
(2015) 03 BOM CK 0353

In the Bombay High Court

Case No : Criminal Revision Application No. 156 of 2002

Kalimoddin and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 18-03-2015

Acts Referred:

Constitution of India, 1950 — Article 13, 13(3)(a), 19, 19(1)(a), 77
Prevention of Insults to National Honour Act, 1971 — Section 2

Citation : (2015) 03 BOM CK 0353

Hon'ble Judges : Sadhana S. Jadhav, J

Bench : Single Bench

Advocate : S.S. Bora, for the Appellant; S.M. Jadhav, APP, Advocates for the Respondent

Final Decision : Allowed

Judgement

Sadhana S. Jadhav, J—Heard Adv. Mr. S.S. Bora appearing for the revision applicant and the learned APP Mr. S.M. Jadhav appearing for the respondent - State.

2. The applicant herein is challenging the correctness and validity of the judgment and order passed by the learned Judicial Magistrate (F.C.), Purna, dated 6th January 1998, in Regular Criminal Case No. 268/1997, thereby convicting the applicant for the offence punishable under Section 2 of the Prevention of Insults to National Honour Act, 1971 [For short, hereinafter referred to as "1971 Act"], and is sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs. 500/-, in default of payment of fine, to suffer further simple imprisonment for two months. The said judgment and order has been upheld by the learned Additional Sessions Judge, Parbhani, in Criminal Appeal No. 4/1998, wherein the learned Additional Sessions Judge, Parbhani, vide judgment and order dated 18th June 2002, has been pleased to dismiss the appeal.

3. Such of the facts necessary for the decision of this revision application are as

follows :-

That, the present applicant happen to be the Head Master of Zilla Parishad Primary School, Laxminagar, Purna. On 15th August 1992, present applicant had hoisted the national flag at about 9.00 a.m. The said flag hoisting ceremony was attended by the villagers of Laxminagar. It was noticed that the flag was not hoisted properly. That, it was hoisted upside down. That, on the same day at 7.00 p.m., the flag was not lowered from the pole. Therefore, the villagers reported the matter to the Police Patil of the village. On 16th August 1992, Namdeo Narayanrao Bansode, Sarpanch of Laxminagar, Purna, lodged report at Police Station, Purna, alleging therein that on 15th August 1992, on the occasion of the independence day of the nation, the flag was hoisted in the school. That, the Assistant Teacher as well as Head Master had left the school soon after the flag hoisting ceremony. They did not return to the school in the evening for lowering down the flag. The villagers informed about it to the Police Patil, Upa-Sarpanch and others. They waited for arrival of the Assistant Teacher and the Head Master, but they did not return to the school and hence, according to the complainant, the applicant herein and the co-accused had offended and dishonoured the national flag. On the basis of this report, Crime No. 28/92 was registered against the accused for the offence punishable under Section 2 of the 1971 Act. The investigation was completed and charge sheet was filed on 29th August 1992. The case was registered as Regular Criminal Case No. 225/1995. The prosecution examined as many as 11 witnesses to bring home the guilt of the accused. The accused examined two witnesses in defence.

4. PW 1 Namdeo Bansode happens to be the complainant. He has deposed before the court in consonance with the First Information Report which is at Exhibit 19. It is elicited in the cross examination, that the witness has a weak eye sight. It is admitted by the witness, that he had seen the flag on the mast from the road in the evening. He has admitted in the cross examination, that he was not aware as to whether the Police had drawn Panchanama of the flag which was improperly hoisted. He had complained against the co-accused before the Block Development Officer.

5. PW 2 Hari Bansode and PW 3 Rustum Ghatol have not supported the prosecution and have been declared hostile. PW 4 Balaji Bansode happens to be the Police Patil of Laxminagar village. He has deposed before the court, that the Head Constable Khalil had drawn a Panchanama before lowering the flag. It is elicited in the cross examination of the Police Patil, that the accused had come to the school before arrival of the Police.

6. The learned Judicial Magistrate (F.C.) has observed that the accused persons i.e. the Head Master had hoisted the national flag having holes and thereby insulted the national flag and has committed offence punishable under Section 2 of the 1971 Act.

7. The learned Counsel for the applicant submits that it cannot be said that the

applicant was knowing that there were holes in the national flag. It can be said to be an inadvertent and unintentional act of the applicant and said act is not covered under Section 2 of the 1971 Act. The learned Counsel has relied upon judgment of the Hon''ble Division Bench of this Court, in the case of Amgonda Vithoba Pandhare Vs. Union of India and Others, (2012) BomCR(Cri) 219 : (2012) 4 MhLj 768 . The Hon''ble Division Bench [Coram : V.M. Kanade & P.D. Kode, JJ.] has observed as follows :

" Explanation 4 mentions various acts of dishonour in Clauses (a) to (l). Perusal of the said section clearly reveals that one of the essential ingredients of the said offence is that disrespect, contempt of the flag should be intentional. Similarly, Explanation 4 gives various instances of disrespect to the Indian National Flag. The offence of not lowering down the flag after sunset does not fall either in the various instances which are mentioned in Explanation 4 or in section 2 of the said Act. The averments in the complaint, therefore, even if they are accepted at its face value, does not constitute an offence within the meaning of section 2 of the said Act. "

The Hon''ble Division Bench of this Court has simpliciter relied upon judgment of the Hon''ble Apex Court, in the case of Union of India Vs. Navin Jindal & another, dated 23rd January 2004, in Civil Appeal No. 453 of 2004, reported in 2004 B.C.I. (soft) 166 (S.C.), wherein the Hon''ble Apex Court has held that the Flag Code contains executive instructions of the Central Government and, therefore, it is not a law within the meaning of Article 13(3)(a) of the Constitution of India. In view of the ratio laid down in the judgment of the Hon''ble Apex Court cited supra, it cannot be said that violation of the instructions which are given in the Flag Code would amount to an offence punishable under Section 2 of the 1971 Act.

8. In the present case, first and foremost allegation against the applicant is that the flag which was hoisted by him were having holes and the second allegation is that the flag was not lowered down after sunset. As far as first allegation is concerned, this court is of the opinion that it was an unintentional act. The said holes were not noticed by the applicant before hoisting the flag and, therefore, it cannot be said that he had any intention to insult the said flag. As far as second allegation is concerned, the applicant cannot be held liable for the said offence, as observed by the Hon''ble Division Bench of this Court in the case of Amgonda Vithoba Pandhare Vs. Union of India & others (supra).

9. The learned Single Judge of this Court [Coram : M.L. Tahaliyani, J.], in the case of Umesh Chopde Vs. State of Maharashtra and Vinod Jagannath Aswar, (2012) BomCR(Cri) 696 : (2012) CriLJ 3142 , while allowing application of the applicant therein seeking quashment of the FIR, has relied upon judgment of the Hon''ble Apex Court in the case of Union of India Vs. Navin Jindal & another (supra) wherein the Hon''ble Apex Court has observed thus :

"28. Before we proceed further, it is necessary to deal with the question, whether

Flag Code is law ? Flag Code concededly contains the executive instructions of the Central Government. It is stated that the Ministry of Home Affairs, which is competent to issue the instructions contained in the Flag Code and all matters relating thereto are one of the items of business allocated to the said Ministry by the President under the Government of India (Allocation of Business) Rules, 1961, framed in terms of Article 77 of the Constitution of India. The question, however, is as to whether the said executive instruction is law within the meaning of Article 13 of the Constitution of India. Article 13(3)(a) of the Constitution of India reads thus :

13(3)(a) Law includes any Ordinance, order bye-law, rule, regulation, notification, custom or usage having in the territory of Indian the force of law.

29. A bare perusal of the said provision would clearly go to show that executive instructions would not fall within the aforementioned category. Such executive instructions may have the force of law for some other purposes; as for example those instructions which are issued as a supplement to the legislative power in terms of Clause (1) of Article 77 of the Constitution of India. The necessity as regard determination of the said question has arisen as the Parliament has not chosen to enact a statute which would confer at least a statutory right upon a citizen of India to fly a National Flag. An executive instruction issued by the appellant herein can any time be replaced by another set of executive instructions and thus deprive Indian citizens from flying National Flag. Furthermore, such a question will also arise in the event if it be held that right to fly the National Flag is a fundamental or a natural right within the meaning of Article 19 of the Constitution of India; as for the purpose of regulating the exercise of right of freedom guaranteed under Article 19(1)(a) to (e) and (g) a law must be made. "

10. In the facts and circumstances of the case, and after considering the law laid down by the Hon"ble Apex Court and this Court, in the above cited judgments, the Revision Application deserves to be allowed.

11. In the result, the Revision Application is allowed.

The judgment and order dated 6th January 1998, passed by the Judicial Magistrate (F.C.), Purna, in Regular Criminal Case No. 268/1997, which was upheld by the Additional Sessions Judge, Parbhani, vide judgment and order dated 18th June 2002, in Criminal Appeal No. 4/1998, is hereby quashed and set aside. The applicant -accused is acquitted of the offence punishable under Section 2 of the Prevention of Insult to National Honours Act, 1971. Bail bonds of the applicant stand cancelled. Amount of fine, if paid by the applicant, shall be refunded to the applicant.

12. Rule made absolute in the above terms.