

(1996) 07 BOM CK 0013
In the Bombay High Court
Case No : Writ Petitin No. 767 of 1992

Anand Patwardhan

APPELLANT

Vs

The Union of India and others

RESPONDENT

Date of Decision : 19-07-1996

Acts Referred:

Cinematograph Act, 1918 — Section 5B
Constitution of India, 1950 — Article 19(1), 21, 226, 25

Citation : AIR 1997 Bom 25 : (1997) 1 BomCR 90 : (1996) 98 BOMLR 794 :
(1996) 2 MhLj 685

Hon'ble Judges : A.P. Shah, J

Bench : Single Bench

Advocate : P.A. Sebastian, for the Appellant; L.S. Vyas and R.C. Master, for the Respondent

Judgement

1. John Stuart Mill, a great thinker of 19th Century in his famous treatise "Utilitarianism, Liberty and Representative Government" neatly explained the importance of free speech and expression in these words:

"But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error."

Indeed, freedom of speech and expression has now been accepted as a natural right which a human being acquires on birth. It is therefore, regarded as a basic human right. The words "freedom of speech and expression" appearing in Art. 19(1)(a) of the Constitution has been construed by the Supreme Court to include freedom to circulate one's views by words of mouth or in writing or through audio-visual instrumentalities. Thus every citizen of this free country has the right to air his or her views through the printing and/or the electronic media

subject to permissible restrictions imposed under Article 19(2) of the Constitution.

The question arising in this petition whether the refusal of Doordarshan to telecast "In Memory of Friends", a documentary produced by the petitioner, violates his fundamental right of freedom of speech and expression will have to be considered in the light of these established principles.

2. The petitioner is a well-known documentary film maker. The documentary films made by the petitioner in the past were acclaimed as national and international level. The petitioner has produced and directed the documentary film in question "In Memory of Friends" about the violence and terrorism in Punjab, about a group of Sikhs and Hindus, who at great personal risk were engaged in an attempt to recover the tolerance and communal harmony that once existed in Punjab. The memory of the legendary martyr Bhagat Singh plays a central role in the film. The film is a 60 minute documentary which was completed in January, 1990. It was screened in the London film festival, 1990 as well as in the non-feature section of the Indian Panorama at the Madras International Film Festival early in 1991. It has been selected as the best investigative documentary for the year 1990 and given award by the Government of India. The Jury which selected it as the best investigative documentary said that the film treated the subject of violence and terrorism with courage, honesty and lucidity. Besides, the said film has won the silver couch at the first Bombay International Festival of documentary and short films and special Jury prize at Mannheim in Germany.

3. The petitioner submitted the film to the Doordarshan on 12th March, 1991 for screening on television. The Doordarshan chose not to reply to the petitioner. The petitioner was constrained to send a legal notice dated 29th April, 1991 in which he called upon Doordarshan to screen the film on T.V. In response to the said letter, Doordarshan sent reply to the petitioner dated 16th May, 1991 in which it was said that the copy of the film was not traceable. The petitioner delivered another copy of the film by hand on 17th July 1991. The petitioner was informed by letter dated 3rd February, 1992 that the film was not found suitable for telecast over Doordarshan under national programmes.

4. It is the case of the petitioner that the respondents have unfairly and arbitrarily rejected the petitioner's film and deprived him of his right of expression guaranteed by Article 19(1)(a) of the Constitution. The petitioner complains that the letter dated 3rd February, 1992 gives no reason why the said film is considered unfit for being telecast on Doordarshan. The petitioner submits that what happened in Punjab is of immense significance to the whole Indian State and that his film is an honest and realistic portrayal of the agony, anguish and tragedy of Punjab. The petitioner submits that refusal of the respondents to have the said film telecast on Doordarshan deprives the Indian citizens of their right to be informed and enlightened about the situation in Punjab which is so vital to the composition and existence of the Indian State. The petitioner has stated that the film makes reference to the massacre of people belonging to one

particular community in Delhi and elsewhere in the first week of November, 1984. The film also deals with the promotion of Bhindran-wale by the then Central Government with a view to undermining the opposition political forces in Punjab State. According to the petitioner, the factual presentation of such subjects in the said film has prejudiced the mind of the respondents and led them to take an arbitrary and unfair decision in the matter.

5. On the request of the learned Advocate appearing for the parties, the Court viewed the film on 13th July, 1996. The film tells the story of a small group of activists in Punjab even when faced with hostilities from terrorists, risked its life to propagate secularism and humanism. The film follows a group of leftist activists led by playwright Gursharan Singh and some other activists as their group travels through Punjab commemorating the martyrdom of Bhagat Singh. Bhagat Singh's writing on the necessity of class struggle, of its power to overcome barriers of religion and his uncompromising atheism are highlighted in the film. The film portrays how fundamentalists are trying to use the image of the popularity of Bhagat Singh amongst the youth to its cause of Khalistan. The film strongly advocates for communal harmony in the State of Punjab. In fact this becomes the central theme of the film as the group led by the activists travelling from village to village carrying Bhagat Singh's message of communal harmony and class solidarity when they too become the target of terrorist attacks. The film is an important contribution on the problems of Punjab and is relevant even today in the context of communal harmony and the unity of the nation. No doubt, that there are some excerpts interview with terrorist groups. There is also an excerpt of an interview of a victim of the unfortunate riots in Delhi that took place following the assassination Mrs. Indira Gandhi. But they are dealt with in a restrained and balanced manner. There is no glorification or justification of the fundamentalists. On the other hand, there is a strong condemnation of those who were responsible for the killing of innocent people in the name of religion. This substance is the range and rigour of the film.

6. In opposing the petition, Doordarshan has filed counter-affidavit of Shri Sandeep Sood, Programmes Executive, Doordarshan Kendra, Worli, Bombay. It is stated in the affidavit that the documentary depicts the editorial commentaries at some places when go all out to prove that it is the class consciousness only as in the case of communists that can prevent the religious and communal massacres. Next it is stated that at certain sport, the editorial commentaries also do aspersions in the existence of the God and, if such a documentary is shown to the members of the public, it would definitely hurt the feelings of some to them. Then an objection raised against the screening of certain parts where the film maker has interviewed some separatist groups. It is stated that some of the replies of the supporters of Khalistan are full of sparks that can ignite big fire. It is contended that if such documentary is shown to people, it would create communal hatred and may even lead to a further violence. It is, therefore, contended that a decision was taken not to screen the film in larger public interest.

7. Before I deal with the objection raised against the screening of the film on Doordarshan, it will be necessary to refer to some important decisions of the Supreme court. In *K.A. Abbas Vs. The Union of India (UOI) and Another*, a Constitution Bench of the Supreme Court considered important questions relating to pre-censorship of cinematograph films in relation to the fundamental right of freedom of speech and expression. K. A. Abbas, a noted Indian journalist and film called "A Tale of Four Cities". In the film he sought to contrast the self-indulgent life of the rich in metropolitan cities with the squalor and destitution of labouring masses who helped to construct the imposing buildings and complexes utilised by the rich. The film also goes on to explore the theme of exploitation of women by men, dealing in particular with prostitution. Abbas applied to the Board of Film Censors for a "U" Certificate, permitting unrestricted exhibition of the film. He was informed by the regional officer that the Examining Committee had provisionally concluded that the film should be restricted to adults. The Revision Committee concurred in this result, whereupon Abbas, after exchanging correspondence with the Board, appealed to Central Government. The Government decided to grant "U" certificate provided that the scenes in the red light district were deleted from the film. Abbas challenged the action of the Board mainly of four issues out of which two did not survive when the Solicitor General stated before the Court that the Government would set on foot legislation to effectuate the policies at the earliest possible date. The two issues which survived thereupon were : (a) that pre-censorship itself cannot be tolerated under the freedom of speech and expression ;(b) that even if it were a legitimate restraint on the freedom, it must be exercised on very definite principles which leave no room for arbitrary action.

8. With regard to the power of pre-censorship, Hidayatullah, C.J., observed:

"We may now illustrate our meaning how even the items mentioned in the directions may figure in films subject either to their artistic merit or their social value overweighing their offending character. The task of the censor is extremely delicate and his duties cannot be subject of an exhaustive set of commands established by prior ratiocination. But direction is necessary to him so that he does not sweep within the terms of the directions vast areas of thought, speech and expression of artistic quality and social purpose and interest. Our standards must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read. The standards that we set for our censors must make a substantial allowance in favour of freedom thus leaving a vast area for creative art to interpret life and society with some of its foibles along with what is good. We must not look upon such human relationships as banned in toto and for ever from human thought and must give scope for talent to put them before society. The requirements of art and literature include within themselves a comprehensive view of social life and not only in its ideal form and the line is to be drawn where the average moral man begins to feel embarrassed or disgusted at a naked portrayal of life without the redeeming touch of art or genius or social

value. If the depraved begins to see in these things more than what an average person would, in much the same way, as, it is wrongly said, a Frenchman sees a woman's legs in everything, it cannot be helped, in our scheme of things ideas having redeeming social or artistic value must also have importance and protection for their growth. Sex and obscene are not always synonymous and it is wrong to classify sex as essentially obscene or even indecent or immoral. It should be our concern, however, to event the use of sex designed to play a commercial role by making its own appeal. This draws in the censor's scissors. Thus audiences in India can be expected to view with equanimity the story of Oedipus son of Latius who committed patricide and incest with his mother. When the Seer Tiresias exposed him, his sister Jocasta committed suicide by hanging herself and Oedipus put out his own eyes. No one after viewing these episodes would think that patricide or incest with one's own mother is permissible or suicide in such circumstances or tearing out one's own eyes is a natural consequence. And yet if one goes by the letter of the directions the film cannot be shown. Similarly, scenes depicting leprosy as a theme in a story or in a documentary are not necessarily outside the protection. If that were so Verrier Elwyn's *Phulmat of the Hills* or the same episode in Henryson's *Testament of Cressaid* (from where Verrier Elwyn borrowed the idea) would never see the light of the day. Again carnage and bloodshed may have historical value and the depiction of such scenes as the Sack of Delhi by Nadirshah may be permissible, if handled delicately and as part of an artistic portrayal of the confrontation with Mohammad Shah Rangila. If Nadir Shah made golgothas of skulls, must we leave them out of the story because people must be made to view a historical theme without true history? Rape in all its nakedness may be objectionable but Voltaire's *Candide* would be meaningless without Cunegonde's episode with the soldier and the story of Lucrece could never be depicted on the screen".

9. In *Odyssey Communications Pvt. Ltd. Vs. Lokvidayan Sanghatana and Others*, a public interest litigation was commenced under Article 226 of the Constitution to restrain the authorities from telecasting the serial "Honi Anhony" on the plea that it was likely to spread false and blind beliefs and superstition amongst the members of the public. the High Court by an interim injunction restrained the authorities from telecasting the serial which led the producer thereof to approach the Supreme Court. The Supreme Court while allowing the appeal held that the right of a citizen to exhibit films on Doordarshan subject to the conditions imposed by the Doodarshan being a part of the fundamental right of freedom of expression could be curtailed only under circumstances set out in Article 19(2) and in no other manner. The right to exhibit the film was similar to the right of a citizen to publish his views through any other media such as newspapers, magazines, advertisement hoardings, etc.

10. In *Ramesh Dalal Vs. Union of India (UOI) and Others*, a petition was filed to restrain the screening of the serial "Tamas" on the ground that it violated Articles 21 and 25 of the Constitution and Section 5B of the Cinematograph Act. Based on the novel of Bhisma Sahni this serial depicted the events that took place in

Lahore immediately before the partition of the country. Two Judges of this Court saw the serial and rejected the contention that it propagates the cult of violence. The decision of this Court was challenged before the Supreme Court. The Supreme Court after referring to the observations of Hidayatullah, C.J. in *K.A. Abbas Vs. The Union of India (UOI)* and Another, proceeded to state as under :

"It is no doubt true that the motion picture is a powerful instrument with a much stronger impact on the visual and aural sense of the spectator than any other medium of communication; likewise, it is also true that the television, the range of which has vastly developed in our country in the past few years, now reaches out to the remotest corners of the country catering to the not so sophisticated, literary or educated masses of people living in distant villages. But the argument overlooks that the potency of the motion picture is as much for good as for evil. If some scenes of violence, some nuances of expression or some events in the film can stir up certain feelings in the spectator, an equally deep strong, lasting and beneficial impression can be conveyed by scenes revealing the machinations of selfish interest scenes depicting mutual respect and tolerance, scenes showing comradeship, help and kindness which transacted the barriers of religion. Unfortunately, modern developments both in the field of cinema as well as in the field of national and international politics have rendered it inevitable for people to face realities of internecine conflicts, inter alia, in the name of religion. Even contemporary news bulletins very often carry scenes of pitched battle or violence. What is necessary sometimes is to penetrate behind the scenes and analyse the causes of such conflicts. The attempt of the author in this film is to draw a lesson from our country's past history, expose the motives of persons who operate behind the scenes to generate and foment conflicts and to emphasise the desire of persons to lie in amity and the need for them to rise above religious barriers and treat one another with kindness, sympathy and affection. It is possible only for motion picture to convey such a message in depth and it is able to do this, it will be an achievement of great social value."

11. The law laid down in *Odyssey Communications Pvt. Ltd. Vs. Lokvidayan Sanghatana and Others*, and *Ramesh Dalal Vs. Union of India (UOI)* and Others, was reiterated by the Supreme Court in *S. Rangarajan Vs. P. Jagjevan Ram and Others*, . The Supreme Court was required to consider if the Madras High Court was justified in revoking the "U" certificate issued to a Tamil film "Ore Oru Gramathile" for public exhibition. The Supreme Court emphasised that the freedom of expression means the right to express one's opinion by words of mouth, writing printing, picture or in any other manner. It would thus include the freedom of communication and the right to propagate or publish opinion. Concluding the discussion the Supreme Court observed in paragraph 53 as under :

"We end here as we began on this topic. Freedom of expression which is legitimate and constitutionally protected cannot be held to ransom by intolerant group of people. The fundamental freedom under Article 19(1)(a) can be

reasonable restricted only for the purpose mentioned in Art. 19(2) and the restriction must be justified on the anvil of necessity and not the quicksand of convenience or expediency. Open criticism of Government policies and operations is not a ground for, restricting expression, We must practice tolerance to the views of others. Intolerance is as much dangerous to democracy as to the person himself".

12. More recently in the case of Life Insurance Corporation of India and Union of India and another Vs. Prof. Manubhai D. Shah and Cinemart Foundation, the Supreme Court was considering the question whether refusal of the Doordarshan to exhibit documentary based on "Bhopal Gas Disaster" on the ground that it is out dated and lost relevance was legal and proper. After noting the traits of the decisions of the Indian Courts, the Supreme Court observed in paragraph 8 of the judgment as under :

"The words "freedom of speech and expression" must, therefore, be broadly construed to include the freedom to circulate one's views by words of mouth or in writing or through audio-visual instrumentalities. It, therefore, includes the right to propagate one's views through the print media or through any other communication channel e.g. the radio and the television. Every citizen of this free country, therefore, has the right to air his or her views through the printing and/or the electronic media subject of course to permissible restrictions imposed under Art. 19(2) of the Constitution. The print media, the radio and the tiny screen play the role of public educators, so vital to the growth of a healthy democracy. Freedom to air one's views is the lifetime of any democratic institution and any attempt to stifle, suffocate or gag this right would sound a death-knell to democracy and would help usher in autocracy or dictatorship. It cannot be gainsaid that modern communication medium advances public interest by informing the public of the events and developments that have taken place and thereby educating the voters, a role considered significant for the vibrant functioning of a democracy. Therefore, in any set up, more so in a democratic set up like ours, dissemination of news and views for popular consumption is a must and any attempt to deny the same must be frowned upon unless it falls within the mischief of Art. 19(2) of the Constitution. It follows that a citizen for propagation of his or her ideas has a right to publish for circulation his views in periodicals, magazines and journals or through the electronic media since it is well known that these communication channels are great purveyors of news and views and make considerable impact on the minds of the readers and viewers and are known to mould public opinion on vital issues of national importance. Once it is conceded, and it cannot indeed be disputed, that freedom of speech and expression includes freedom of circulation and propagation of ideas, there can be no doubt that the right extends to the citizen being permitted to use the media to answer the criticism levelled against the view propagated by him. Every free citizen has an undoubted right to lay what sentiments he pleases before the public, to forbid this, except to the extent permitted by Art. 19(2), would be an inroad on his freedom. This freedom must, however, be exercised with

circumspection and care must be taken not to trench on the rights of other citizens or to jeopardise public interest. It is manifest from Art. 19(2) that the right conferred by Article 19(1) (a) to (is) subject to imposition of reasonable restrictions in the interest of amongst others, public order, decency or morality or in relation to defamation or incitement to an offence. It is, therefore, obvious that subject to reasonable restrictions placed under Article 19(2) a citizen has a right to publish, circulate and disseminate his views and any attempt to thwart or deny the same would offend Art. 19(1)(a)."

13. The Supreme Court then proceeded to hold that a film maker has a fundamental right under Article 19(a) to exhibit his films and therefore, the onus lies on the part which claims that it would be entitled to refuse enforcement of this right by virtue of the law made under Article 19(2) to show that the film did not conform to the requirement of that law. In paragraph 22 the Supreme Court observed:

"In India our Constitution recognises the need to place reasonable restrictions on grounds specified by Art. 19(2) and S.58 of the Act on the exercise of the right of speech and expression. It is for this reason that the need for prior restraint is recognised and our laws have assigned a specific role to the censors as such is the need in a rapidly changing societal structure. But since permissible restrictions, albeit reasonable, are all the same restrictions on the exercise of the fundamental right under Art. 19(1)(a), such restrictions are bound to be viewed as anathema, in that, they are in the nature of curbs or limitations on the exercise of the right and are, therefore, bound to be viewed with suspicion, thereby throwing a heavy burden on the authorities that seek to impose them. The burden would, therefore, heavily lie on the authorities that seek to impose them to show that the restrictions are reasonable and permissible in law."

14. From the above resume of the decisions of the Supreme Court, it is clear that the Apex Court has always placed a broad interpretation on the value and content of Article 19(1)(a), making it subject only to the restrictions permissible under Article 19(2). The latest decision of the Supreme Court in *Bobby Art International, etc. Vs. Om Pal Singh Hoon and others*, in respect of the movie "Bandit Queen" is on similar lines. While setting aside the judgment of the Delhi High Court directing certain excisions and modifications in the movie, the Supreme Court held that a film that illustrates the consequences of the social evil must also show that social evil. The guidelines must be interpreted in that light. No film that extols the social evil or encourages it is permissible, but a film that carries the message that social evil is evil cannot be made impermissible on the ground that it depicts social evil. At the same time, the depiction must be just sufficient for the purpose of the film. The drawing of the line is best left to the sensibilities of the expert Tribunal. The Tribunal is a multi-member body. It is comprised of persons who gauge public reactions to films and, except in cases of stark breach of guidelines, should be permitted to go about its task.

15. Coming then to the objections raised by the respondents, we have noted that

one of the objection is that the documentary tries to propagate leftist view point that only a class consciousness can prevent the religious and communal massacre. One may not agree with the view of the film maker. But in a democracy it is not necessary that every one should sing the same song. Freedom of expression is the rule and it is generally taken for granted. The film maker may project his own message which the other may not approve of it. But he has a right to "think out" and put the counter appeals to reason. It is a part of a democratic give-and-take to which one could not complain. The State cannot prevent open discussion and open expression, however, hateful to its policies. Everyone has a fundamental right to form his own opinion on any issue or general concern. He can form and inform by any legitimate means. In this behalf the following observations of Alexander Meikle-john, an American philosopher of freedom of expression, are worth noting :

"When men govern themselves, it is they and no one else -- who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un American as well American If then, on any occasion in the United States it is allowable, in that situation, to say that the Constitution is a good document it is equally allowable. If a public building may be used in which to say, in time of war, that the war is justified, then the same building may be used in which to say that it is not justified. If it be publicly argued that conscription for armed service is normal and necessary, it may likewise be publicly argued that it is immoral and unnecessary. It may be said that American political institutions are superior to those of England or Russia or Germany, it may with equal freedom, be said that those of England or Russian or Germany, it may with the equal freedom, be said that those of England or Russia or Germany are superior to our. These conflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant..... To be afraid of ideas, any idea, is to be unfit for self-government."

16. The next objection is that the commentaries cast aspersion in the existence of God. This is a total misconception of the relevant excerpt which is extracted from the writings of Bhagat Singh, and it as follows :

"I ask why your omnipotent God does not stop every man when he is committing any sin or offence. Why did he not kill warlords or kill the fury of war in them and thus avoid the catastrophe hurled down on the head of the humanity by the Great War? Why does he not produce a certain sentiment in the minds of British people to the liberate India? Why does he not infuse altruistic enthusiasm in the hearts of all capitalists to forego their rights of personal possession or the means of production and thus redeem the whole labouring community, nay, the whole human society from the bondage of capitalism? Where is God? What is he doing? Is he enjoying all these woes of the human race? Down with him."

If is difficult to understand as to how the above excerpts are likely to hurt the sentiment of any person. The film is not against any religion but is against

spreading of violence and hatred in the name of religion. The objection is thus completely without any merit.

17. Lastly, there is objection to certain parts of the film showing interviews of terrorists. In a documentary film which makes an attempt to analyse the problems of Punjab, reference to the terrorist group is almost inevitable. We must judge the film in its entirety from the point of view of its overall impact. I have already recorded that there is no justification of the fundamentalists. On the other hand, there is a strong condemnation of those responsible for the killing of innocent people in the name of the religion. The documentary viewed in its entirety is capable of creating a lasting impression of the message of peace and co-existence and there is no fear of the people being overwhelmed or carried away by excerpts showing interviews with fundamentalist groups. The standard to be applied by the Board or Courts for judging the film should be that of an ordinary man of common sense and the prudence and not that of an out of the ordinary or hypersensitive man. In this context the observation of Vivian Bose, J., as he then was, in the Nagpur High Court in the case of AIR 1947 1 (Nagpur) are extremely relevant :

"... That the effect of the words must be judged from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view. This is in our opinion, is the correct approach in judging the effect of exhibition of a film or of reading a book. It is the standard of ordinary reasonable man or as they say in English law, "the man of the top of the Clampham omnibus"."

There is one more aspect of the matter which is required to be mentioned at this stage. Before the film was submitted to the Doordarshan, the censor granted "U" certificate to the film. If the norm of appraisal was the same as applied by the censor while granting the "U" certificate, it is difficult to understand as to show the Doordarshan could refuse to exhibit it.

18. In view of the foregoing discussion, the petition must succeed and is accordingly made absolute in terms of prayer clauses (a) and (b) of the petition.

19. Mr. Sebastian, counsel of the petitioner made a request that the Doordarshan should be directed to exhibit the film on channel I or II since other channels basically cater to categories of people belonging to the linguistic class. He also requested that the Doordarshan should be asked to exhibit the film during reasonable hours. He complained that in respect of another film the order passed by this Court was virtually rendered nugatory by the Doordarshan by exhibiting the film at midnight. The Doordarshan is directed to exhibit the petitioner's documentary film within two months from today either on channel I or II between 6 p.m. to 11 p.m. if shown between Monday to Saturday, or in the morning or evening slot if shown on Sunday.

20. Petition allowed.