public and public health. The report pointed out in paragraph 256-259 how in other countries control was exercised and restrictive laws to achieve that end had been enacted. In the Appendix to the Report was given a list of a number of samples of advertisements of patent and proprietary medicines dealing with cures of all kinds of disease.
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> (2) As a result of the Chopra Committee Report the Drugs Act was passed in 1940.
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> (3) In 1948 The Pharmacy Act was passed to regulate the provisions of pharmacy. As a result of these two enactments the State Governments were given the responsibility of controlling the manufacture of drugs and pharmaceuticals and their sales through qualified personnel and the Central Government was given the control on quality of drugs and pharmaceuticals imported into the country.

(4) The Chopra Committee Report dealt with the popularity of the patent and proprietary medicines in the following words :

"The pride of place must be accorded to ingenious propaganda clever and attractive dissemination of their supposed virtues and wide and alluring advertisements. The credulity and gullibility of the masses, especially when 'certain cures' are assured in utterly hopeless cases, can well be imagined. Perusal of the advertisements of 'cures' produces a great effect on patients who have tried treatment by medical men without success. Such patients resort to any and every drug that comes in their way. In an infinitesimal small number of cases spontaneous cures are also effected. Widest publicity is given to these and the preparations become invested with miraculous virtues. The reassurances of cure, the force of argument advanced to guarantee it and the certificates of persons said to have been cured which are all set out in advertisements make a deep impression, especially on those with weak nerves. The love of mystery and secrecy inherent in human nature, the natural disinclination and shyness to disclose details of one's illness especially those involving moral turpitude, the peculiar temperament of the people who, high and low, rich and poor, demand 'something in a bottle' for the treatment of every ailment and poverty of the people who cannot afford to pay the doctor's bills or the high prices current for dispensed medicines, or the high prices current for dispensed medicines, have all been enlarged upon as tending to self-diagnosis and self-medication by patent and proprietary medicines."

(5) Evidence was led before the Chopra Committee deprecating the increasing sale of proprietary medicines particularly those with secret formulae as such drugs were positively harmful and were a serious and increasing menace. There were advertisements and pamphlets issued in connection with these medicines which showed fraudulent practices and extravagant claims for these medicines.

(6) The Chopra Committee Report had also made a recommendation for a strict measure of control over proprietary medicines.

(7) The Bhatia Committee was set up in pursuance to a resolution No. CI-1(12)/52 dated February 14, 1953, and between March 1953, and end of that year it examined a large number of witnesses in different towns of India some of whom represented chemists and druggists, some were leading medical practitioners and some were State Ministers for Health. The Bhatia Committee issued a Questionnaire to various organisations and witnesses. It contained questions in regard to advertisement of drugs and therefore one of the objects of this Committee which was inaugurated by the Health Minister on March 12, 1953, was amongst other things to look into the control to be exercised over objectionable and unethical advertisements.

(8) There were a large number of objectionable advertisements in the Press in regard to patent medicines which were after the Act came into force pointed out by the Press Commission Report but it cannot be said that this fact was unknown to Parliament as this Committee also examined a number of witnesses.

(9) The Indian Medical Association had suggested to this Press Committee which was presided over by the late Mr. Justice Rajadhyaksha the barring of advertisements

of medicines which claim to cure or alleviate any of the following diseases :

Cancer, Bright's disease, Cataract, Diabetes, Epilepsy, Glaucoma, Locomotor ataxia, Paralysis, Tuberculosis.

(10) In the United Kingdom, advertisements of drugs or treatment for these diseases are governed by the Cancer Act of 1939 and the Pharmacy and Medicines Act of 1941. (Advertisement relating to the treatment of general diseases are governed by the Veneral Diseases Act of 1917).

(11) Wyndham E. B. Lloyd in his book 'Hundred years of medicine' published in 1936 wrote about the outstanding evils which arise from the use of secret remedies and nostrums. It also drew attention to the dangers of advertisements in regard to them and what the British Medical Association had said about them.

(12) The British Medical Association had in a book entitle 'Secret Remedies What they cost and contain' exposed ruthlessly the harmful effects of such remedies. The council on Pharmacy and Chemistry of American Medical Association had also given its opinion on the harmful effects of indiscriminate self-medication by the public and the grave danger which ensued from such misdirected and inadequate treatment, and the failure to recognise seriousness of the disease only when it was too late.

It is not necessary to refer to the recommendations of the Bhatia Committee or the Press Enquiry Committee because they were published in June and July 1954 respectively.

In England as far back as 1889, an Act called the Indecent Advertisements Act (52 and 53 Vict. Ch. 18) was passed to suppress indecent advertisements in which advertisements relating to syphilis, gonorrhea, nervous debility or other complaints or infirmity arising from intercourse was prohibited. In 1917 the General Diseases Act (7 and 8 Geo. V Ch. 21) was passed in England. This placed restrictions on advertisement relating to treatment for venereal diseases. In 1941, The Pharmacy and Medicine Act, 1941 (4 and 5 Geo. VI Ch. 42) was passed which corresponds in material particulars to the impugned Act. It cannot be said that there was no material before Parliament on the basis of which it proceeded to enact the impugned legislation. This material shows the history of the legislation, the ascertained evil intended to be cured and the circumstances in which the enactment was passed. In Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar ([1959] S.C.R. 279,297), Das, C.J., observed :-

> "that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation;"

Thus it is open to the court for the purpose of determining the constitutionality of the Act to take all these facts into consideration and in the present case we find that there was the evil of self-medication, which both in this country and in other countries, the medical profession and those, who were conversant with its dangers, had brought to the notice of the people at large and the Government in particular. They had also warned against the dangers of self-medication and of the consequences of unethical advertisement relating to proprietary medicines particularising those

diseases which were more likely to be affected by the evil. There is reason, therefore, for us to assume that the state of facts existed at the time of the legislation which necessitated the Act. These facts we have already set out it is not necessary to reiterate them.

With this background in view we proceed to examine the provisions of the Act and ascertain the predominant purpose, true intent, scope and the object of the Act. The preamble shows that the object of the Act was to control the advertisement of drugs in certain cases, i.e., diseases and to prohibit advertisements relating to remedies pretending to have magic qualities and provide for other matters connected therewith. The title of the Act also shows that it is directed against objectionable advertisements. The definition section (2) in cl. (a) defines advertisements and in cl. (b) drugs which include (i) medicines for use of human beings and animals, (ii) substances for use of diagnosis, treatment or prevention of diseases in human beings and animals, (iii) articles other than food which affect the organic functions of the body of human beings or animals and (iv) articles intended for use of component of any medicine etc., cl. (c) defines magic remedies to include a talisman, mantra, kavacha and other charms and (d) relates to the publication of any advertisement and (e) what a venereal disease is. Section 3 prohibits advertisement of drugs for treatment of diseases and disorders. Clause (a) of s. 3 deals with procurement of miscarriage in women or prevention of conception; cl. (b) with maintenance or improvement of capacity of human beings for sexual pleasure; cl. (c) with diagnosis and cure of general and other diseases. Section 4 prohibits misleading advertisements relating to drugs. Section 5 similarly prohibits advertisements of magic remedies efficacious for purposes specified in s. 3. Section 6 prohibits the import into and export from India of certain advertisement. Section 14 is a saving clause which excludes registered practitioners, treatises or books, advertisements sent confidentially to medical practitioners, wholesale or retail chemists for distribution among registered medical practitioners or to hospitals or laboratories. It also excludes advertisements printed or published by Government or with the previous sanction of the Government. Section 15 gives the Government the power to grant exemptions from the application of ss. 3, 4, 5 and 6 in certain cases.

As already stated when an enactment is impugned on the ground that it is ultra vires and unconstitutional what has to be ascertained is the true character of the legislation and for that purpose regard must be had to the enactment as a whole, to its objects, purpose and true intention and to the scope and effect of its provisions or what they are directed against and what they aim at (A. S. Krishna v. State of Madras ([1957] S.C.R. 399, 406, 410)). Thus examined it cannot be said that the object of the Act was merely to put a curb on advertisements which offend against decency or morality but the object truly and properly understood 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. No doubt in s. 3 diseases are expressly mentioned which have relation to sex and disorders peculiar to women but taken as a whole it cannot be said that the object of the Act was to deal only with matters which relate to indecency or immorality. The name and the preamble are indicative of the purpose being the control of all advertisements relating to drugs and the use of the word animals in cl. (b) of the definition section negatives the object being merely to curb the emphasis on sex and indecency. Section 4 further suggests that the legislature was trying to stop misleading advertisements relating to drugs. Section 5 also tends to support the object being prohibition of advertisements suggesting remedies for all kinds of diseases. Section 6 also points in the same direction, i.e., to stop advertisements as to drugs. Section 14 and 15 are a clearer indication that there should be no advertisements for drugs for certain diseases in order that the general public may not be misled into using them for ailments which they may imagine they are suffering from and which they might believe to be curable thereby. That this is so is shown by the fact that such advertisements can be sent to medical practitioners, hospitals and laboratories. The exclusion of

Government advertisements and the power to give exemption all point to the objective being the stopping of advertisements of drugs for the object above-mentioned and not merely to stop advertisements offending against morality and decency.

Mr. Munshi's argument was that s. 3 was the key to the Act and that the object and direct effect of the Act was to stop advertisements and thereby impair the right of free speech by directly putting a prohibition on advertisement. If the contention of Mr. Munshi were accepted then the restriction to be valid must fall within cl. (2) of Art. 19 of the Constitution. In other words it must have relationship with decency or morality because the other restrictions of that clause have no application. If on the other hand the submission of the learned Solicitor-General is accepted then the matter would fall under sub-cls. (f) and (g) and the restriction under Art. 19(6). The object of the Act as shown by the scheme of the Act and as stated in the affidavit of Mr. Merchant is the prevention of self-medication and self-treatment and a curb on such advertisements is a means to achieve that end. Objection was taken that the preamble in the Act does not indicate the object to be the prevention of treatment of diseases otherwise than by qualified medical practitioners as the English Veneral Diseases Act 1917 does. In this Court in many cases affidavits were allowed to be given to show the reasons for the enactment of a law, the circumstances in which it was conceived and the evils it was to cure. This was done in the case of Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar ([1959] S.C.R. 279). Similarly, in Kathi Raning v. The State of Saurashtra ([1952] S.C.R. 435) and in Kavalappara Kottarathil Kochunni v. The State of Madras (A.I.R. (1959) S.C. 725) affidavits were allowed to be filed setting out in detail the circumstances which led to the passing of the respective enactments.

In support of his argument that any limitation of his right to advertise his goods was an infringement of his freedom of speech because advertisement was a part of that freedom Mr. Munshi relied upon Alma Lovell v. City of Griffin (82 Law Ed. 949; 303 U.S. 444). In that case the objection was taken to the validity of a municipal ordinance prohibiting the distribution without a permit of circulars, handbooks, advertising or literature of any kind on the ground that such ordinance violated the first and the 14th amendment by abridging the freedom of the Press and it was held that such prohibition was invalid at its face as infringing the constitutional freedom of the Press and constitutional guarantee of such freedom embraced pamphlets and leaflets. The actual violation which was complained of in that case consisted of the distribution without the required permission of pamphlets and magazines in the nature of religious tracts. Chief Justice Hughes, said :-

> "The ordinance in its broad sweep prohibits the distribution of "circulars, handbooks, advertising or literature of any kind." It manifestly applies to pamphlets, magazines and periodicals."

No doubt the word advertisement was used both in the ordinance as well as in the opinion by the learned Chief Justice but the case actually related to the distribution of pamphlets and magazines. Mr. Munshi also relied on Express Newspapers (Private) Ltd. v. The Union of India ((1959) S.C.R. 12, 123-133), where the cases dealing with freedom of speech were discussed by Bhagwati, J., but the question of advertisements as such did not arise in that case.

An advertisement is no doubt a form of speech but its true character is reflected by the object for the promotion of which it is employed. It assumes the attributes and elements of the activity under Art. 19(1) which it seeks to aid by bringing it to the notice of the public. When it takes the form of a commercial advertisement which has an element of trade or commerce it no longer falls within the concept of freedom of speech for the object is not propagation of ideas-social, political or economic

or furtherance of literature or human thought; but as in the present case the commendation of the efficacy, value and importance in treatment of particular diseases by certain drugs and medicines. In such a case, advertisement is a part of business even though as described by Mr. Munshi its creative part, and it was being used for the purpose of furthering the business of the petitioners and had no relationship with what may be called the essential concept of the freedom of speech. It cannot be said that the right to publish and distribute commercial advertisements advertising an individual's personal business is a part of freedom of speech guaranteed by the Constitution. In Lewis J. Valentine v. F. J. Chrestensen (86 Law. Ed. 1262). It was held that the constitutional right of free speech is not infringed by prohibiting the distribution in city streets of handbills bearing on one side a protest against action taken by public officials and on the other advertising matter. The object of affixing of the protest to the advertising circular was the evasion of the prohibition of a city ordinance forbidding the distribution in the city streets of commercial and business advertising matter. Mr. Justice Roberts, delivering the opinion of the court said :-

> "This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising ..... If the respondent was attempting to use the streets of New York by distributing commercial advertising, the prohibition of the Code provisions was lawfully invoked against such conduct."

It cannot be said therefore that every advertisement is a matter dealing with freedom of speech nor can it be said that it is an expression of ideas. In every case one has to see what is the nature of the advertisement and what activity falling under Art. 19(1) it seeks to further. The advertisements in the instant case relate to commerce or trade and not to propagating of ideas; and advertising of prohibited drugs or commodities of which the sale is not in the interest of the general public cannot be speech within the meaning of freedom of speech and would not fall within Art. 19(1)(a). The main purpose and true intent and aim, object and scope of the Act is to prevent self-medication or self-treatment and for that purpose advertisements commending certain drugs and medicines have been prohibited. Can it be said that this is an abridgment of the petitioners' right of free speech. In our opinion it is not. Just as in Chamarbaughwalla's case ([1957] S.C.R. 930) it was said that activities undertaken and carried on with a view to earning profits e.g. the business of betting and gambling will not be protected as falling within the guaranteed right of carrying on business or trade, so it cannot be said that an advertisement commending drugs and substances as appropriate cure for certain diseases is an exercise as a appropriate cure for certain diseases is an exercise of the right of freedom of speech. Das, C.J., in State of Bombay v. R. M. D. Chamarbaughwala's ([1957] S.C.R. 874) case said at page 920 :

> "We have no doubt that there are certain activities which can under no circumstances be regarded as trade or business or commerce although the usual forms and instruments are employed therein. To exclude those activities from the meaning of those words is not to cut down their meaning at all but to say only that they are not within the true meaning of those words."

One has only to substitute for the words "trade or business or commerce" the phrase "freedom of speech" to see how it applies to the present case. Freedom of speech goes to the heart of the natural

right of an organised freedom-loving society to "impart and acquire information about that common interest". If any limitation is placed which results in the society being deprived of such right then no doubt it would fall within the guaranteed freedom under Art. 19(1)(a). But if all it does is that it deprives a trader from commending his wares it would not fall within that term. In John W. Rast v. Van Deman & Lewis Company (60 Law Ed. 679, 690) Mr. Justice McKenna, dealing with advertisements said :-

> "Advertising is merely identification and description, apprising of quality and place. It has no other object than to draw attention to the article to be sold and the acquisition of the article to be sold constitutes the only inducement to its purchase."

As we have said above advertisement takes the same attributes as the object it seeks to promote or bring to the notice of the public to be used by it. Examples can be multiplied which would show that advertisement dealing with trade and business has relation with the item "business or trade" and not with "freedom of speech". Thus advertisements sought to be banned do not fall under Art. 19(1)(a).

It was also connected that the prohibition against advertisements of the petitioners was a direct abridgment of the right of freedom of speech and Alice Lee Grosjean v. The American Press Co. (80 Law Ed. 660) was relied upon. That was a case in which a tax was levied base on gross receipts for the privilege of engaging in the business of public advertisements in newspapers, magazines etc. having a specified circulation and it was there held that such a statute abridged the freedom of the press because its effect was not merely to reduce revenue but it had tendency to curtail circulation. This subject was discussed in Express Newspapers' case ([1959] S.C.R. 12,123-133) at pages 128 to 133 where the question was whether the Wage Board Act specifying the wages and conditions of service of the working journalists and thus imposing certain financial burden on the press was an interference with the right of freedom of Press and Bhagwati, J., said at page 135 :-

> "Unless these were the direct or inevitable consequences of the measures enacted in the impugned Act, it would not be possible to strike down the legislation as having that effect and operation. A possible eventuality of this type would not necessarily be the consequence which could be in the contemplation of the legislature while enacting a measure of this type for the benefit of the workmen concerned."

In considering the constitutionality of a statute the Court has regard to substance and not to mere matters of form and the statute must be decided by its operation and effect; J. M. Near v. State of Minnesota (75 Law Ed. 1357, 1363-4).

In the present case therefore (1) the advertisements affected by the Act do not fall within the words freedom of speech within Art. 19(1)(a); (2) the scope and object of the Act its true nature and character is not interference with the right of freedom of speech but it deals with trade or business; and (3) there is no direct abridgment of the right of free speech and a mere incidental interference with such right would not alter the character of the law; Ram Singh v. The State of Delhi ([1951] S.C.R. 451, 455); Express Newspapers (Private) Ltd. v. The Union of India ([1959] S.C.R. 12, 123-133).

It is not the form or incidental infringement that determines the constitutionality of a statute in reference to the rights guaranteed in Art. 19(1), but the reality and substance. The Act read as a whole does not merely prohibit advertisements relating to drugs and medicines connected with diseases expressly mentioned in s. 3 of the Act but they cover all advertisements which are

objectionable or unethical and are used to promote self-medication or self-treatment. This is the content of the Act. Viewed in this way, it does not select any of the elements or attributes of freedom of speech falling within Art. 19(1)(a) of the Constitution.

It was next argued that assuming that the matter was within clauses (f) & (g) of Art. 19(1), the restraint was disproportionate to the purpose of the Act, the object sought to be achieved and the evil sought to be remedied. It was further argued that it could not be said that the restrictions imposed by the Act were in the interest of the general public. The basis of this argument was (1) the very wide definition of the word 'advertisement' in s. 2(a); (2) the use of the word 'suggest' in s. 3; (3) the uncanalised delegated power to add diseases to the schedule; (4) the existence of s. 14(c) read with rule 6 of the Rules and (5) the procedural part in s. 8 of the Act; all of which, according to counsel, showed that it was beyond all allowable limits of restraint under cl. 6 of Art. 19.

'Advertisement' in the Act, it was argued, included not only advertisements in newspapers and periodicals and other forms of publication but also on cartons, bottles and instructions inside a carton. Without this latter kind of advertisement, it was submitted, the user would be unable to know what the medicine was, what it was to be used for and how ? If the purpose of the Act is to prevent objectionable and unethical advertisements in order to discourage self-medication and self-treatment it cannot be said that the definition is too wide keeping in view the object and the purpose of the Act which have been set out above. It is these evils which the Act seeks to cure and if the definition of the word 'advertisement' was not so broad and inclusive it would defeat the very purpose for which the Act was brought into existence.

The argument that the word 'suggest' is something subjective is, in our opinion, also not well-founded. 'Suggest' has many shades of meaning and in the context it means commendatory publication. It connotes a direct approach and its use in s. 3 does not support the contention that the restraint is disproportionate. In another part of the judgment we shall discuss the constitutionality of the power of delegation reasonableness of the range of diseases added in the schedule and it is unnecessary to go over the same field here.

Then we come to s. 14(c) and r. 6 i.e., prohibited advertisement is to be sent confidentially by post to a registered medical practitioner or to a wholesale and retail chemist or a hospital and laboratory and the following words have to be inscribed on the outside of every packet containing the advertisement, i.e., "for the use only of registered medical practitioners or a hospital or a laboratory". If the purpose is to discourage self-medication and encourage treatment by properly qualified medical practitioners then such a regulatory provision cannot be considered an excessive restraint. The mere fact that in the corresponding English Act certain other persons are also mentioned and that such advertisements can be published in certain medical journals and scientific treatises is not a ground for holding the restriction to be disproportionate. It is not a proper method of judging the reasonableness of the restrictions to compare every section of the Act with the corresponding English Act and then to hold it unreasonable merely because the corresponding section of the two Acts are different. The evil may be the same but the circumstances and conditions in the two countries in regard to journals may be different and there are bound to be differences in the degree of restrictiveness in the operative portions of the two Acts. The policy behind the Act is that medication should be on the advice of qualified medical practitioners. Merely because the legislature thought that it would not exclude advertisements in medical journals of the country would not be indicative of the disproportion of the restraint.

Objection was then taken to the procedural part in s. 8 and it was submitted that the power of

search, seizure and detention was unfettered and very wide and there is no proper procedure laid down as in the Criminal Procedure Code or the Drugs Act and there are no rules and safeguards in regard to search warrants or entry into premises as there are in Code of Criminal Procedure or the Drugs Act. In part of the judgment we shall deal with this question and it is not necessary to do so here.

It was next contended that the Act was not in the interest of the general public as it could not be said that the mention of the names of diseases or instructions as to the use of particular medicines for those diseases was not in the interest of the general public. Besides, it would prevent the medicines being brought to the notice of the practising medical practitioners or distributing agencies. It would also prevent a properly worded advertisement suggesting cure of diseases to people who for the sake of prestige and other understandably valid reasons do not like to confide to any person the nature of their diseases and that it would prevent medical relief in a country where such relief is notoriously inadequate. We have already set out the purpose and scope of the Act, the conditions in which it was passed and the evils it seeks to cure. If the object is to prevent self-medication or self-treatment, as it appears to be then these are exactly the evils which such advertisements would subserve if a piece of legislation like the Act did not exist. It has not been shown that the restrictions laid down in the Act are in any manner disproportionate to the object sought to be attained by the Act nor has it been shown that the restrictions are outside the permissible limits.

Mr. Chatterjee in dealing with this point drew our attention to the test of reasonableness as laid down in Chintaman Rao v. The State of Madhya Pradesh ([1950] S.C.R. 759) where it was said by Mahajan, J. (as he then was) at pages 762 and 763 :-

> "The question for decision is whether the statute under the guise of protecting public interests arbitrarily interferes with private business and imposes unreasonable and unnecessarily restrictive regulations upon lawful occupation; in other words, whether the total prohibition of carrying on the business of manufacture of bidis within the agricultural season amounts to a reasonable restriction on the fundamental rights mentioned in article 19(1)(g) of the Constitution."

It has not been shown in the present case that under the guise of protecting public interest the Act arbitrarily interferes with private business or imposes unreasonable restrictions. If the true intention of the Act is, as indeed it is, to stop objectionable and unethical advertisements for the purpose of discouraging self-medication no question of unreasonable restriction arises. Mr. Chatterjee also relied upon the observation of Bose, J., in Dwarka Das Srinivas of Bombay v. The Sholapur Spinning & Weaving Company Limited ([1954] S.C.R. 674, 733) where the learned Judge said that "the provisions in the Constitution touching fundamental rights must be construed broadly and liberally in favour of those on whom the rights have been conferred". With this statement we are in accord. The interpretation should be such as to subserve the protection of the fundamental rights of the citizen but that is subject to limitations set out in Art. 19 itself which are for the general welfare of all citizens taken as a whole and are therefore for the interest of the general public. Mr. Chatterjee further contended that the restraint was excessive because the prohibition of a mere mention of the name of a disease and the suggestion of a cure for that could not be a reasonable restriction. As submitted by the learned Solicitor-General the objection is not to the names but to the advertisements commending certain medicines as a cure for the same and this is what the Act is endeavouring to eliminate. In our opinion it cannot be said that the restrictions either excessive or disproportionate or are not in the interest of the general public.

The third point raised by Mr. Munshi was that the words 'or any other disease or condition which may be specified in the rules made under this Act' in cl.(d) of s. 3 of the Act are delegated legislation and do not lay down any certain criteria or proper standards, and surrender unguided and uncanalised power to the executive to add to diseases in the schedule. The learned Solicitor-General in reply supported the schedule as a case of conditional legislation and not the exercise of delegated legislative power and he further contended that even if it was held to be the latter it was within the limits recognised by judicial decisions. The distinction between conditional legislation and delegated legislation is this that in the former the delegate's power is that of determining when a legislative declared rule of conduct shall become effective; Hampton & Co. v. U. S. (276 U.S. 394) and the latter involves delegation of rule making power which constitutionally may be exercised by the administrative agent. This means that the legislature having laid down the broad principles of its policy in the legislation can then leave the details to be supplied by the administrative authority. In other words by delegated legislation the delegate completes the legislation by supplying details within the limits prescribed by the statute and in the case of conditional legislation the power of legislation is exercised by the legislature conditionally leaving to the discretion of an external authority the time and manner of carrying its legislation into effect as also the determination of the area to which it is to extend; (The Queen v. Burah ((1878) 3 App. Cas. 889); Russell v. The Queen ((1882) 7 App. Cas 829, 835); King Emperor v. Benoarilal Sarma ((1944) L.R. 72 L.A. 57); Sardar Indar Singh v. State of Rajasthan ([1957] S.C.R. 604).) Thus when the delegate is given the power of making rules and regulations in order to fill in the details to carry out and subserve the purposes of the legislation the manner in which the requirements of the statute are to be met and the rights therein created to be enjoyed it is an exercise of delegated legislation. But when the legislation is complete in itself and the legislature has itself made the law and the only function left to the delegate is to apply the law to an area or to determine the time and manner of carrying it into effect, it is conditional legislation. To put it in the language of another American case :

> "To assert that a law is less than a law because it is made to depend upon a future event or act is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know."

The proper distinction there pointed out was this :

> "The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. There are many things upon which wise and useful legislation must depend which cannot be known to the law making power, and must therefore be subject of enquiry and determination outside the hall of legislature."

(In Lockes Appeal 72 Pa. 491; Field v. Clark 143 U. S. 649.)

But the discretion should not be so wide that it is impossible to discern its limits. There must instead be definite boundaries within which the powers of the administrative authority are exercisable. Delegation should be not be so indefinite as to amount to an abdication of the legislative function- Schwartz American Administrative Law, page 21.

In an Australian case relied upon by the learned Solicitor General the prohibition by proclamation of goods under s. 52 of the Customs Act 1901 was held to be conditional legislation; Baxter v. Ah

Way (8 Com. L.R. 626, 634, 637, 638). According to that case the legislature has to project its mind into the future and provide as far as possible for all contingencies likely to arise in the application of the law, but as it is not possible to provide for all contingencies specifically for all cases, the legislature resorts to conditional legislation leaving it to some specified authority to determine in what circumstances the law should become operative or to what its operation should be extended, or the particular class of persons or goods to which it should be applied : Baxter's case (8 Com. L.R. 626, 634, 637, 638) at pp. 637 & 638.

Broadly speaking these are the distinguishing features of the two forms of delegation and these are their characteristics. The question is in which compartment does the power given in the Act fall.

The power given to the authority under the provision (S. 3) of the Act is contained in cl. (d) in the following words :-

S. 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

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(d) the diagnosis, cure, mitigation, treatment or prevention of any general disease or any other disease or condition which may be specified in rules made under this Act."

And power to make rules is laid down in s. 16 which is as follows :-

> S. 16 (1) "The Central Government may by notification in the official gazette make rules for carrying out the purposes of this Act.
>
> (2) In particular and without prejudice to the generality of the foregoing power, such rules may -
>
> (a) specify any disease or condition to which the provisions of s. 3 shall apply;
>
> (b) prescribe the manner in which advertisement of articles or things referred to in cl. (c) of sub-s. (1) of s. 14 may be sent confidentially."

For the petitioner it was argued that s. 3(d) is delegated legislation and not conditional legislation as the power delegated therein is only to specify conditions and diseases in the rules.

The interdiction under the Act is applicable to conditions and diseases set out in the various clauses of s. 3 and to those that may under the last part of clause (d) be specified in the rules made under s. 16. The first sub-section of s. 16 authorises the making of rules to carry out the purposes of the Act and cl. (a) of sub-section (2) of that section specifically authorises the specification of diseases or conditions to which the provisions of s. 3 shall apply. It is the first sub-section of s. 16 which confers the general rule making power, i.e., it delegates to the administrative authority the power to frame rules and regulations to subserve the object and purpose of the Act. Clause (a) of the second sub-section is merely illustrative of the power given under the first sub-section; King Emperor v. Sibnath Banerji ((1945) L.R. 72 I.A. 241). Therefore, sub-s. 2(a) also has the same object as sub-s. (1), i.e, to carry out the purposes of the Act. Consequently, when the rule making authority specifies conditions and diseases in the schedule it exercises the same delegated authority as it does when it

exercises powers under sub-s. (1) and makes other rules and therefore it is delegated legislation. The question for decision then is, is the delegation constitutional in that the administrative authority has been supplied with proper guidance. In our view the words impugned are vague. Parliament has established no criteria, no standards and has not prescribed any principle on which a particular disease or condition is to be specified in the Schedule. It is not stated what facts or circumstances are to be taken into consideration to include a particular condition or disease. The power of specifying diseases and conditions as given in s. 3(d) must therefore be held to be going beyond permissible boundaries of valid delegation. As a consequence the Schedule in the rules must be struck down. But that would not affect such conditions and diseases which properly fall within the four clauses of s. 3 excluding the portion of cl. (d) which has been declared to be unconstitutional. In the view we have taken it is unnecessary to consider the applicability of Baxter v. Ah Way (8 Com. L.R. 626, 634, 637, 638).

We are of the opinion therefore that the words "or any other disease or condition which may be specified in the rules made under this Act" confer uncanalised and uncontrolled power to the Executive and are therefore ultra vires. But their being taken out of the rest of the clause or section as they are severable; R. M. D. Chamarbaughwala v. The Union of India ([1957] S.C.R. 930).

The constitutionality of s. 8 of the Act was challenged on the ground that it violated the petitioners' right under Arts. 21 and 31. That section when quoted runs as follows :

> "Any person authorised by the State Government in this behalf may, at any time, seize ..... and detain any document, article or thing which such person has reason to believe contains any advertisement which contravenes any of the provisions of this Act and the court trying such contravention may direct that such document (including all copies thereof) article or thing shall be forfeited to the Government".

It was pointed out by Mr. Munshi that there was no limitation placed on, no rules and regulations made for and no safeguards provided in regard to the powers of a person authorised in that behalf by Government to seize and detain any document, article or anything which in the opinion of such person contains any advertisement contravening any of the provisions of the Act. It was also submitted that in the corresponding English Act of 1939, in s. 10 there are proper safeguards provided in regard to the exercise of the power of seizure etc. The first part of s. 8 of the Act dealing with seizure and detention received slender support from the Solicitor-General. It may be, he contended, that having regard to the purpose and object of the Act the Indian legislature did not think it necessary to provide any safeguards and that the legislature thought that nobody would be prejudiced by reason of the want of safeguard previous to the seizure. In our opinion this portion of the section goes far beyond the purpose for which the Act was enacted and, the absence of the safeguards which the legislature has thought it necessary and expedient in other statutes, e.g., the Indian Drugs Act, is an unreasonable restriction on the fundamental rights of the petitioners and therefore the first portion of the section, i.e., "any person authorised ..... by any of the provision of this Act" is unconstitutional. What then is the consequence of this unconstitutionality ? If this portion is excised from the rest of the section the remaining portion is not even intelligible and cannot be upheld. The whole of the section must therefore be struck down.

By a portion of cl. (d) of s. 3 and the whole of s. 8 being declared unconstitutional the Act is not thereby affected as they are severable from the rest of the Act. As a consequence of excision of that portion and of s. 8 from the Act the operation of the remaining portion of the Act remains unimpaired. R. M. D. Chamarbaughwala v. The Union of India ([1957] S.C.R. 930). As a result of

s. 8 being declared invalid, all the goods seized from the petitioners having been seized without the authority of law must be returned to the respective petitioners. It will be for the Government to take such action in regard to the proceedings taken or prosecutions commenced as is in accordance with the law laid down in this judgment.

We declare the portion of cl. (d) of s. 3 indicated above and s. 8 unconstitutional and direct therefore that a writ of mandamus shall issue directing the respondents to return the goods seized. As the petitioners' challenge to the constitutionality of the Act is partially successful the proper order as to costs is that the parties do pay their own costs.

Petition partly allowed.

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