

Reserved on 21.12.2012

Delivered on 18.1.2022

Court No. - 87

Case :- CRIMINAL APPEAL No. - 1284 of 2012

Appellant :- Kanhaiya Lal Nishad

Respondent :- State of U.P.

Counsel for Appellant :- Janardan Yadav

Counsel for Respondent :- Govt. Advocate

Hon'ble Mrs. Sadhna Rani (Thakur),J.

This appeal has been preferred against the judgment and order dated 14.12.2011 passed by Additional Sessions Judge, Court No.16, Deoria in S.T. No.219 of 2007 (State Versus Mohd. Minhaj and Another), arising out of Case Crime No.457 of 2006, under Section 7 of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, Police Station- Gauri Bazar, District- Deoria, whereby the learned trial court has sentenced the appellant with fine of Rs.1,000/- and in default the appellant had to undergo two months simple imprisonment.

The law was set into motion when the Sub-Inspector Sita Ram Arya filed a seizure memo at P.S. Gauri Bazar, Deoria that on 03.09.2006, he alongwith HCP Sri Ramdheer Singh, Constable 335 Shahnawaz Akhtar and Constable 432 Akhilesh Singh alongwith jeep and its driver Rajendra Yadav, was on petrol duty and in search of wanted criminals at Rampur Chauraha he was informed by the informer that in village Bhetauli Bujurg, Tola Nauvgaon in the field of Ram Vriksha Yadav a

tantrik is making fool of the innocent public by practicing exorcism. He has buried alive two persons. He, immediately, alongwith his colleagues reached at the spot where a huge crowd was gathered and a tantrik was practicing exorcism. Two pits were digged in his front, which were covered with the wooden plank and soil over the plank. On interrogation the tantrik and the public disclosed that in both the pits one man each is present and with the miracle of the tantrik these persons will come out (alive) after 24 hours. The police got removed the soil with the help of public and after removing the plank both the persons were taken out. Both of them were breathing very slowly, when interrogated the person practicing exorcism disclosed his name to be Minhaj s/o Mohd. Hadish resident of Phutaha Patkhauli, P.S. Tarkulva, District Deoria and introduced him as a tantrik, out of two persons taken out of the pit one disclosed his name to be Udaibhan Gaud s/o Survdev Gaud resident of Bhauvapar Chaubey Tola, P.S. Chaurichaura, District Gorakhpur and introduced him as the disciple of tantrik and the other person rescued out of the pit introduced him as Kanhaiya Lal Nishad s/o Towar Prasad resident of Bhatauli Bujurg Tola Naugava Gauribazar, District Deoria. Near the pits the offerings flowers, leaves, incense sticks and Rs. 346.50 of different denomination were present. On further interrogation the tantrik, namely, Mohd. Minhaj disclosed that he and his disciple had learned this art of exorcism from Ajmer Sharif and they wandering as nomades used to remove the obstacles of ghosts among public and facilitate them in getting secret money, accordingly, they also earn

handsome money for themselves. When the pits were inspected thoroughly with the help of a torch, in one of the pit, a snake put by tantrik was also found. If the persons buried alive were not rescued in time both of them could have died. All the accused persons were made aware of their offences under Section 308, 420 IPC and Section 7 of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 and were taken into custody at 19:20 PM. The recovered money was also seized. The family members of the accused persons were informed through mobile. Police tried to find out the independent witness from among the public but nobody agreed to become a witnesses. Seizure memo was prepared which was read over and explained to all the police personnel and the accused persons. At the time of arrest the orders and guidelines of Hon'ble High Court and the National Human Rights Commission of India were adhered. The copies of the memo were given to all the accused persons.

On the basis of seizure memo Case Crime No.457 of 2006, under Sections 308 and 420 I.P.C. and Section 7 of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 was registered. Investigation was taken over by S.I. Jai Prakash Lal, who investigated the matter. The investigation culminated into filing of charge-sheet under Section 308, 420 I.P.C. and Section 7 of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 against all the above named three accused persons.

After receiving the charge-sheet, the concerned court took cognizance and on 13.02.2008, the Special Judge, EC Act, Court No.5, Deoria framed charges under Sections 420 I.P.C. and Section 7 of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 against all the three accused persons, namely, Mohd. Minhaj, Udaibhan Gaud and Kanhaiya Lal Nishad on the same date. Against accused Mohd. Minhaj charge under Section 308 I.P.C. was also framed.

All the three accused persons denied the charges and pleaded to be tried.

The prosecution produced S.I. Ramdheer Singh as P.W.-1, Sihasan Prasad s/o Lal Chandra as P.W.-2, Sudarshan Prasad s/o Began as P.W. -3, Head Constable Dhananjay Pandey as P.W.-4 and Constable 674 Shahnawaz Akhtar as P.W.-5 in support of their case.

As documentary evidence, seizure memo as Exhibit Ka-1, chik F.I.R. as Exhibit Ka-2, copy of G.D. as Exhibit Ka-3, site plan as Exhibit Ka-4 and charge-sheet as Exhibit Ka-5 were produced.

No material exhibit was produced by prosecution.

After prosecution evidence, the statements of all the accused persons were recorded under Section 313 Cr.P.C. wherein all the three denied the occurrence and prayed their implication in this case false due to village party bandi.

No defence evidence has been produced by the accused persons.

On the basis of evidence produced and after hearing the arguments of rival parties, the lower court found the offence under Section 7 of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 to be proved against the accused persons and thereby all the three accused persons were convicted under Section 7 of Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 and fined of Rs.1,000/- each and in default of payment of fine accused persons had to undergo two months imprisonment. Accused Mohd. Minhaj was acquitted of the charges under Sections 308, 420 I.P.C. and accused Udaibhan Gaud and Kanhaiya Lal Nishad were acquitted of charge under Section 420 I.P.C.

This is an appeal filed by the accused- appellant Kanhaiya Lal Nishad only against the impugned judgment, wherein he has been convicted and sentenced under Section 7 of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 with a fine of Rs. 1,000/- with default stipulation.

The appeal has been filed on the grounds that the trial court has passed the judgment and conviction order against the weight of evidence present on record. This judgment and order has been passed relying upon the evidence, which is not admissible in Indian Evidence Act. The learned trial court has gone beyond its jurisdiction in passing of impugned judgment and also procedure laid down in Evidence Act not having properly appreciated, as such the entire judgment and conviction order suffers from illegality, irregularity and perversity and the judgement and

order being unjust, improper and illegal on the face of record is liable to be set aside.

Heard learned counsel for the appellant and the learned A.G.A.

It is argued by the learned counsel for the appellant that though the appellant has deposited the amount of fine of Rs. 1,000/- but as he is a diploma holder engineer, this conviction can cause him hardship in the future, so the prayer for setting aside the impugned judgment and order is made.

Learned A.G.A. on the other hand has submitted that the learned lower court after going through the evidence on record has passed the impugned judgment, which is just and proper in the eyes of law, hence, the same does not need any interference and thus deserves to be confirmed.

The record reveals that leader of the seizing party Sita Ram Arya and the Investigating Officer Jai Prakash Lal Srivastava both have died, so the seizure memo has been proved by P.W.-1 S.I. Ramdheer Singh and same is further confirmed by P.W. -5 Constable Shahnawaz Akhtar both being the members of the seizing party. Though, as per seizure memo, independent witnesses could not be procured but when the charge-sheet was filed the investigating officer mentioned Sri Sinhasan Prasad and Sudershan as independent public witnesses. Both of them were produced in the court as P.W.-2 and P.W.-3, respectively. But they have not supported the prosecution case and have been declared hostile. In cross-examination by the State Counsel, nothing useful has come out.

P.W-4 is a formal witness, who has proved the chik F.I.R. and copy of the G.D. P.W.-5 apart from proving the incident has also proved site plan and charge-sheet as secondary evidence. The whole prosecution case rests on the oral evidence of P.W. -1 and P.W.-5, who were admittedly the members of the seizing party.

It is an admitted fact that in the court neither the offerings of rupees, flowers, incense sticks nor wooden plank and snake dead or alive etc. have been produced nor any of the public person or any of the accused person has filed any complaint anywhere regarding this incident. As per seizure memo, accused Mohd. Minhaj is said to be a tantrik, who is the main accused. Accused Udaibhan Gaud is said to be his disciple but the present accused Kanhaiya Lal Nishad is a member of public, who is noway related to the tantrik or his disciple. He has submitted in his statement under Section 313 Cr.P.C. that he has been implicated in this case due to village party bandi and enmity but what is the village party bandi and with whom he is in enmity has not been disclosed or proved by him.

It is also argued that none of the offerings including rupees have been produced before the court and present accused is said to be present on the spot as an ordinary person only. It is further argued that the police has wrongly implicated the appellant. He is not the beneficiary of any act done by the tantrik and no independent witness has supported the prosecution case. By filing the High School Certificate of the year, 2003, Intermediate Examination Certificate Year, 2006, certificate of the Board

of Technical Education, U.P. Lucknow of the Diploma Course in Civil Engineering dated 01.11.2012, certificate of course on computer of February, 2018, certificate of Acme Computer Education of the year 2016, certificate of completion of CADD Center Training Services, Gorakhpur dated 06.09.2016, certificate of Railway Recruitment Board dated 03.03.2021 alongwith the documents of the Railway examination, sponsor certificate dated 16.01.2009, statement of marks of B.A.-II year, 2021 and provisional admit card for the examination, 2016 as a part of affidavit it is argued that at the time of incident the appellant was the student of Class-12th and now he has passed diploma in Civil engineering by first division in the year, 2012 and has also passed diploma in computer application and auto Cadd in the year, 2016 and has passed B.A.-II year in the year 2021. As he is good in studies and has qualified first stage of some competitive examinations he is having neither any criminal record nor he is involved in any anti social activities so the prayer of setting aside the conviction order has been made because as per appellant counsel this conviction may cause hindrance in shaping of his future.

It is further argued that neither the plaintiff nor the investigating officer has been produced in the court nor any offerings or any material related to the alleged offence like wooden plank, snake dead or alive, offerings of flowers, leaves, incense sticks and rupees have been produced in the court, hence, no offence can be said to be proved against the appellant.

It is true that no independent witness has supported the prosecution case and the plaintiff and the investigating officer both have not been produced because of their death. But P.W.-1 and P.W.-5, who were present at the spot as a member of seizing party relating to present offence have supported the prosecution case in the court. P.W.-5 has also proved the site plan and charge-sheet filed by the Investigating Officer as secondary evidence. So far as, any material regarding tantra vidya (exoticism) is concerned, no doubt that any offerings and the material related to exorcism has not been produced in the court by the police personnel and that is why all the accused persons have been acquitted of the charge under Section 420 I.P.C. and accused Mohd. Minhaj has been acquitted of the charge under Section 308 I.P.C. and all the accused persons have been convicted under Section 7 of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, only.

It is argued that this Drugs and Magic Remedies (Objectionable Advertisements) Act 1954 relates to the advertisements only and the present accused was not advertising any drug or magic remedy, therefore, he cannot be held liable for the charge under Section 7 of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954. If we go through, this Act, Section 7 prescribes the penalty and Section 2 relates to the definitions.

In the preface of this Act, the need of introducing the bill related to Drug and Magic Remedies is explained wherein it is disclosed that objectionable advertisements published in the newspapers or magazines

or otherwise relating to alleged cures for venereal diseases, sexual stimulants and alleged cures for diseases and conditions peculiar to women are found to be increasing. These advertisements tend to cause the ignorant and the unwary to resort to self-medication with harmful drugs and appliances, or to resort to quacks who indulge in such advertisements for treatments which cause great harm. It is necessary in the public interest to put a stop to such undesirable advertisements. This Bill having been passed by both the Houses of Parliament, received the assent of the President and came on the Statute Book as The Drugs And Magic Remedies (Objectionable Advertisements) Act, 1954.

The word advertisement has been defined in Clause 2 (a) of the Drugs And Magic Remedies (Objectionable Advertisements) Act, 1954. According to which 'advertisement' includes 'any notice, circular, label, wrapper, or other document, and **any announcement made orally** or by any means of producing or transmitting light, sound or smoke'. As per Section 2(d) of the Act 'taking any part in the publication of any advertisement' includes- the printing of the advertisement and the publication of any advertisement outside the territories to which this Act extends by or at the instance of a person residing within the said territories.

Thus, the advertisement can be made oral also and the person taking part in this advertisement shall also be liable to be convicted under this Act. The present appellant is said to have taking part in the Act of exorcism by getting himself buried alive in a pit covered with the wooden

plank and thereafter covering with the soil. Both the witnesses, P.W.-1 and P.W.-5 have clearly stated in their evidence that when on the information of the informer they reached on the spot they found there a huge gathering accused, Minhaj was busy in exorcism. He was sitting in front of two pits, which were covered by the wooden plank and putting soil over the planks.

On interrogation, the public disclosed that in each of the pit one man is confined and with the miracle done by the tantrik both the persons will come out (alive) after 24 hours. The police with the help of public present there got removed the soil and wooden plan over the pits and dragged both the persons out of the pits. The present accused was one out of the two persons who were put in to the pit and it was being claimed by the tantrik that these two persons till come out (alive) after 24 hours thus, the present accused can very well be said to be a part of the act of exorcism. The said act of Tantrik claiming it to be a miracle and participation in this act by the rest two persons both are covered under the Drugs And Magic Remedies (Objectionable Advertisements) Act, 1954. Thus, in my opinion, the lower court has rightly reached at the definite conclusion that the offence under Section 7 of the Drugs And Magic Remedies (Objectionable Advertisements) Act, 1954 has been committed by the appellant.

So far as the prayer of the learned counsel for the appellant that this conviction judgment and order will adversely affect the carrier of the appellant is concerned, in my opinion, if the offence has been committed

then the person must be ready to undergo the punishment fixed by the statute for that offence. Though, the prayer is also made to suspend the impugned conviction order by drawing the attention of this Court towards the order of the co-ordinate bench of this Court dated 01.11.2021 passed in Criminal revision No. 2724 of 2021 wherein till the next date of listing, the effect and operation of the judgment impugned against the revisionist has been stayed.

The attention of the Court has also been drawn towards the judgment of **Rajasthan High Court at Jaipur Bench in Sunder Lal Versus State, 2008 0 Supreme (Raj) 2181** wherein Jaipur Bench of Rajasthan High Court allowed the stay application of the appellant and stayed the conviction order dated 02.08.2007 passed by the Additional Sessions Judge, Dausa in Sessions Case No.47 of 2005 till the disposal of appeal. In both the cases the conviction order has been stayed either till the next date of listing or till the disposal of appeal. These order/judgment are distinguishable as here in the case in hand the stage is different. In the present matter the appeal of the appellant is being decided finally and so no interim order can be passed, hence, the appellant does not deserve the benefit of these order and judgement.

The lower court is found to reach at a definite conclusion after placing reliance on the trustworthy testimony of the police personnel. The prosecution story is fully proved beyond all reasonable doubts against the appellant, in my opinion, the appellant has been rightly found guilty of the offence punishable under Section 7 of the Drugs and Magic

Remedies (Objectionable Advertisements) Act, 1954, thus, the judgment of the lower court needs no interference. Sentence awarded to the appellant is also not excessive.

The appeal lacks merits and is, accordingly, **dismissed**. The conviction and sentence recorded by the learned lower court is hereby, confirmed.

Order Date :- 18.1.2022

Radhika