

**(2001) 10 BOM CK 0041**

**In the Bombay High Court**

**Case No : Writ Petition No. 3184 of 2000**

Anand Chintamani Dighe and Another

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

**Date of Decision : 09-10-2001**

**Acts Referred:**

Constitution of India, 1950 — Article 19(1), 226

Criminal Procedure Code, 1973 (CrPC) — Section 95, 95(1), 96, 96(4)

Penal Code, 1860 (IPC) — Section 153A, 153A(1), 295A

**Citation :** (2001) 3 ALLMR 151 : (2002) 1 BomCR 57 : (2002) 1 BOMLR 671 :  
(2002) CriLJ 8 : (2002) 2 MhLj 14

**Hon'ble Judges :** B.P. Singh, C.J.; S. Radhakrishnan, J.; D.Y. Chandrachud, J

**Bench :** Full Bench

**Advocate :** Indrajeet Kulkarni, for the Appellant; P. Janardhanan, A.A.G. and  
C.R. Sonawane, A.G.P., for the Respondent

**Final Decision :** Allowed

## Judgement

D.Y. Chandrachud, J.—On 3rd December 1998, the Government of Maharashtra, in exercise of powers conferred by Section 95(1) of the Code of Criminal Procedure, 1973, declared that every copy, including the manuscript or any other form of the play entitled "Mee Nathuram Godse Boltoy" and its translations in Gujarati or any other language shall stand forfeited to Government. The Gujarati translation of the original in Marathi is entitled "Gandhi ke Godse". In these proceedings, the order of forfeiture has been sought to be impugned. In view of the provisions of Sub-section (2) of Section 96 of the Code, the petition has been heard by a Special Bench of three Judges. In the petition as originally filed, the writer of the play was the second petitioner before the Court. The first petitioner claimed that he was a social worker, inter alia, working for an institution known by the name and style of the "Hindu Manch" of the District of Thane. The first petitioner has since expired, after the matter was heard and judgment was reserved. The name of the first petitioner is deleted from the array of parties and the petition is disposed of on the basis that the writer of the play who is now the

sole petitioner moves the Court for relief against the order of forfeiture.

2. Translated literally, the title of the play "Mee Nathurarn Godse Boltoy" means "I am Nathurarn Godse Speaking". The play was written in 1988. The Gujarati version of the play was approved by the Censor Board without any deletion and it was stated before us that 25 performances of the play in Gujarati took place. The Maharashtra Stage Performances Scrutiny Board granted in November 1997, its authorisation for the staging of the performances of the play. The permission granted by the Board on 26th November 1997, a copy of which is placed in the file tendered to the Court on behalf of the State Government by the Learned Additional Advocate General shows that permission for staging the play was granted without the exclusion or deletion of any part thereof. The underlying report dated 24th November 1997 of Smt. Lalita Bapat, a Member of the Scrutiny Board, set out that there was nothing objectionable in the play and that accordingly, permission should be granted for staging the play in the "Universal Category", meaning thereby that it was suitable for general viewing. The play was accordingly staged from time to time. According to the petitioner, an "emoted" reading of the play was slated to take place on 19th May 2000 at the Gadkari Rangayatan, Thane at 9 p.m. before a private audience consisting of persons invited by the Hindu Manch. In the course of a meeting held on 15th May 2000 with the Commissioner of Police, Thane, the petitioner was informed, this being also recorded by a letter of the said date, that the scripts of the play in Marathi, Gujarati and all other languages had been forfeited to the State Government by a notification dated 3rd December 1998. The petitioner was, in the circumstances, informed that since all the scripts of the play have been forfeited to Government, no performance of the play should be staged as planned, According to the petitioner, the notification of the Government dated 3rd December 1998 was not served on him at any date prior to the communication of the Police Commissioner and the petitioner was unaware of the order of forfeiture. The order of forfeiture which has been passed by the State Government, brief as it is, may be extracted hereinafter since it is upon the validity of that order that the claim for relief in these proceedings must depend. The order provides thus :

"Whereas it appears to the Government of Maharashtra that the Script of the Marathi play "Mee Nathuram Godse Boltoy" written by Shri Pradeep Dalvi, published in the form of printed document (containing 23 pages) and its Gujarathi translation "Gandhi ke Godse" contains derogatory references towards Mahatma Gandhi and certain communities, which are likely to disturb the public tranquility, promote disharmony or feelings of enmity, hatred or ill-will among the different groups or communities;

And whereas the reading of the said play shows that it is written with deliberate and malicious intention to outrage the feelings of the persons who follow and believe in the teachings of Mahatma Gandhi;

And whereas the Government of Maharashtra is of the opinion that the

publication of the said play is punishable under sections 153-A and 295-A of the Indian Penal Code (45 of 1960);

Now, therefore, in exercise of the powers conferred by Sub-section (1) of Section 95 of the Code of Criminal Procedure, 1973 (2 of 1994) the Government of Maharashtra hereby declares that the every copy (including manuscript or any other form) of the said play, in Marathi and translation thereof in Gujarathi or any other languages, shall be forfeited to Government."

The petitioner has also adverted to the fact that on 17th May 2000 an order came to be passed and served u/s 144 of the Code of Criminal Procedure, 1973 prohibiting the petitioner from holding the stage performance which was proposed to be held on 19th May 2000 within the jurisdiction of the Thane Police Commisstonerate.

3. The Learned Additional Advocate General has placed before the Court, the relevant files containing the decisions formulated in regard to the play which form the subject matter of these proceedings. Affidavits have been filed in these proceedings on behalf of the State and the concerned authorities. The Learned Additional Advocate General relies upon a decision taken by the State Cabinet on 18th July 1998 for prohibiting the staging of performances of the play. The decision of the cabinet has also been relied upon in the affidavit in reply dated 16th June 2001 and is annexed as Exhibit "3" to the affidavit sworn by Shri Satish R. Patankar, Desk Officer in the General Administration Department of the State Government. The decision which was taken on 18th July 1998 was to prohibit the performances of the play. The decision records that it was based upon the possibility of a deterioration in the law and order situation and upon the advice of the Central Government that a prohibition should be imposed on the performances of the play in Marathi, Gujarati and other languages. The cabinet decision, it must be noted, was in the matter of prohibiting the stage performances of the play and did not authorise action u/s 95 of the Code of Criminal Procedure, 1973 of forfeiting the script of the play. Following the decision of the cabinet of 18th July 1998, a communication dated 21st July 1998 was addressed by the Desk Officer in the Home Department to the Commissioner of Police, Greater Bombay calling upon him to cancel the performance licences which had been granted for the staging of the play. The affidavit in reply in these proceedings also adverts to a letter dated 17th July 1998 addressed by the Additional Secretary to the Government of India in the Ministry of Home Affairs to the Chief Secretary of the Government of Maharashtra. The letter of the Union Government was in response to a communication dated 16th July 1998 addressed on behalf of the State Government to the Joint Secretary in the Ministry of Home Affairs. The communication addressed by the State Government sets out that the Maharashtra Stage Performances Scrutiny Board had granted Censor clearance for the performance of the play. According to the said communication, Smt. Lalita Bapat, a member of the Board had cleared the script on 24th November 1997 certifying that she did not find anything

objectionable in the script and that consequently the play be certified in the "Universal" Category of viewership. The Chairman of the Board while issuing the certificate had clarified that no cut had been directed to be made in the script. The play, it was stated, was staged on 10th July 1998 at the Shivaji Mandir Theatre, at Dadar, Mumbai. In response to the aforesaid letter of the State Government, the Additional Secretary in the Ministry of Home Affairs, Government of India, addressed a letter dated 17th July 1998 which has been placed on the record of the proceeding as Exhibit T to the affidavit in reply dated 16th June 2001. The letter of the Union Government was to the following effect:

"This is with reference to the State Government's Fax Message, dated the 16th July, 1998, regarding the alleged glorification of Nathuram Godse in a Marathi play "Mee Nathuram Godse Boltoy".

2. Keeping in view the reported intent of the play, the Central Government would advise the State Government to prohibit its performance. The Central Government strongly disapproves of anything that denigrates the hallowed memory of Mahatma Gandhi, and belittles the unique role he played in leading the nation to freedom from colonial rule."

4. What does emerge from the aforesaid narration of facts is that both the communication of the Union Government dated 17th July 1998 and the decision of the State Government dated 18th July 1998 related to the proposed prohibition upon the performances of the play. The fact that there was at that stage no authorisation for an order of forfeiture of the scripts of the play is an undisputed position of fact.

4-A. In the meantime, on 2nd September 1998, a letter was addressed by Dr. P.S. Pasricha from the office of the Commissioner of Police, Greater Bombay; to the Additional Chief Secretary (Home) referring therein to the "controversy about banning of the Marathi play Mee Nathuram Godse Boltoy". The letter recorded that during a discussion on 1st September 1998 with the Additional Chief Secretary, the attention of the latter had been drawn to the fact that despite the Cabinet decision to ban the play, no notification had yet been issued, in the absence of which, the Police stated that they were unable to implement the decision of the Government. The letter recorded that the Stage Performances Scrutiny Board had neither reviewed the certificate of suitability which was issued for the play, nor had the Board revised, suspended or rescinded the certificate. The letter records that it had been suggested to the Government that the provisions of Section 95 of the Code of Criminal Procedure, 1973 could be used "for imposing a ban on the said play". A draft notification was sent therewith by the Office of the Commissioner of Police.

5. On 1st September 1998, a proposal was put up by the Home Department recording that a direction had been issued to the Competent Authorities on 21st July 1998 and on 28th August 1998 that no performance licence should be granted for the play in any language, It was also recorded that an application

made for the grant of a performance licence to the Police by the producer and writer of the play had been refused. In the note which was put up by the Home Department, it was proposed that a prohibition should be imposed on all Audio and Video Cassettes of the play as also in the public reading or performances of the play. On this, a noting was made by the Deputy Chief Minister on 2nd September 1998 that apart from the aforesaid, a proposal for taking action u/s 95 of the Code of Criminal Procedure, 1973 should be put up.

6. A proposal was accordingly put up on 3rd September 1998. The said proposal adverted to the fact that while the Police authorities had declined to grant a performance licence, there was no possibility of the Stage Performances Scrutiny Board revoking the certification granted to the play, The play may, it was stated give rise to an intensity of feelings among different classes of society and there was a possibility of law and order being affected. However, should the producer or writer challenge the decision of the government, the position of the government would be vulnerable before the High Court because the Stage Performances Scrutiny Board had declined to revoke the certification granted by it. On the aforesaid proposal, the Chief Secretary directed on 7th September 1998 that it should be ascertained from the Chairman of the Scrutiny Board as to what the Board proposes to do regarding certification of the play.

7. The Government moved the Stage Performances Scrutiny Board for rescinding the permission which had been granted by the Board in November 1997. In reply to a letter dated 8th October 1998, addressed by the State Government in the Social Welfare, Cultural Affairs and Sports Department, the Stage Performances Scrutiny Board on 9th October 1998 informed the Government that a careful decision had been arrived at by the Board on the basis of the report of a Member of the Board, Smt. Lalita Bapat, who had read a copy of the play. The Board had thereafter, cleared the play without cut or deletion and certified the play for Universal Viewership under the authority of the Chairman of the Board. The reply of the Board also sets out that at that stage it had not been anticipated that the performance of the play would give rise to a controversy and that perhaps, the controversy may have arisen out of political considerations. In these circumstances, the Board intimated to the Government that it was not reconsidering its earlier decision and it was for the State Government to inform the Board of its decision on the issue.

8. Ultimately, a fresh proposal was mooted on 12th October 1998 after soliciting the views of the Scrutiny Board. Since the ultimate decision which was arrived at by Government was on the basis of the aforesaid proposal, it would be necessary to carefully scrutinise the underlying reasons on the basis of which action u/s 95 of the Code of Criminal Procedure, 1973 was adopted. The action was proposed to be taken on the basis of the following :

(i) On 2nd September 1998, the office of the Commissioner of Police had suggested that action be taken u/s 95 since despite the Cabinet decision to ban the play, the Police had not been able to implement the decision of the

Government in the absence of a Notification. The letter also recorded that Stage Performances Scrutiny Board had not reviewed or rescinded the certification granted to the play;

(ii) The Central Government on 17th July 1998 had communicated to the State Government that the performances of the play should be prohibited. However, the advice of the Central Government was only in regard to banning the performance of the play and not prohibiting the play itself,

(iii) After receipt of the letter from the Central Government, a meeting was held in the office of the Additional Chief Secretary (Home) in which it had been decided that (a) though the play had been certified by the Scrutiny Board, action should be taken by the Board forthwith to rescind the certification and that a communication to that effect should be issued by the Social Welfare, Cultural Affairs and Sports Department; (b) since the aforesaid action by the Scrutiny Board would take some time, the Police should be directed in the meantime, to revoke the performance licence granted to the play. Accordingly such a direction had been issued on 21st July 1998;

(iv) On 18th July 1998, the Cabinet had decided to prohibit, in view of the decision of the Central Government and in view of the possibility of law and order being affected, to prohibit performances of the play. The Cabinet decision, like the decision of the Central Government was in regard to a ban on the performance of the play only and not for prohibiting the play itself;

(v) The Social Welfare, Cultural Affairs and Sports Department had communicated with the Scrutiny Board which alone had the power to certify the performance of the play. On 25th July 1998, the Board had held a meeting in which the members of the Board had expressed their agreement with the view of one of its Members, Smt. Lalita Bapat. The Board was of the view that the certification which was granted to the play was of a permanent nature and there was no question of reconsidering the decision taken by the Board to certify the play;

(vi) In the circumstances, two Departments of the Government had taken two different and conflicting positions, the Commissioner of Police declining on one hand to grant a performance licence on 31st August 1998. On the other hand, the Board declined to review its earlier decision to certify the play;.

(vii) The Commissioner of Police had declined to grant a performance licence since there was possibility that as a result of the staging of the play, "intense feelings" may be aroused in "different classes" of society and a possibility of a "law and order situation" arising in relation thereto.

(viii) On the proposal which had earlier been made, the Chief Secretary had directed that the views of the Stage Performances Scrutiny Board should be duly ascertained. The Chairman of the Scrutiny Board had, however, not taken any action on the communication of the Social Welfare, Cultural Affairs and Sports

Department. It was this proposal which was ultimately affirmed by the Deputy Chief Minister on 2nd November 1998.

9. This narration of facts is relevant for the purposes of the present proceedings because what emerges is that the Stage Performances Scrutiny Board as far back as in November 1997 certified the play as being fit for performance. The certificate issued by the Scrutiny Board was express in that it stated that no deletion at all had been recommended in the play. The play was certified for universal viewership of all audiences. The State Government had sometime in July 1998, communicated to the Central Government in regard to the controversy which appeared to have arisen in regard to the performance of the play and acting on the advice of the Union Home Ministry that the performance of the play may be prohibited, the Cabinet had on 18th July 1998 arrived at a decision to do so. On that basis, the performance licence which was granted for the play was cancelled by the Police and no fresh permissions were being granted for staging the play. The action u/s 95 of the Code of Criminal Procedure was proposed by the office of the Commissioner of Police on the ground that in the absence of a notification by the Government the Police had not been able to enforce the ban on the performance of the play. A proposal was accordingly put up before the Home Department on which the Chief Secretary suggested that the views of the Stage Performances and Scrutiny Board should be ascertained. Government was conscious of the fact that in view of the refusal of the Board to revoke certification, the decision to prohibit the performance was liable to be susceptible of a challenge in Court. The Board reiterated its earlier decision to permit the performance of the play. In suggesting that a notification u/s 95 of the Code of Criminal Procedure be issued, the Home Department stated that there were two divergent views within the Government itself : those of the Scrutiny Board which maintained its earlier decision and those of the Police Commissioner who had cancelled the performance licence. In the file note on the basis of which the ultimate decision was arrived at, besides the aforesaid fact, a passing reference was made to the fact that there was a possibility of a law and order situation arising and of the play generating intense feelings amongst various classes of Society. These were then the circumstances in which the notification u/s 95 of the Code of Criminal Procedure, 1973 came to be issued. The validity of the notification may now be considered.

10. Section 95 of the Code of Criminal Procedure, 1973 is an enabling provision which, in certain circumstances, empowers the State Government to declare that a copy of a newspaper, book or document be forfeited to the Government. Section 95 provides thus :

"95. Power to declare certain publications forfeited and to issue search-warrants for the same. -- (1) Where -

(a) any newspaper, or book, or

(b) any document,

wherever printed, appears to the State Government to contain any matter the publication of which is punishable u/s 124-A or Section 153-A or Section 153-B or Section 292 or Section 293 or Section 295-A of the Indian Penal Code (45 of 1860), the State Government may, by notification, stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter, and every copy of such book or other document to be forfeited to Government, and thereupon any police officer may seize the same wherever found in India and any Magistrate may by warrant authorise any police officer not below the rank of sub-inspector to enter upon and search for the same in any premises where any copy of such issue or any such book or other document maybe or maybe reasonably suspected to be.

(2) In this section and in Section 96, --

(a) "newspaper" and "book" have the same meaning as in the Press and Registration of Books Act, 1867 (25 of 1867);

(b) "document" includes any painting, drawing or photograph, or other visible representation.

(3) No order passed or action taken under this section shall be called in question in any Court otherwise than in accordance with the provisions of Section 96."

The provisions of Section 95 of the Act deal with any newspaper, book or document which is printed. The power to issue a declaration of forfeiture that is conferred upon the State Government is conditioned by the requirement that it must appear to the State Government that such newspaper, book or document contains any matter, the publication of which is punishable under sections 124-A, 153-A, 153-B, 292, 293 or 295-A of the Penal Code. The section mandates that a declaration by the State Government to the effect that every copy of the issue of the newspaper, book or document be forfeited to Government must be issued in the form of a notification stating the grounds of the opinion of the State Government. Upon the issuance of a notification by the Government containing the declaration which sets out the grounds of the opinion, any Police officer is empowered to seize the printed matter in respect of which a declaration has been issued wherever it is found in India and any Magistrate may authorise a Police officer not below the rank of sub-inspector to enter upon and search any premises where the printed matter is reasonably suspected to be.

11. Section 96 of the Code empowers any person having any interest in any newspaper, book or other document, in respect of which an order of forfeiture is made u/s 95 to move the High Court for setting aside the declaration on the ground that it did not contain any such matter as is referred to in subsection (1) of Section 95. Section 96 of the Code provides as follows :

"96. Application to High Court to set aside declaration of forfeiture. -

(1) Any person having any interest in any newspaper, book or other document, in respect of which a declaration of forfeiture has been made u/s 95, may, within,

two months from the date of publication in the official Gazette of which declaration, apply to the High Court to set aside such declaration on the ground that the issue of the newspaper, or the book or other document, in respect of which the declaration was made, did not contain any such matter as is referred to in Sub-section (1) of Section 95.

(2) Every such application shall, where the High Court consists of three or more Judges, be heard and determined by a Special Bench of the High Court composed of three Judges and where the High Court consists of less than three Judges, such Special Bench shall be composed of all the Judges of that High Court.

(3) On the hearing of any such application with reference to any newspaper, any copy of such newspaper may be given in evidence in aid of the proof of the nature or tendency of the words, signs or visible representations contained in such newspaper, in respect of which the declaration of forfeiture was made.

(4) The High Court shall, if it is not satisfied that the issue of the newspaper, or the book or other document, in respect of which the application has been made, contained any such matter as is referred to in Sub-section (1) of Section 95, set aside the declaration of forfeiture.

(5) Where there is a difference of opinion among the Judges forming the Special Bench, the decision shall be in accordance with the opinion of the majority of those Judges."

12. The power to forfeit a newspaper, book or document is drastic power. An order of forfeiture has serious consequences both in terms of the impact of the forfeiture upon the due exercise of the fundamental right of the freedom of speech and expression and in terms of the invasive powers which are given to Police officers to seize, infringing copies of the book, document or newspaper and to search places where they are reasonably suspected to be found. Before the power is exercised, it must appear to the State Government that the printed matter contained in the newspaper, book or document is such that the publication thereof would be punishable under one of the sections of the Penal Code to which a reference is incorporated in Sub-section (1) of Section 95. The appearance of that fact to the Central Government is, however, not sufficient because the Central Government has to set out the grounds of its opinion in the declaration which it issues. The exercise of the power of forfeiture by the government is not final but is subject to judicial review u/s 96. Sub-section (4) of Section 96 mandates that the High Court shall set aside the order of forfeiture if the Court is not satisfied that the printed matter which is the subject of forfeiture does not contain such matter as is referred to in Sub-section (1) of Section 95. An affirmative duty is cast upon the High Court to quash the forfeiture, if it is not satisfied that the printed matter contains material of the nature referred to in Section 95(1). The invasive power u/s 95 is thus subject to strict safeguards which define the conditions for the arriving of the decision by government, "the setting out of grounds for its opinion and of subjecting that decision to the anvil

of judicial review.

13. The question as to what is meant by the expression "grounds of its opinion" is not res integra, but is now the subject matter of several pronouncements of the Supreme Court. But before referring to those judgments, it will be necessary to advert to the fact that in order that the State Government may exercise the power conferred upon it under Sub-section (1) of Section 95 it must appear to the State Government that the printed matter of the kind referred to in the section is such that the publication thereof would be punishable under one of the six named sections of the Penal Code. Section 124-A of the Penal Code deals with sedition; Section 153-A deals with promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc. and doing acts prejudicial to maintenance of harmony; Section 153-B with imputations and assertions prejudicial to national integration; Section 292 with the sale of obscene books; Section 293 with the sale of obscene objects to young persons; and Section 295-A with deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs. Insofar as the present case is concerned, reference has been made in the course of submissions to clauses (a) and (b) of Sub-section (1) of Section 153-A which read as follows :

"153-A. Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony. -- (1) Whoever -

(a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, or

(b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquility, or

(c) .....

shall be punished with imprisonment which may extend to three years, or with fine, or with both."

Section 295-A of the Penal Code provides as follows :--

"295-A. Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religious beliefs."-- Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with

both."

In the present case, the notification that was issued by the State Government is prefaced by the statement that it appears to the State Government that the Script of the Marathi play in question and its Gujarati translation contain derogatory references towards Mahatma Gandhi and certain communities. It is then stated that these are likely to disturb the public tranquility, promote disharmony or feelings of enmity, hatred or ill-will among different groups or communities. The next part of the notification is that a reading of the play shows that it is written with a deliberate and malicious intention to outrage the feelings of persons who follow and believe in the teachings of Mahatma Gandhi. The notification then adverts to the opinion of the Government that the publication of the play is punishable under sections 153-A and 295-A of the Indian Penal Code.

14. The provisions of Section 99-A of the Code of Criminal Procedure, 1898 came up for construction before a Constitution Bench of the Supreme Court in *Harnam Das Vs. State of Uttar Pradesh*, . An order of forfeiture had been passed by the Government of Uttar Pradesh u/s 99-A in respect of two books published in Hindi entitled "Sikh Mat Khandan Part I" and "Bhoomika Niazam Sikh Mat Khandan" on the ground that the publication of those books was punishable under sections 153-A and 295-A of the Penal Code. Mr. Justice A. K. Sarkar speaking for the majority held that the order which was passed by the Government set out its opinion that the books contained matters the publication of which is punishable under sections 153-A and 295-A of the Penal Code. It did not however, state, as it should have, the grounds of that opinion, (at para 4 page 1663). The Court observed thus :

"So it is not known which communities were alienated from each other or whose religious beliefs had been wounded according to the Government, nor why the Government thought that such alienation or offence to religion had been caused."

The Supreme Court held that the reason why the statutory provision contained in the Code of 1898 required the Government to state the grounds of its opinion was to enable the High Court to set aside the order of forfeiture "if it was not satisfied of the propriety of those grounds". Unless this was so, the Court held, the grounds of the Government's opinion would serve no purpose at all. The High Court in a case where the order passed by the Government did not set out the grounds for the opinion of the Government ought not to have sustained the order. If the High Court, as in the case decided by the Supreme Court, thought that the order could be upheld on grounds other than those on which the Government based its opinion, there would have been no need to provide that the grounds for the Government's opinion be stated. The Supreme Court held as follows :

"We are, therefore, of opinion that u/s 99-D it is the duty of the High Court to set aside an order of forfeiture if it is not satisfied that the grounds on which the Government formed its opinion that the books contained matters the publication

of which would be punishable under any one or more of sections 124-A, 153-A or 295-A of the Penal Code could justify that opinion. It is not its duty to do more and to find for itself whether the book contained any such matter whatsoever."

The Judgment of the Supreme Court thus is an authority for the proposition of law that the grounds of the opinion of the Government have to be set out in the notification of the Government itself. The requirement of setting out grounds is not met by merely adverting to the provisions of the statute, or by using the language of the statute. Referring to the terms of the notification in the case before it, the Supreme Court observed that the Notification provided no guidance on which communities were alienated from each other as a result of the publication of the books or whose religious beliefs had been wounded, according to the Government. The Notification did not provide why the Government thought that such alienation or offence to religion had been caused. The observations of the Supreme Court are clearly apposite to the facts of the present case because the notification which forms the subject matter of the challenge in the present case merely sets out that the script of the play and its Gujarati translation contain derogatory references towards Mahatma Gandhi and certain communities. Which communities those are, has not been specified.-Nor for that matter, has the Government set out the reasons on the basis of which it states that those references are likely to disturb the public tranquility or to promote disharmony or feelings of enmity, hatred or ill-will among different groups or communities.

15. The importance of setting out the grounds of the opinion of the Government was reiterated by the Supreme Court in a judgment of two Learned Judges in Narayan Dass Indurakhya Vs. State of Madhya Pradesh, . In that case, the Government had passed an order u/s 4 of the Criminal Law (Amendment) Act, 1961 which empowered it to declare any newspaper or book as defined in the Press and Registration of Books Act, 1867 or any other document wherever printed, to be forfeited to Government if it appeared to Government that the said book, questioned the territorial integrity or frontiers of India in a manner which was or was likely to be prejudicial to the interests of the safety or security of India. The appellant before the High Court had published a book on Geography for students of the Secondary School Standards. The Supreme Court referred to the fact that from the communication of the State Government, it appeared that Government had taken objection to the fact that the book contained certain wrong maps of the territorial borders of the Country. The High Court had upheld the order of forfeiture passed by the State Government. Allowing the appeal and setting aside the order of forfeiture, the Supreme Court held that the notification was vitiated upon a failure of the Government to state the grounds of its opinion and a mere reference to the words of the statute would not fulfil the statutory requirement of setting out those grounds :

"According to the Oxford Dictionary the meaning of the word "ground" in this connection must be "base, foundation, motive valid reason". What the State

Government did in this case in the opening paragraph of the order was merely to quote a portion of words of Section 2 namely that the books "questioned the territorial integrity and frontiers of India in a manner which is likely to be prejudicial to the interest of the safety or security of India." The order gives no indication of the facts or the statements or the representations contained in the book which according to the State Government offend Section 2. In the order itself there is no reference to any map or any text in the book which would come within the mischief of the said section."

The grounds, the Supreme Court held, must be distinguished from the opinion. The grounds constitute the conclusion of fact on which an opinion is based :

"There is a considerable body of statutory provisions which enable the State to curtail the liberty of the subject in the interest of the security of the State or forfeit books and documents when in the opinion of the Government, they promote class hatred, religious intolerance, disaffection against the State etc. In all such cases, instances of some whereof are given below the State Government has to give the grounds of its opinion. Clearly the grounds must be distinguished from the opinion. Grounds of the opinion must mean the conclusion of facts on which the opinion is based. There can be no conclusion of fact which has no reference to or is not *ex facie* based on any fact."

The Supreme Court referred, with approval, to the judgment of Jenkins, C. J. in *In re, Mahomed Ali*, ILR 41 Cal 466 where the Learned Chief Justice had held that "repetition of an opinion cannot be its grounds". The Learned Judge had held that in the case of the notification under challenge "nothing in the nature of a fact is set forth" and a mere reference to the words of the section was clearly inadequate. Stephen, J. in a concurring opinion had noted that "the ground of an opinion must in this case, if not always, be a fact or facts". The Supreme Court then cited the judgment of a Learned Single Judge, Chakravarti, C. J., of the Calcutta High Court in *Arun Ranjan Ghose v. State of West Bengal*, (1955) 59 Cal WN 495 in which the following observations were made :

"It is useful to consider here what is meant by grounds of opinion. The formation of an opinion by Government is undoubtedly the ground for the action taken by them, but the grounds for the opinion are obviously different. The opinion, after it has been formed, furnishes a ground to Government for taking action contemplated, but the grounds on which the opinion itself is formed are and must be other grounds. Those grounds must necessarily be the import or the effect or the tendency of matters contained in the offending publication, either as a whole or in portions of it, as illustrated by passages which Government may choose."

The Court relied upon its earlier Judgment in *Harnam Das's* case and concluded that the State Government had merely given its opinion and not the grounds of its opinion which consequently vitiated the notification of forfeiture.

16. A Bench of three Learned Judges of the Supreme Court once again

considered the provisions of Section 99-A of the Criminal Procedure Code of 1898 in the State of Uttar Pradesh v. Lalai Singh Yadav, AIR 1917 SC 202. Mr. Justice V.R. Krishna Iyer delivering the judgment of the Court held thus :

"A drastic restriction on the right of a citizen when imposed by statute, calls for a strict construction, especially when quasi-penal consequences also ensue. The imperial authors of the Criminal Procedure Code have drawn up Section 99A with concern for the subject, and cautionary mandates to government. The power can be exercised only in the manner and according to the procedure laid down by the law. Explicitly the section compels the government to look at the matter which calls for action to consider it as to the clear and present danger it constitutes in the shape of promoting feelings of enmity and hatred between different segments of citizens or as to its strong tendency or intendment to outrage the religious feelings of such segments (there are other proclivities also stated in the section with which we are not concerned for the present purpose) and quite importantly, to state the grounds of its opinion. We are concerned with the last ingredient. When the section says that you must state the grounds it is no answer to say that they need not be stated because they are implied. You do not state a thing when you are expressively silent about it. To state "is to declare or to set forth, especially in a precise, formal or authoritative manner, to say (something), especially in an emphatic say; to assert" (Random House Dictionary). The conclusion is inescapable that a formal authoritative setting forth of the grounds is statutorily mandatory, if you laze and omit, the law visits the order with voidness and this the State Government must realize especially because forfeiture of a book for a penal offence is a serious matter, not a routine act to be executed with unconcern or indifference. The wages of neglect is invalidity, going by the text of the Code."

The Bench reiterated the importance of the Government furnishing its grounds for its opinion because it was only when those grounds are furnished that the High Court in the exercise of the power of judicial review u/s 99-C of the old Code could examine the grounds on the basis of which an order of forfeiture had been passed. The Court held that while it is not necessary that the grounds be stated "at learned length", that would depend upon the facts of each case, but, nevertheless "an order may be brief but not a blank". The following observations of the Court emphasize the necessity for a careful and strict construction of the provisions of forfeiture impinge as they do upon the eternal value attached to fundamental freedoms on the basis of which a democratic society is founded. In this context a reference may be made to the following observations of the Supreme Court:

"The possible invocation of the powers u/s 99A of the Code of Criminal Procedure by various State Governments on several occasions induces us to enter a caveat. Basic unity amidst diversity notwithstanding, India is a land of cultural contrarities, co-existence of many religions and anti-religions, regionalism and bigotry, primitive cults and materialist doctrines. The compulsions of history and

geography and the assault of modern science on the retreating forces of mediaeval ways - a mosaic like tapestry of lovely and unlovely strands -have made large and liberal tolerance of mutual criticism, even though expressed in intemperate diction, a necessity of life. Governments, we are confident, will not act in hubris, but will weigh these hard facts of our society while putting into operation the harsh directives for forfeiture. From Galileo and Darwin, Thoreau and Ruskin Karl Marx, H.G. Wells. Bernard Shaw and Bertrand Russel, many great thinkers have been objected to for their thoughts and statements avoiding for a moment great Indians from Manu to Nehru. Even today, here and there, die-hards may be found in our country who are offended by their writings but no Government will be ante-diluvium enough to invoke the power to seize their great writings because a few fanatics hold obdurate views on them."

17. If the validity of the notification which has been issued in the present case is assessed on the touch stone of the law which has been laid down by the Supreme Court, there can be no doubt about the conclusion that the Government has completely failed to furnish the grounds of its opinion. The opinion of the Government in the present case is that the publication of the play is punishable under Sections 153-A and 295-A of the Penal Code. The notification contains a statement in the first paragraph that it appears to government that the Script of the original play in Marathi and its Gujarati translation contain "derogatory references towards Mahatma Gandhi and certain communities, which are likely to disturb the public tranquility, promote disharmony or feelings of enmity, hatred or ill-will among the different groups or communities." The second paragraph then sets out that a reading of the said play shows that it is written "with deliberate and malicious intention to outrage the feelings of the persons who follow and believe in the teachings of Mahatma Gandhi". The notification does not specify which part of the play, according to the Government, led it to conclude that the play would according to it, promote disharmony, feelings of enmity and hatred or ill-will amongst different groups or communities. The words used in the notification in the first para only contain a recitation of the language of Clause (a) of Sub-section (1) of Section 153-A of the Penal Code. What part of the play is such that it would, in the opinion of the Government, render the printed matter punishable u/s 153-A has not been specified. The notification has not specified the communities or the groups between whom such a consequence is likely to be the result. Clause (a) of Sub-section (1) of Section 153-A applies where a person by words either spoken or written, or by signs or by visible representation or otherwise, promotes or attempts to promote, on ground of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, social, language or regional groups or castes or communities. The notification is silent on whether the play promotes, and if it does appear so to government which part, promotes enmity, hatred or disharmony on grounds of religion, race, place of birth, or any of the grounds set out in Clause (a). Whether it is religious, social, language or regional groups or

castes or communities that are involved is not mentioned. Apart from merely advertent to the statutory language, the notification of the Government does not provide the facts on the basis of which the opinion of the Government is based. Clause (b) of Sub-section (1) of Section 153-A in contradistinction to Clause (a) deals with a person who commits any act which is prejudicial to the maintenance of harmony between different religious, social, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquility. Here again beyond stating that the public tranquility is likely to be disturbed, the notification is completely silent on what is the nature of the act which is committed or what part of the play would constitute a violation of Clause (b) of Sub-section (1) of Section 153-A. Similarly, Section 295-A deals with a person who, with a deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written or by signs or by visible representation or otherwise insults or attempts to insult the religion or the religious beliefs of that class. The second paragraph, of the notification states that "it is written with deliberate and malicious intention to outrage the feelings of the persons who follow and believe in the teachings of Mahatma Gandhi." There is absolutely no reference in this part of the notification of there being any deliberate or malicious intention of outraging the religious feelings of any class or citizens or of insulting or attempting to insult the religion or religious belief of that class. Offending the sensitivities of the followers of a national leader or of the Father of the Nation as in the present case, cannot be equated with offending the religion or the religious beliefs of a class of citizens.

18. In this backdrop a reference may be made to the contents of the affidavits of the State Government before us in these proceedings. In an affidavit dated 14th June 2001 what is sought to be averred is that "the entire tenor of this script is in sarcastic overtones". There are, according to the State, derogatory remarks in the script "towards a political leader of the Nation of such a stature that the personality has been declared as the Father of the Nation". Such derogatory remarks, it is stated, are "bound to evoke the emotion of a group of person (sic) who are followers of the late leader". The State government, it is stated, apprehends that "the opposes and followers of Gandhi philosophy would clash and create tense law and order situation leading to disharmony thereby promoting enmity between different groups on the basis of the religion, residence and other grounds". The aforesaid extract is contained in para 25 of the affidavit. A second affidavit dated 16th June 2001 has thereafter been filed. The second affidavit recites that complaints were received by the State Government, after about 25 performances of the play were staged, that the image of Mahatma Gandhi was damaged by the play. A Fax Message was sent to the Government of India in response to which a reply dated 17th July 1998 was received in which the Union Government advised the State Government to prohibit the performances of the play having regard to the reported intent of the play. According to the State Government, the impugned notification u/s 95 of the Code of Criminal Procedure, 1973 was issued on the basis of the communication

addressed by the Government of India. Now, as already noted earlier, the letter dated 17th July 1998 of the Additional Secretary in the Ministry of Home Affairs made no reference to an order of forfeiture u/s 95 of the Code of Criminal Procedure, 1973 and this was something which has been noticed even in the remarks on the file of the State Government before the impugned notification was issued. The Union government had no occasion to consider whether the power u/s 95 should be exercised while issuing the said letter. The letter was in response to a message of the State Government. The Union Government was not requested to consider and it was not considering whether the conditions for the exercise of power u/s 95 existed. Therefore, the communication of the Union Government cannot furnish a justification for the exercise of the powers in the present case u/s 95 of the Code of Criminal Procedure, 1973. The affidavit of the State Government then refers to the decision taken by the Cabinet on 21st July 1998. Here again, the affidavit omits to state that the decision of the cabinet dated 18th July 1998 was to prohibit the performance of the play and not to impose an order of forfeiture u/s 95 of the Code. The affidavit of the Government is that the impugned notification was issued in order "to maintain the law and order and to avoid any enmity or clashes between the two classes of the Society as the words mentioned in the said Drama are most derogatory and offensive against the Great Leader of Nation Late Mahatma Gandhi". In the affidavit filed by the State Government there are references to certain complaints which were received by the State Government from the District President of the Nasik Branch of the Janata Dal Party and by the National President of the Youth Congress.

19. In view of the well settled position in law, the lacunae in the impugned notification could not have been permitted to be supplemented in affidavits filed in these proceedings. But, what the affidavit which have been filed by the State Government would establish is that there was absolutely no material before the State Government on the basis of which it formed the opinion that the material contained in the play was such as would amount to offences punishable under Sections 153-A and 295-A of the Penal Code. The exercise of the power of forfeiture u/s 95 of the Code of Criminal procedure, 1973, cannot be justified except on the basis of a compliance with the conditions set out therein. The power of forfeiture which has been conferred by the Code upon the State Government is a drastic power, the exercise of which has to be strictly conditioned by due observance of the requirements of Section 95. Section 95 does not empower the State Government to issue an order of forfeiture merely because it apprehends "that a law and order situation" may arise due to the opposition of a segment of the society to the message which is sought to be conveyed in the play. Section 95 of the Code of 1973 and its precursor in the earlier Code of 1898 have been construed in several judgments including the binding judgments of the Supreme Court which are referred to earlier. The provisions contained in the Code of 1898 were enacted before the constitutional safeguards afforded to the citizens of a free India, were introduced upon the Constitution being adopted. But, even prior to the adoption of the Constitution,

Courts while interpreting similar statutory provisions circumscribed the exercise of the drastic power of forfeiture so as to ensure that the power is not abused by the Government over stepping the strict conditions subject to which the power may be exercised. Those conditions must apply with greater force after the adoption of the Constitutional safeguards, particularly the guarantee of the freedom of speech and expression under Article 19(1)(a) of the Constitution. The Government in the present case seems to have acted in the wake of the criticism voiced against the play and of the sense of outrage of those who believe that the play unfairly criticizes the Father of the Nation. The Father of the Nation holds a position which is *sui generis* in the nation. The nation owes its freedom to his relentless struggle for independence from a foreign power. His message of peace and non-violence should provide a beacon to these troubled times. But, it is important to realise that there are eternal values on which the Constitution of a democracy is founded. Tolerance of a diversity of view points and the acceptance of the freedom to express of those whose thinking may not accord with the mainstream are cardinal values which lie at the very foundation of a democratic form of Government. A society wedded to the rule of law, cannot trample upon the rights of those who assert views which may be regarded as unpopular or contrary to the views shared by a majority. The law does not have to accept the views which have been expressed by the petitioner in the play in order to respect the right of the petitioner as a playwright to express those views. Respect for and tolerance of a diversity of viewpoints is what ultimately sustains a democratic society and Government. The right of the playwright, of the artist, writer and of the poet will be reduced to husk if the freedom to portray a message - whether it be in canvas, prose or verse - is to depend upon the popular perception of the acceptability of that message. Popular perceptions, however strong cannot override values which the constitution embodies as guarantees of freedom in what was always intended to be a free society.

20. Nearly three decades ago in the year 1970 a Special Bench of three judges of this court constituted under the provisions of Section 99-B of the Criminal Procedure Code, 1898 had occasion to consider a challenge to an order of forfeiture passed against the author and publisher of a book called "Gandhi Hatya Ani Mee", ("Gandhi Assassination and I"). This Court in *Gopal Vinayak Godse v. Union of India*, (1970) 72 BLR 871 set aside the order of forfeiture. The Full Bench while noting that "the ingenuity and imagination of a literary artist have on occasion been permitted a free play in the book" held that while the author "may perhaps have overshot the limits of a historian", the Court was satisfied that "he had certainly not perverted history". The Court noted that the book was full of allegories, similes and other figures of speech "which are favourite vehicles of some literary writers". The total effect of the book, ruled the Bench, was not to incite or inflame communal passions. In these circumstances, the order of the forfeiture was set aside.

21. The Learned Additional Advocate general has urged before us that the challenge to the order of forfeiture must be rejected since Section 96 mandates

that the challenge has to be preferred within a period of two months. In the present case, the notification dated 3rd December, 1998 was published in the Official Gazette on 5th August 1999 while the petition was filed on 19th May 2000. The judgment of the Special Bench in Gopal Vinayak Godse's case (supra) furnishes a complete answer to the submission which has been urged on behalf of the State. The Special Bench noted in that case that u/s 29(2) of the Limitation Act of 1963, the position which obtained under the earlier Act of 1908 has undergone significant change because under the new provision, if the special law prescribes for an application, a period of limitation different from the period prescribed by the schedule, then for the purposes of determining any period of limitation prescribed for an application by the special law, the provisions contained in sections 4 to 24 of the Act of 1963 would apply to the extent to which they are not expressly excluded by the Special Law. The result is that while Section 5 of the Limitation Act, 1908 would have been inapplicable to an application u/s 99-B of the Criminal Procedure Code, 1898 Section 5 of the Act of 1963 would apply to it. The period of two months, it was held, can, therefore, be appropriately extended u/s 5 of the Limitation Act, 1963 in appropriate cases. In the present case, the petitioner has averred that though the notification was issued on 3rd December 1998, it was only on 15th May 2000 at a meeting held with the Commissioner of Police that a copy of the notification dated 3rd December 1998 together with a letter of the Commissioner of Police was served upon the petitioner. The notification was gazetted only on 5th August 1999. We are satisfied that a sufficient explanation is furnished in these proceedings for the delay, if any, in moving this Court. In any event, it must be noted that these proceedings have been initiated both under article 226 of the Constitution and under the relevant provisions of the Code of Criminal Procedure, 1973. In a matter relating to the fundamental rights of the petitioner, the Court would be averse to reject the petition filed before it on the ground of delay particularly when we are satisfied that the delay, if any, has been sufficiently explained.

22. The net result, therefore, is that the notification of forfeiture which has been issued by the State Government clearly does not fulfil the mandatory requirement of Sub-section (1) of Section 95 of the Code of Criminal Procedure, 1973. The notification does not set out the grounds of the opinion of the State Government. The facts on the basis of which the opinion was arrived at by the Government have not been spelt out in the notification and a mere reference to the statutory provisions of Sections 153-A and 295-A of the Penal Code will not save the notification against the consequence of invalidity. Indeed, even the affidavit in reply which has been filed by the State Government before this court is equally silent about the material on the basis of which or, for that matter, the reasons on the basis of which the opinion was arrived at by the Government. The satisfaction which is required to be arrived at by the State Government that the printed matter contains material of a kind punishable under Sections 124-A, 153-A, 153-B, 292, 293 or 295-A of the Penal Code is completely absent in the present case. The affidavits which have been filed on behalf of the State

Government merely allude to the fact that the Government formed an opinion that it was necessary to issue the notification in order to maintain law and order and to avoid enmity or clashes between two classes of society. The Government states in para 6 of its affidavit dated 16th June 2001 that there was a "likelihood that some politically motivated persons may create such law and order situation by instigating the public against the Government" and that "Government desired that no such situation should arise". The contents of the affidavits in reply which have been filed by the Government in the present case are eloquent testimony of how far Government has been in the present case from fulfilling the mandatory preconditions set out in Section 95 in order that the power of forfeiture should be exercised in the facts of the present case. There is, to use a term of common parlance, not even the whisper of a suggestion that there was any fact on the basis of which Government concluded that the printed matter contained in the play constituted an offence punishable under Sections 153-A and 295-A of the Penal Code.

23. The files which have been fairly produced and placed before the Court by the Learned Additional Advocate General would demonstrate beyond any doubt that the exercise of power u/s 95(1) of the Code in the present case was for reasons extraneous to the conditions statutorily mandated for the exercise of the power. The exercise of the power is, therefore, ultra vires Section 95(1) of the Code. There were complaints before the Government, many of them by political parties in regard to the performance of the play. Before receipt of the complaints, the play itself had been duly approved by the Stage Performances Scrutiny Board in November 1997. The Board had found the play to be fit for universal viewing and had issued a certification without even a single cut, deletion or excision. The State Government states before the Court on affidavit that the complaints were received by it after 25 performances of the play were staged. In response to a communication of the State Government, the Union Government had informed it that keeping in view the reported intent of the play, the Central Government would advise the State Government to prohibit its performance. This was on 17th July 1998. On 18th July 1998, the Cabinet decided to prohibit the performance of the play. It was only on 2nd September 1998 that a letter was addressed by the office of the Commissioner of Police to the Additional Chief Secretary (Home) of the State Government that in the absence of a notification, despite the decision of the government to ban the play, the Police had not been able to implement the decision. Since the Stage Performances scrutiny Board had neither reviewed nor rescinded the certification granted for the play, it was proposed by the Commissioner of Police that a notification u/s 95 be issued. The Government was conscious of the fact that neither the communication of the Central Government dated 17th July 1998, nor the decision of the State Cabinet dated 18th July 1998 authorised the exercise of power u/s 95 to issue an order of forfeiture since all that had been considered was the question of prohibiting the performances of the play. When the Stage Performance Scrutiny Board was approached by the State Government to review its earlier decision to certify play, the Board

responded by informing the Government that at its meeting held on 25th July 1998, the Board had decided to stand by its earlier decision to certify the play. The attention of the Government was expressly drawn to the fact that in view of the decision of the Stage Performances Scrutiny Board, the position of the Government would be rendered vulnerable, should a challenge be preferred by the producer or writer of the play to the prohibition on performances. With the assistance of the Learned Additional Advocate General and the Learned A.G.P., we have perused the files which have been produced before the Court and we do not find any satisfaction of the State in terms of the mandatory requirements of Section 95(1) of the Code. The files produced before us contain an express reference to the fact that there was a divergence of views between two wings of the State. While the authorities of the Police had declined to issue licences for performances, the Stage Performances Scrutiny Board had declined to revoke the order of certification. The apprehension that the play may give rise to an "intensity of feelings" amongst various classes of society and that the Police Commissioner had consequently declined to grant a performance licence in view of the possibility that a law and order situation would arise was not a ground which would warrant the imposition of an order of forfeiture u/s 95 of the Code.

24. The notification is in the circumstances, clearly ultra vires and illegal. Having, therefore, regard to the facts and circumstances of the case, we are of the view that the petitioner is entitled to succeed. The order of forfeiture dated 3rd December 1998 and the consequential communication of the Police Commissioner are quashed and set aside.

25. The Writ Petition is allowed in the aforesaid terms with no order as to costs.