

(2000) 05 BOM CK 0017

In the Bombay High Court

Case No : Writ Petition (Stamp) No. 15519 of 2000

Anand Chintamani Dighe and Another

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 19-05-2000

Acts Referred:

Constitution of India, 1950 — Article 19(1), 21, 226
Criminal Procedure Code, 1973 (CrPC) — Section 144, 95, 99D
Penal Code, 1860 (IPC) — Section 124

Citation : (2001) CriLJ 2203

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : Shri V.N. Damle, Mr. D.K. Ghaisas and Mr. P.V. Bapat, for the Appellant; Shri C.R. Sonawane, Additional Government Pleader, for the Respondent

Judgement

Dr. D. Y. Chandrachud, J.—Leave to amend. Amendment to be carried out forthwith.

2. This petition under Article 226 of the Constitution is filed by a social worker who is the 1st Petitioner and by the author of a book entitled "Mee Nathuram Godse Boltoy" (I am Nathuram Godse speaking) who is the 2nd Petitioner. The petition challenges an order dated 15.5.2000 passed by the Commissioner of Police, Thane by which he has prohibited the performance before a private audience of a reading of the play, described in the Petition as an "emoted" reading, which is to take place on 19.5.2000 at 9 p.m. at Gadkari Rangayatan, Thane. The Police Commissioner in passing the aforesaid order has relied upon a Notification issued on 3.12.1998 by the Government of Maharashtra by which, in exercise of the powers conferred by sub-section (1) of Section 95 of the Code of Criminal Procedure, 1973, the Government of Maharashtra declared that every copy, including the manuscript, or any other form of the play in Marathi and the translation thereof in Gujarati or any other languages shall be forfeited to the Government. Apart from the aforesaid, a prohibitory order has been passed u/s

144 of the Criminal Procedure Code on 17.5.2000. These are the subject matter of the challenge in the writ petition.

3. The play was authored by the 2nd Petitioner, who is a writer, in the year 1988. The Censor Board initially rejected the script completely. The play was thereafter translated into Gujarati and the Gujarati translation came to be cleared by the Censor Board. 25 performances of the play took place after which the 2nd Petitioner and the producer approached the Censor Board claiming that in view of the clearance granted to the Gujarati version, there should be no difficulty, about allowing performances in Marathi. The Censor Board issued a certificate in 1997 approving the Marathi script of the play. The Petitioners have stated that on 19.5.2000 what they describe as an "emoted reading" of the play is to take place at Gadkari Rangayatan before a private audience invited by an organisation known as the Hindu Manch which is organising the function. On 15.5.2000 the Petitioners were called by the Police Commissioner of Thane and the writ petition narrates that an effort was made to dissuade the Petitioners from holding the programme. At that stage, the Petitioners were informed about a Notification issued by the State Government forfeiting the script of the play by a Government Notification dated 3.12.1998. The Petitioners are aggrieved by the conduct of the Respondents in issuing the Notification of 3.12.1998 forfeiting the script of the play, the order of the Police Commissioner of 15.5.2000 prohibiting the performance of the play and by the prohibitory order passed u/s 144 of the Criminal Procedure Code, 1973.

4. I have heard Shri Damle for the Petitioners, Shri Sonawane, Additional Government Pleader for the Respondents and as also learned Counsel for an Intervener who has filed an intervention application on behalf of the Thane City District Youth Congress which is opposing the reading of the play. In view of the urgency of the matter, I am passing this ad interim order indicating briefly my reasons. Having heard the learned Counsel for the parties, I am of the view that the reading of the play stated at 9 p.m. tonight 19.5.2000 must be allowed to proceed. At the outset, it must be noted that allegations of mala fides have been made on behalf of the Petitioners, in the amendment to the writ petition. Reference has been made in the annexures to the amendment to a letter dated 16.5.2000 addressed by the National President of the Nationalist Youth Congress to the Deputy Chief Minister by which a request was made to prohibit the performance which is to take place on 19.5.2000. In the view which I have taken, prima facie, it is not necessary to consider this issue at the present stage.

5. Long years ago a Full Bench of this Court in a decision in Gopal Vinayak Godse v. The Union of India, 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). The Full Bench, after considering the merits of the objections raised by the State to the book in question, set aside the order of forfeiture holding that the apprehension that the book was liable to cause feelings of enmity and hatred between the Hindu and Muslim communities

was baseless and was not sustainable in law. Thirty years thereafter some of those apprehensions have been voiced again to justify the order of forfeiture in the present case.

6. At the outset, a few basic observations need to be made because the case raises an important issue of constitutional principle. Every author, publisher and performer is entitled to the fundamental right to the freedom of speech and expression under Article 19(1)(a) of the Constitution. This right, it is well settled, is not an absolute right and is subject to reasonable restrictions by the State. The restrictions contemplated by clause (2) of Article 19 are those in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of Court, defamation or incitement to an offence. However, it merits some degree of emphasis that the strength of our society and the stability of the constitutional structure lies in its ability to accommodate a diversity of view points and cultures. The maturity of a society committed to a democratic way of life lies as much as in its respect for those who conform as in its deference for those who do not. The founding fathers of our Constitution adopted a democratic constitution embodying guarantees of civil and personal liberty. The Constitution preserves a healthy tradition of respect for the believer and the non-believer, the conservative as well as the liberal, those on the core as well as those on the periphery; the agnostic and the heretic. The process of thought control is alien to a set of democratic values. It would indeed be a dangerous trend in society if the fundamental rights of those who espouse views which run contrary to the views held by the majority are to be trampled upon because they do not conform to the prevailing trend of thought. In *State of U. P. v. Lalai Singh.*, the Supreme Court sounded a note of caution which is apposite in this context;

"Basic unity amidst diversity notwithstanding, India is a land of cultural contrarieties, co-existence of many religions and anti-religions, rationalism and bigotry, primitive cults and materialist doctrines. The compulsions of history and geography and the assault of modern science on the retreating forces of medieval 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."

I mention this because I proceed on the assumption that the views which are reflected and written by the author in the present case do not conform to those held by a large majority. Even so, respect for the freedom of the author should allow the performance to proceed and the Court must frown upon the attempts on the part of the State, to police the freedom of speech and expression in the manner in which it has been attempted in the present case. The policing of the freedom of expression must be kept within the narrowest possible confines and

in my view the dangers which are sought to be portrayed by the Respondents do not meet the requirements of those narrow confines.

7. The book was authored in 1988. The admitted position is that there have been a number of performances of the play. The play has been cleared by the censor board for performances in Gujarati and Marathi. Performances of the play have, in fact, taken place. The State has not been able to contend that there was all these years that have passed the slightest degree of danger to the existence of communal harmony and communal well being as a result of the book or the play. The play was written in 1988 and it was only in 1998 that the State Government chose to exercise its power to forfeit the script of the play. One cannot for a moment suggest that an order of forfeiture in the case of written work cannot be passed except soon after it was written. This cannot be for the simple reason that situations and circumstances in a society are liable to evolve and change over a period of time. However, in the present case, there is absolutely no material on the basis of which a reasonable body of persons could have arrived at the conclusion that the script of the play was liable to give rise to an offence under sections 153A and 295A of the Indian Penal Code.

Section 95 of the Criminal Procedure Code, 1973, provides as follows:

"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 295A 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 may be or may be reasonably suspected to be."

There are three key ingredients of the Section : (i) The section applies to a newspaper, book or document which is printed; (ii) It must appear to the State Government that the newspaper, book or document contains any matter the publication of which is punishable under sections 124A, 153B, 292, 293 or 295A of the Penal Code; and (iii) the State Government in the notification directing the forfeiture of the newspaper, book or document must state the grounds of its opinion. The provisions of Section 95, it must be borne in mind, confer a drastic power to forfeit every copy of the book, document or newspaper that is the subject matter of an order passed under sub-section (1). Once a notification is issued, a Police Officer is empowered to seize copies, "wherever found in India"

and a Magistrate may empower a Police Officer not below the rank of a Sub-Inspector to enter upon and search any premises where any copy of such a publication "may be reasonably suspected to be." These are wide powers, and operate as a drastic restriction on the rights of citizens. In *State of U. P. v. Lalai Singh*, a Bench of the Supreme Court consisting of three learned Judges held that such a provision called for a strict construction :

"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 99(A) 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."

8. Section 95 requires the State Government to furnish in the notification, the grounds of its opinion. In *Narayan Das v. State of M. P.*, the Supreme Court held that the grounds of the opinion must mean the conclusion of facts on which the opinion is based :

"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 the 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 offended 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. A book may contain matter questioning the territorial integrity and frontiers of India in many ways one of which may be a wrong map which does not show the proper boundaries of India, either by omitting a portion of the Indian territory therefrom or by depicting a portion of what is really Indian territory as belonging to some other State. A book may also come within the mischief of Section 2 if there is any express reference in the text containing suggestions based on historical or political or other reasons that some portion of what is generally known to the public as India territory is not so.

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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 same view was taken earlier by the Supreme Court in *Harnam Das v. State of U. P.*, which was a decision of the Constitution Bench. The Supreme Court held that "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 124A, 153A, or 295A of the Penal Code could justify that opinion. It is not its duty to do more and to find out for itself whether the book contained any such matter whatsoever." (Para 12 of pages 1665-66).

In the later Judgment in *The State of Uttar Pradesh Vs. Lalai Singh Yadav*, the Supreme Court placed the principle in the following words :

"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 way; 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. These considerations are magnified in importance when we regard the change over from the Raj to the Republic and the higher value assigned to the great rights of the people."

9. Prima facie, the impugned notification dated 3rd December, 1998 does not meet these essential requirements of sub-section (1) of Section 95. The grounds of opinion must constitute the base, the foundation or the valid reason for the notification. The impugned notification, as indeed was the case before the Supreme Court in *Narayan Das's* case, gives no indication of the facts or the statements or the representations contained in the book which according to the State Government "offend Sections 153A or 295A". In the order itself there is, to quote the words of the Supreme Court, "no reference to ... any text in the book which would come within the mischief of the said section." There can be no conclusion of fact which has no reference to or is not ex-facie based on any fact." The impugned notification thus fails to meet the requirements of Section 95. The requirements of the Section must be strictly construed and the deficiencies of the notification cannot be cured by supplying an assumed basis for its justification.

Section 95 was enacted in the Code of Criminal Procedure of 1973 though a similar provision was to be found in the Code of 1898. In interpreting the power to forfeit which is conferred by Section 95, a construction consistent with the guarantees of life and personal liberty under the Constitution will have to be adopted. An expansive interpretation of Article 21 of the Constitution, in a line of

decisions of the Supreme Court after Maneka Gandhi, has brought within the fold of the rights to life and liberty a panoply of rights, including the right to education and the right to know. Playwrights and authors unquestionably exercise a fundamental right to free speech and expression available to all citizens alike under Article 19(1)(a), when they write, perform or seek to find expression to their creativity. In this sense, the Constitution protects the creative expression of those engaged in human endeavour in the areas of fine art and culture. Article 19(1)(a) is, however, not the only article to which the protection of literary activities can be traced. Literature, culture and the fine arts are an expression of the yearning of the individual to find expression to the inner desire and perception of the human being endowed with those skills. The author, the playwright and the artist achieves through her media of expression, a sense of fulfilment, a sense of satisfaction which makes life meaningful. Article 21 today protects these legitimate activities which make life meaningful and impart to the quality of life a dimension beyond a mere physical existence. Forms of literary endeavour are therefore, within the protection of the right to life under Article 21. Coupled with this is the right of the wider society and the community to know, to receive information and be informed. The right to information, or the right to know is an intrinsic facet of the right to life under Article 21 of the Constitution. An informed citizenry must have the means to receive news and information, and apart from this, to receive thoughts, perceptions and ideas. Those perceptions and viewpoints may not be in conformity with widely held social, economic and political beliefs. A diversity of viewpoint promotes an ability on the part of the society to exercise a right of choice, a right to decide and the right to form perceptions which lie at the core of the functioning of a democratic system. The electronic age has radically transformed the face of every society and the role of the state in policing information. Be it in the form of access to satellite based electronic media or the information highway on the internet, traditional barriers to the flow of information have been altered. A veritable flood of information in regard to diverse areas of human endeavour is now available and a sense of realism must therefore guide a purposeful interpretation of provisions such as Section 95 of the Code of Criminal Procedure, 1973. Those provisions exist and have to be applied in appropriate cases. However, the authorities of the State have to be conscious of the evolving interpretation of the fundamental guarantees to civil and personal liberty by the Supreme Court. No society is static and a vibrant judicial interpretation of the right to life and personal liberty has been hallmark of constitutional jurisprudence in the last two decades or more. The judicial evolution of the meaning of constitutional guarantees must hence, be a guide to the interpretation of draconian statutory powers such as Section 95 of the Criminal Procedure Code, 1973. There has to be, in that sense, an amalgam of constitutional and statutory interpretation particularly where civil and personal liberty is in the danger of being eroded. The right of the author, the playwright and the artist must have a meaningful content. If popular perceptions, as perceived by the State, are to be an index of the freedom of those engaged in the fine arts, culture or literary activity, the

work of the author and the artist would be reduced to little else but its husk. The Court in its interpretation of constitutional and statutory guarantees has to ensure against the erosion of fundamental freedoms held dear by the Founding Fathers of the Constitution and the generations which have followed. Tolerance of a diversity of viewpoint is the guiding principle of stable constitutional systems, and ours is no exception. The protection of the heritage of our culture and literature is a facet, and an important one at that, of that sense of tolerance which lies at the core of the Indian Constitutional system.

10. The learned Additional Government Pleader submitted, firstly, that the jurisdiction to determine this issue cannot be exercised by a Single Judge of this Court, since u/s 96 the issue must be determined by a Special Bench of not less than three Judges. It must be noted that a similar argument was made before the Full Bench of this Court in 72 Bom. L.R. 871 and was rejected on the ground that apart from the jurisdiction u/s 99(D) of the Code, (Act V of 1898) (which is similar to the provisions of section 96 of the Cr.P.C., 1973) the Court was exercising the jurisdiction under Article 226. A Single Judge, under the Rules of the High Court, is entitled to exercise powers for certain limited purposes, in the course of the vacation of the Court and, therefore, there is no reason as to why this writ petition cannot be entertained. Mr. Sonawane also pointed out that there was a delay on the part of the Petitioners in challenging the Notification dated 3.12.1998. In a matter such as the present one where important fundamental rights are in issue and wider questions of principle affecting the society at large are involved, I would be averse to reject the prayer for relief on a technical ground. In any event it was on 15.5.2000 that the Police Commissioner relying upon the Notification sought to prohibit the emoted reading of the play which is to take place on 19.5.2000. In my view, therefore, the petition is not liable to be dismissed on the ground of delay.

11. Having heard the learned Counsel for the parties, I am prima facie satisfied that the impugned Notification dated 3.12.1998, the order of the Police Commissioner dated 15.5.2000 and the prohibitory order u/s 144 are liable to be stayed so as to permit the performance which is to take place on 19.5.2000 at 9 p.m. It is clarified that this order is restricted to the performance which is to take place today. Mr. Damle appearing on behalf of the Petitioners assures the Court on behalf of the Organisers of the function (Petitioner No. 1 is authorised to make a statement on behalf of the Organisers of the function) that the emoted reading of the play will be carried out in an orderly manner and there would be no apprehension of any breach of law and order or public order.

12. In the result, the impugned Notification dated 3.12.1998, the order of the Police Commissioner dated 15.5.2000 and the prohibitory order dated 17.5.2000 are stayed. It is clarified that the stay of the notification is in respect of the performance of the play which is to take place on 19.5.2000. Ad interim relief in the aforesaid terms to continue for today's performance.

Intervention application is allowed.

All concerned parties including the Police Commissioner, Thane to act on an ordinary copy of this order duly authenticated by the Personal Secretary of this Court.

Certified copy expedited.