

(2009) 01 BOM CK 0100

In the Bombay High Court

Case No : Writ Petition (Lodg.) No's. 2717 and 2773 of 2008

Kamal R. Khan

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 09-01-2009

Acts Referred:

Bombay Cinemas (Regulation) Act, 1953 — Section 6, 6(1), 6(3)
Constitution of India, 1950 — Article 1, 14, 19(1), 19(2), 29

Citation : (2009) 4 BomCR 496

Hon'ble Judges : Kumar Swatanter, C.J;Chandrachud D.Y., J

Bench : Division Bench

Advocate : A.M. Saraogi, in W.P.Lodg. No. 2717/2008 and I.G. Khandelwal, in W.P.lodg. No. 2773/2008, for the Appellant; N.P. Pandit, A.G.P., for the Respondent

Judgement

Kumar Swatanter, C.J.—The petitioner is an actor and producer and has produced a film titled as "Deshdrohi". This picture was floated for release with effect from 14th November, 2008 while production of the film was completed in January 2008. The State of Maharashtra took a decision to suspend exhibition of this picture on and from 14th November, 2008 and passed an order dated 12th November, 2008. In this order it was stated that in the film North Indians have been referred to as "Bhaiyyas" in a derogatory manner by the locals, several scenes denigrate North Indians and the overall view and the contents appear inflammatory. The Film Certificate Appellate Tribunal vide order dated 11th October, 2008 granted a "U" Certificate to the film subject to certain dialogue modifications at five instances. All these changes have been made. The Principal Secretary to the Government of Maharashtra (Home Department) then proceeds to notice that the theme of the film and its impact remains unchanged. Following operative part of the order can usefully be referred at this stage:

There are strong reasons to believe that if exhibited the film will in all likelihood inflame passions and incite the people to violence leading to disturbance of public order. Therefore, I hereby order that the film "Deshdrohi" produced by M/s. OK

International which is slated for release on the 14th November, 2008 should be suspended from exhibition u/s 6(1) of the Bombay Cinemas (Regulation) Act, 1953 from the date of this order for a period of 60 days in the State of Maharashtra.

2. The legality of this order was questioned by the petitioner by filing a writ petition in this Court which came to be registered as Writ Petition (Lodging) No. 2652 of 2008. A Division Bench of this Court while disposing of the writ petition did not quash the order dated 12th November, 2008, but directed a post decisional hearing to the petitioner and the respondents were directed to take all aspects into consideration, noting that the petitioners were willing to delete any objectionable portion from the picture if directed by the authorities concerned. The respondents were required to pass an order by 20th November, 2008. Of course liberty was granted to the petitioner to challenge the order if adverse to the interest of the petitioner.

3. The respondents granted a hearing to the petitioner and relying upon certain letters, particularly upon a letter written by the Additional Commissioner of Police dated 18th November, 2008 to the Additional Chief Secretary (Home) an order was passed on 20th November, 2008 extending the order of suspension. The order dated 20th November, 2008 confirmed the earlier order dated 12th November, 2008 and maintained the period of suspension for a period of sixty days i.e. till 11th January, 2009. The petitioners felt aggrieved from this order and have filed the present writ petition challenging the correctness of this order on various grounds. Another Writ Petition being (Lodging) 2773 of 2008 was filed by a wing of a Society, Right to Read Foundation, challenging the order dated 12th November, 2008 on the ground that the order was erroneous, arbitrary and amounts to interfering with the right of the common man to exhibit and see films, in terms of Article 19(1)(a) of the Constitution of India. This latter writ petition hardly survived as the earlier order dated 12th November, 2008 was followed by the order dated 20th November, 2008.

4. The respondents filed a reply affidavit primarily taking up the plea that exhibition of this picture is likely to create law and order problems and because of the reasons stated in the order dated 12th November, 2008 as well as in the letter dated 18th November, 2008 there is a possibility of clashes between communities and the information given by intelligence officers about the general impression of the various sections of public who were likely to see the movie who felt that the same should not be exhibited as it is likely to increase the feeling of ill will amongst Maharashtrians and North Indians. Reference was also made to the information collected by the field officers of the Special Branch and it is stated that these sources indicate that "an impression has been created amongst the workers at the grass root levels and the leaders of the above mentioned organizations by the film promos, dialogues and advertisements that both the communities have been portrayed in a poor light". As already noted the first order dated 12th November, 2008 was directed to be reconsidered by the

authorities primarily for violation of principles of natural justice and the respondents were directed to give a post decisional hearing to the petitioner. It is not in dispute before us that the Principal Secretary, Government of Maharashtra (Home Department) passed the initial order when admittedly, she had not even seen the picture. What was the basis of reasonable belief, what was the record before the said officer before she passed the order dated 12th November, 2008 has been left to be imagined. We must go by the language of the order as admittedly no records were maintained of showing any other source of intimation which could reasonably be construed to be the basis or foundation for passing this order. Strangely in a letter dated 10th November, 2008 written to the Additional Chief Secretary from the office of the Deputy Inspector General (Law and Order) the reason stated was that keeping in view the serious incidents and as evident now in the happenings in the city of Mumbai in the month of October 2008 relating to problems in Railway Examinations, it was stated that political leaders are likely to take advantage and create problem if the picture is permitted to be exhibited. Another document which has now been placed on record is the letter dated 8th November, 2008 which has been written to the Director General of Police by the Additional Commissioner of Police (Special Branch), Mumbai. In this letter it is stated that the Police Officer had seen the movie and referred to the events and occurrences which followed as a result of the activities of Shri Raj Thackeray, Leader of Maharashtra Nav Nirman Sena in relation to examination of the Railway Board conducted in the city of Mumbai. Referring to that document the reason stated for recommending suspension of exhibition of the picture is that some scenes in the picture are likely to inflame the situation between the communities. It is shown in the picture that a Maharashtrian girl is involved with a North Indian boy which is likely to cause ill feeling amongst Maharashtrian women and some of the characters in the picture bear resemblance to political leaders in the State of Maharashtra and the language used in certain scenes of the picture is improper. The letter dated 10th November, 2008 refers to the letter dated 8th November, 2008. However, none of these letters or their impact was discussed by the authorities concerned in the order dated 12th November, 2008. In fact they do not find even mention. Copies of the said letter were never given to the petitioner so as to enable him to offer his comments. Thus these documents if considered by the authorities while passing the order dated 12th November, 2008 were not directly or even indirectly shown to the petitioner.

5. Be that as it may after the order of the Court dated 17th November, 2008 the Additional Commissioner of Police issued another letter to the Additional Chief Secretary (Home) and it will be useful to reproduce the entire letter as that is the last of the letters exchanged between the Government departments before the impugned order dated 20th November, 2008. The letter reads as under:

The Hindi movie "Deshdrohi" was slated for release on 14/11/08 in Mumbai as well as all over India. The movie contains scenes in which North Indians referred to as "Bhaiyyas" in a very derogatory manner. Maharashtrians (Marathis) have

also been depicted in poor light in the movie.

It is learnt through reliable sources that there is stiff opposition to release of this movie by Maharashtrians as well as North Indians both of whom are greatly agitated over the manner in which they have been depicted. If released, the cinema halls that would screen the movie are likely to be attacked and clashes between Maharashtrians and North Indians are expected resulting into public order problems.

6. The letter dated 18th November, 2008 reproduced above is again based on a mere apprehension that if the picture is released, the cinema halls that would screen the movie are likely to be attacked and there may be clashes. In this letter for the first time it is recorded that there are objections to the release of the picture both by the Maharashtrians as well as North Indians, as both the communities have been depicted in poor light. During the course of hearing we had asked Counsel appearing for the State to produce the original records which substantiate the pleas taken by the State in the two orders dated 12th November, 2008 and 20th November, 2008. No records were shown to us. However, the above referred two letters were produced during the course of hearing. It is a matter of some concern that over a period of nearly a month of intelligence inputs, no records are maintained of any kind particularly when on the basis of such inputs a decision is sought to be taken by the State which has serious civil consequences upon the rights of an individual citizen. The constitutional rights available to the petitioner under Article 19(1)(a) cannot be circumscribed or adversely affected in such a casual manner. The fundamental rights are in certain cases subject to certain reasonable restrictions. The State has the liberty to pass executive orders on the strength of its statutory power, but certainly not in violation to constitutional rights available to the citizens of the country. Reverting back to the material produced before us, stand of the State is not consistent. In one place it is indicated that the picture depicts Maharashtrians in poor light and the North Indians as "Bhaiyyas" in a derogatory manner and is likely to give rise to clashes. Other stand taken is that the political leaders are likely to exploit the situation, in view of the happenings in the month of October, 2008 in the city of Mumbai. The order dated 12th November, 2008 was passed by the authorities without even viewing the picture. This itself shows the casual manner in which the authorities had acted. Before passing the order dated 20th November, 2008 the authorities claim to have seen the picture. In the previous order of the Court it was recorded that the petitioner was willing to delete certain dialogues and even scenes which may be found by the authorities concerned as objectionable. This request of the petitioner found no favour with the respondent authorities and no appropriate reason has been stated in the impugned order except that the theme of the picture is likely to create a problem or clashes. It is not expected of such highly placed authorities in the State hierarchy to pass orders of this kind in a casual manner. The Court while relying upon the statement made on behalf of the State had not quashed the order dated 12th November, 2008 so that with the passage of time the State would act

objectively. During the course of hearing since the ban was to continue till 11th January, 2009, the Court had even suggested that the State would objectively consider lifting of the suspension order thereafter. But we are informed yesterday that the State wishes to continue the order of suspension even for a further period which may even be based on some additional material.

7. An executive or administrative action of the State has to be examined from the touchstone arbitrariness. Firstly, there are hardly any reasons which can appropriately govern the issue and justify the order of suspension for such a long period. Let us examine the practical aspect of exhibition of this picture "Deshdrohi". This picture has long back been exhibited in the entire country including Northern States. The CDs of this film are freely available in the city of Mumbai now for a considerable time. The plea of the State is self destructive to the extent that though the promos/advertisements have been demonstrated or exhibited for last more than few months, as the movie was floated for exhibition in the last week of November 2008, still no incident has happened in the city of Mumbai. The promos of the picture are stated to contain dialogues in the picture which are objectionable. If that be so it was expected of the authorities concerned to examine the effect of these events while passing the order dated 20th November, 2008.

8. Section 6 of the Bombay Cinemas (Regulation) Act, 1953 empowers the State to suspend the exhibition of a film over a particular period of time and during the period of that order of suspension the film shall be deemed to be an uncertified film. In terms of Sub-section (3) of Section 6 the order passed would remain in force for a period of two months from the date of its passing unless it is specifically extended by the Competent Authority. By operation of law or deemed fiction of law the certificate granted to the film by the Censor Board is automatically kept in abeyance. In the present case, the "U" certificate is issued by the Censor Board on 23rd October, 2008 and it is noticed that the Censor Board had raised some objections which were removed by the petitioner and thereafter a certificate of fitness for exhibition was issued by the Censor Board. An argument has been raised before us on behalf of the petitioner that the scope of Section 6 primarily relates to the place where the picture is to be exhibited and this power is not available to the State for passing of an order of suspension in general terms. In view of the course of action that we propose to pass in this petition it is not necessary for us to examine the merit or otherwise of this legal controversy. Suffice it to note that the order u/s 6 can only be passed if the State is of the opinion that any film which is being publicly exhibited is likely to cause a breach of public order. Public order is the term which has now been well defined in law. It essentially must be understood in complete contradistinction to the words law and order" and "security of the State". In the case of State of U.P. and Another Vs. Sanjai Pratap Gupta @ Pappu and Others, , the Supreme Court while dealing with this concept clearly held thus:

10. "Public order", "law and order" and the "security of the State" fictionally draw

three concentric circles, the largest representing law and order, the next representing public order and the smallest representing security of the State. Every infraction of law must necessarily affect order, but an act affecting law and order may not necessarily also affect public order. Likewise, an act may affect public order, but not necessarily the security of the State. The true test is not the kind, but the potentiality of the act in question. One act may affect only individuals while the other, though of a similar kind, may have such an impact that it would disturb the even tempo of the life of the community. This does not mean that there can be no overlapping, in the sense that an act cannot fall under two concepts at the same time. An act, for instance, affecting public order may have an impact that it would affect both public order and the security of the State.

9. Thus public order is a term of different significance and implication than the expression law and order". Law and order is the outer most circle, the inner most being security of the State. These are obviously decipherable terms and expressions and have different ramifications and requirements in law. Merely because few people will come together and raise a protest and/or that a political leader is likely to abuse or misuse the exhibition of the picture per se would not be a ground which would fall within the ambit and scope of the expression "public order". To control law and order is the primary obligation of the State and the State must essentially perform its duties with due adherence to law. For the purposes of its convenience or its inability to handle such situation, the State cannot transgress and infringe the fundamental rights and protection of the citizen. To carry out business and to have freedom of speech and expression both are protective rights and cannot be infringed upon by the State with such a casual approach.

10. For the reasons aforestated it is clear that it is a colourable exercise of power which smacks of arbitrariness. The action of the State is hardly supported by any record much less a proper reasoning and appropriate records to back up this decision. All that appears to us is that the State has taken a decision to suspend the exhibition of this picture and wishes to adhere to that decision irrespective of its consequences and being violative of constitutional protections available to the petitioner.

Chandrachud D.Y., J.

11. I am in agreement with the erudite judgment of the learned Chief Justice and share His Lordship's reasons, conclusions and above all, his concern over what has happened. However, there are a few thoughts and concerns which I must add as a member of a Court which exercises constitutional jurisdiction.

12. This case upon which we adjudicate is of seminal importance for more reason than one. The State has exercised its power to suspend the exhibition of a cinematograph film under a legislation which conditions the exercise of the power on grounds of public order. The impact of an order u/s 6(1) of the Bombay

Cinemas (Regulation) Act, 1953 is to curtail the fundamental right to the freedom of speech and expression. Free speech and expression lies at the core of the values which sustain democracy. Governance in civil society must thrive by the expression of dissent as much as democracy thrives by the expression of popular support. The right to question and to criticize is intrinsic to good governance. Those who are governed must have a sense of participation in the process of governance just as those who govern must have the feel of the ground and their ears to reality. Governing and being governed are inseparable facets of constitutional governance. A free flow of ideas, information and knowledge is critical to good governance. Good governance demands not just rule by law but rule of the good law and enforcement of law upon principles which are consistent with a constitutional order. Citizens are entitled to criticize and to critique even if such criticism is trenchant. Suppress criticism and you suppress democracy. Suppress the free flow of information, ideas and knowledge and you create a society which is repressed and inhibited. Worse still, a lack of accountability or transparency are liable to result when citizens are gagged. One does not need to travel far back in history to find examples where the muting of dissent has produced the worst violations of human rights.

12-A. Free speech is of intrinsic value in a democracy. Speech in all its forms is an expression of human personality. To speak is to give creative expression to ideas, thoughts and perceptions. Anguish and appreciation, criticism and acceptance, speech and silence are all forms of symbolism which nature ordains in the evolution of the human ethos. Speech is the quintessence of human life. Article 19(1)(a) is a constitutional embodiment of a right which inheres in nature—a right which is inseparable from human existence. But, apart from its intrinsic importance, free speech is of instrumental importance. The instrumental value of the right in a democratic order is that it recognizes the importance of a free expression of ideas in the attainment of democratic values. The intrinsic and the instrumental elements find recognition in the constitutional ethos. The intrinsic value of free speech is a constitutional recognition of a right which inheres in nature, as a reflection of the essence of human personality. The instrumental value of free speech recognizes that the right is a means to an end—illustrative of those ends is the participation of citizens in the process of governance, the expression of dissent, governance by principles of good administration and rule by good law, and the peaceful persuasion in a democracy of every member of society in determining who shall govern. Speech in a democracy is a peaceful, but powerful instrument of change. The power of speech is what distinguishes peaceful from violent societies. Democracy is founded on the assumption that free speech is not a threat to its existence but furthers its cause. On the contrary, intolerance towards speech is a characteristic of violent societies. Ours is not intended by the framers of the Constitution to be a society where speech will be repressed. Though we have increasingly become vulnerable to violence inflicted from outside the nation, as the recent events would show, it is important in times of crisis to reaffirm, rather than revise, the commitment to our core

constitutional values.

13. The Constitution contemplates that the fundamental rights are not absolute. The grounds on which an abridgment is permissible are spelt out in the Constitution and those grounds are exhaustive of the power to curtail. There is no residuary power to abridge fundamental freedoms and every restraint must be justified by law on a foundation which the Constitution authorizes both in terms of the nature and extent of the curtailment. The extent of the curtailment must bear a nexus with a constitutionally authorized ground for curtailment. The proportionality between the extent of the curtailment and the constitutionally authorized basis of curtailment is what ensures against the law being arbitrary and contrary to Article 14. The element of proportionality is what preserves the balance between the right and the restriction and synchronizes the freedom on the one hand and the limits on freedom on the other.

13-A. Among the restrictions which a law can impose on the right under Article 19(1)(a) is a reasonable restriction in the interest of public order. The State tells us on affidavit in the present case that it was acting in the interest of maintaining "public law and order". The deponent of the affidavit, and by necessary consequence the State, have plainly acted in ignorance of the well settled distinction between a problem of law and order on the one hand and public order on the other hand. Every problem of law and order does not constitute a problem of public order. A problem of public order involves an aggravated form of disorder which affects public tranquility and peaceful co-existence in society. The carefully crafted provisions of the Constitution permit reasonable restrictions, under Article 19(2), on the freedom of speech and expression in the interests of the security of the State, public order but not on a localized issue of law and order.

14. The prelude to the action of the Government in the present case, and, as we shall see, the foundation of the action was an agitation that was commenced by a political party in connection with the process of recruitment to join in the Railways. A letter written on 8th November, 2008 by the Additional Commissioner of Police in the Special Branch to the Director General of Police refers to an agitation that was commenced by the Maharashtra Nav Nirman Sena, a political party led by Mr. Raj Thackeray. The agitation pitted the interests of Maharashtrians against those who had settled in the State from the Northern part of the country. The intelligence information which the State received was that political parties and their leaders were likely to misuse the prevailing situation since the film "Deshdrohi" dealt with the issue of discrimination against North Indians in the State of Maharashtra. The film, according to the State, has as its central theme, the discrimination against persons from the northern parts of the country in the State of Maharashtra.

15. The politics of hate and intolerance is an anathema to our constitutional order. The free movement of persons throughout the territory of India is one of the fundamental freedoms recognized by Article 19(1)(d) of the Constitution. Likewise, the right to reside and settle in any part of the territory of India is

protected by Article 19(1)(c). Article 19(1)(g) guarantees to every person the right to practice any profession or to carry on any occupation, trade or business. That right can be exercised in any part of the territory of India. India is one nation, and as Article 1 posits, a Union of States, Article 29 recognizes the rights of any section of the citizens to conserve their distinct language, script or culture. Article 30 speaks of the rights of linguistic minorities on the same plane as religious minorities to establishment of educational institutions. Practicing hate or intolerance towards any segment of society is fundamentally contrary to a constitutional order in which it is the fundamental duty of every citizen-under Article 51-A "to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic, and regional on sectional diversities",

16. In a constitutional order where these are the underpinnings, can a film which is critical of perceived discrimination be suppressed on the ground of a likelihood of public disorder? The producer of the film states before the Court that the film was completed even before the recent disturbances in the State and that it could hence not have been based on them. But that to my mind is besides the point. Giving expression to a perception that there is discrimination against a particular segment of society is protected by the guarantee of free speech. In doing so, an author, playwright or producer is entitled to utilize creativity to the utmost. The critique may be severe, the words used may appear to be strong to the weak hearted and the depiction may overstate the point. But the right to do so is exactly what Article 19(1) a protects so long as public order is not implicated. The realities of life are harsh and the guarantee of free speech does not require writers and directors to present a sanitized view of life. The heart of a film, as a medium of expression, lies in its ability to move the viewer by the strength of the depiction. How sensitive should be the depiction or how crude are not matters where the law intervenes so long as the limits of a valid piece of legislation are not trespassed.

17. In this case, the State Government informs us on affidavit that political leaders and political parties may unfairly use the situation that arose out of the politics that was preached by a particular political party. The State is not powerless if any segment of society-be it a political party, its protagonists or otherwise-preaches hate or intolerance within a State to those who originated elsewhere. Maharashtra has a secular tradition which has witnessed a peaceful co-existence of diverse religious and linguistic communities and the aberrations to the norm have been isolated. The State is a microcosm of the nation in every sense and every segment of Indian society has contributed to the development of Maharashtra in industry, education, professions and trades, amongst others. The duty to govern in accordance with the Constitution involves a non negotiable obligation to tackle all those who preach hatred and violence to persons perceived to be from outside the State. The State Government cannot explain away its inability or unwillingness to do so by clamping down on the fundamental, freedoms of citizens, like the petitioner, who focus public attention

to the issue. Films do not have to be fictional to be protected nor must they run the risk of prohibition, if the reality which they portray is stark.

18. The power which is conferred upon the State Government by Section 6(1) is not a power of censorship. The Central Board of Film Certification carried out that exercise when its appellate committee gave to the film a "U" certification. Evidently, the Board which cleared the film with cuts did not regard the film as implicating an issue of public order. The power u/s 6(1) is to suspend a film which is "being exhibited" if it is in the view of the Government likely to lead to a breach of public order. The State Government acted even before the film could be exhibited and stated on affidavit that the action was based on "promos" and publicity material and the reactions which they created amongst certain persons. Evidently, it was not the exhibition of the film that created a problem of public order because the Government interdicted its exhibited even before the film was released to theatres for exhibition. There was no cogent material before the State to substantiate an inference that the exhibition of the film was likely to cause a breach of public order. The affidavit of the State is completely vague and bereft of material particulars. The first order of suspension that was passed by the State Government is completely silent on any intelligence inputs that may have been received by the State. The second order that was passed by the State consequent upon the directions issued by this Court for a post decisional hearing is palpably vague as are the intelligence inputs that are now stated to be the basis of the action. Circumstances extraneous to the exercise of power u/s 6 have been relied upon, among them being:

(i) that in the background of the agitation launched by Mr. Raj Thackeray of the Maharashtra Nav Nirman Sena, the situation was likely to be exploited by political parties and political leaders;

(ii) that women in Maharashtra would conceive it as an affront to them because the film depicts a person of north Indian origin to be involved in a relationship with a woman from Maharashtra;

(iii) that some part of the characters in the film bear a resemblance to certain political personalities; and

(iv) the sons of the soil issue had not been resolved.

These considerations are extraneous to the domain of a lawful exercise of power u/s 6 and do not constitute valid grounds to abridge the constitutional right to free speech and expression. There was absolutely no material before the State Government to support an inference that there was a breach of public order or a likelihood of such a breach consequent upon the exhibition of the film. The suspension of the exhibition of the film was ill conceived. The State Government ought to have firmly dealt with those who preach hatred and instigate violence against citizens of the country for whom home and hearth are Maharashtra. It is ironical that what was done was to suppress the creative expression of an idea and of the lawful anguish of a citizen expressed on screen. The order of

suspension is unsustainable. For the reasons indicated in the judgment of the learned Chief Justice and in my own, I concur with the learned Chief Justice in allowing the petition.

P.C.: - In the result of our discussion we quash the orders dated 12th November, 2008 and 20th November, 2008. However, in the facts and circumstances of the case, there shall be no order as to costs.

On the oral request, stay of the operation of the judgment is rejected.