

(2017) 07 MP CK 0009
In the Madhya Pradesh High Court
Case No : 9060 of 2017

Ku. Shivani Deb.

APPELLANT

Vs

State of Madhya Pradesh & Ors.

RESPONDENT

Date of Decision : 13-07-2017

Acts Referred:

Constitution of India, Article 21, Article 32 - Amendment of the Schedule - Remedies for enforcement of rights conferred by this Part
Indian Penal Code, 1860, <a href=176

Citation : (2017) 07 MP CK 0009

Hon'ble Judges : Hemant Gupta, Vijay Kumar Shukla

Bench : Single Bench

Advocate : Umesh Trivedi, P. K. Kaurav, Swapnil Ganguly

Final Decision : Dismissed

Judgement

1. The petitioner, mother of Mohd Salik, killed in a police encounter on 31.10.2016, has filed the present writ petition to set aside the order dated 22.4.2017 passed by the Commissioner of Inquiry, Bhopal; to direct Commission to supply all documents and also to permit the petitioner to cross-examine the witnesses and any other writ or direction as may be necessary.

2. The brief facts leading to the present petition are that by notification dated 7.11.2016, the State of Madhya Pradesh constituted a one man Inquiry Commission under the Commissions of Inquiry Act, 1952 (hereinafter referred to as "the Act" for short). The terms of reference of Inquiry Commissions (hereinafter referred to as "the Commission" for

short) read as under:-

"(1) Circumstances and incidence under which eight under trial prisoners escaped from Central Jail in the intervening night of 30th and 31st October, 2016 - officers and employees responsible for such incidence- (2) Circumstances and incidence of police encounter between eight absconded prisoners near Gram: Manikhedi, Thana: Gunga, Distt: Bhopal on 31st October, 2016, in which all eight prisoners died- (3) Whether the said encounter done by the police was reasonable under prevailing circumstances- (4) Suggestions to stop repetition of this incidence of absconding prisoners from jail. (5) Some other matters which are incidental to inquiry."

3. The background of the notification is that on the intervening night of 30th and 31st October, 2016 eight under trials absconded from jail and were later killed in an encounter on 31.10.2016 near village Manikhedi, Police Station: Gunga, District: Bhopal. The Commission was appointed to examine the circumstances and incidence under which eight under trial prisoners escaped from Central Jail and to find out the officers and employees responsible for such incidence. The other term of reference is in relation to the circumstances and incidence of police encounter between eight absconded prisoners.

4. The Commission in order to examine the terms of reference ordered publication of the public notices on 14.12.2016. The public notice was published in the newspaper on 17.12.2016 as also pasted on the notice board of the office of Commission. The Commissioner also served notice on the family members of the deceased under trials on 19.12.2016. On 30.1.2017, the Commissioner passed an order of taking on record the statements/ affidavits filed by the family members of the deceased under trials in terms of Rule 5 (2) (b) of the Commissions of Inquiry (Madhya Pradesh) Rules, 1991 (for short "the Rules") whereas, request submitted by the Superintendent of Jail in respect of public hearing under Rule 5 (1) of the Rules was ordered to be taken up for decision together with other applications. The Commissioner passed an order on 2.2.2017 that the proceedings of the Commission shall not be public and only parties shall

remain present. It was ordered on 4.2.2017 that the submissions submitted by the Superintendent, Central Jail and from the Police Department are to be treated as under Rule 5 (2) (a) and (b) of the Rules, whereas 18 documents/ affidavits filed by the family members of the deceased under trials are to be treated under Rule 5 (2) (b) of the Rules.

5. It is thereafter, two applications were filed by the family members of the deceased under trials. I.A. No.7 is for production of documents as mentioned in such application whereas, in I.A. No.8, the demand was made to cross examine the executants of other affidavits. The impugned order was passed on 22.4.2017. The Commissioner found that the inquiry being conducted by the Commission cannot be taken at par with that of a criminal trial. The Commissioner partly allowed IA No. 7 when 25 documents as described in Annexure - A were ordered to be supplied. Such documents pertain to the postmortem report of the deceased under-trials; the FIRs, Marg intimation (daily diary report), newspaper publications etc. However, the documents in police file contained in Part-A and other documents including CDs, video etc. were not supplied being sensitive in nature. The I.A. No.8, was declined inter alia for the reason that procedure of recording evidence under Chapter-X of the Indian Evidence Act, 1872 is not required to be followed and that the family members of the deceased under-trials are not entitled to seek cross examination. With this factual background certain statutory provisions need to be extracted, which reads as under :-

" Commission of Inquiry Act, 1952 -

3. Appointment of Commission. - (1) The appropriate Government may, if it is of opinion that it is necessary so to do, and shall, if a resolution in this behalf is passed by each House of Parliament or, as the case may be, the Legislature of the State, by notification in the Official Gazette, appoint a Commission of Inquiry for the purpose of making an inquiry into any definite matter of public importance and performing such functions and within such time as may be specified in the notification, and the Commission so appointed shall make the inquiry and perform the functions accordingly:

*** **

6. Statements made by persons to the Commission.-No statement made by a person in the course of giving evidence before the Commission shall subject him to, or be used against him in, any civil or criminal proceeding except a prosecution for giving false evidence by such statement:

Provided that the statement -

(a) is made in reply to a question which he is required by the Commission to answer, or

(b) is relevant to the subject-matter of the inquiry."

"8. Procedure to be followed by the Commission - The commission shall, subject to any rules that may be made in this behalf, have power to regulate its own procedure (including the fixing of places and times of its sittings and deciding whether to sit in public or in private)

8B. Persons likely to be prejudicially affected to be heard- If, at any stage of the inquiry, the Commission - (a) considers it necessary to inquire into the conduct of any person; or

(b) is of opinion that the reputation of any person is likely to be prejudicially affected by the inquiry,

the Commission shall give to that person a reasonable opportunity of being heard in the inquiry and to produce evidence in his defence:

Provided that nothing in this section shall apply where the credit of a witness is being impeached.

8C. Right of cross examination and representation by legal practitioner - The appropriate Government, every person referred to in section 8B and, with the permission of the Commission, any other person whose evidence is recorded by the Commission. -

(a) may cross-examine a witness other than a witness produced by it or him;

(b) May address the Commission; and

(c) May be represented before the Commission by a legal practitioner, or with the permission of the Commission, by and other person."

6. In terms of Section 12 of the Act, the State Government has

framed Commissions of Inquiry (Madhya Pradesh) Rules, 1981. Rule 5 is

the procedure of inquiry, which reads as under :-

"5. Procedure of inquiry. - (1) A Commission may sit in public or in private as it thinks fit :

Provided that a Commission shall sit in private on a request being made by the State Government in that behalf.

(2) A Commission shall, as soon as may be after its appointment,-

(a) issue a notice to every person, who in its opinion should be given an opportunity of being heard in the inquiry, to furnish to the Commission a statement relating to such matters as may be specified in the notice;

(b) issue a notification, to be published in such manner as it may deem fit, inviting all persons acquainted with the subject-matter of the inquiry to furnish to the Commission a statement relating to such matters as may be specified in the notification;

(c) may ask the parties to file rejoinders.

(3) Every statement furnished under clause (a) of sub-rule

(2) shall be accompanied by an affidavit in support of the facts set out in the statement sworn by the person furnishing the statement.

(4) Every person furnishing a statement under clause (a) of sub-rule (2) shall also furnish to the Commission along with the statement a list of the documents, if any, on which he proposes to rely and forward to the Commission, wherever practicable, the originals or true copies of such of the documents as may be in his possession or control and shall state name and address of the person from whom the remaining documents may be obtained.

(5) [(a) The Commission shall examine all statements and rejoinders, if any, furnished to it under clauses (b) and (c) of sub-rule (2) and if, after examination, the Commission considers it necessary to record evidence, it may record the evidence,

(i) produced by the State Government, if any;

(ii) of any person who has furnished a statement under clause (a) of sub-rule (2) and whose evidence the Commission, having regard, to the statement, considers relevant for the purpose of the inquiry; and

(iii) of any other person whose evidence in the opinion of the Commission, is relevant to the inquiry, in such order as it may deem fit:

Provided that the Commission may dispense, with the attendance of any person for the purpose of giving evidence before it, if in its opinion-

(i) such attendance cannot be enforced except by causing undue hardship or inconvenience to that person;

(ii) such attendance should be dispensed with for any other sufficient reason to be recorded by it in writing.]

(b) If, after all the evidence is recorded under clause (a), the Commission is

satisfied that it is necessary for the

proper determination of any relevant fact to do so, it may recall any witness already examined or examine any new witness.

(c) The parties other than the one which examines a witness, and in the case of a witness of the Commission all the parties, may be allowed to cross-examine a witness unless the Commission, for reasons to be recorded, orders otherwise.

(6) Travelling and other expenses as the Commission may deem reasonable shall be paid to a person who is summoned to assist the Commission at the stage of preliminary investigation or to give evidence or to produce documents before a Commission.

(7) The Commission shall have the powers of a Civil Court to make local investigation, either personally or through any person duly authorised by it, into any matters falling within its terms of reference.

(8) A Commission shall have the power to regulate its own procedure in respect of any matters for which no provision is made in these Rules."

7. The argument of learned counsel for the petitioner is that the petitioner and other persons are the affected parties as their reputation is likely to be affected by any finding in the inquiry being conducted.

Therefore, in terms of Section 8B(b) of the Act, they are entitled to opportunity of hearing and to produce evidence and in terms of Section 8C of the Act have a right to cross examine the witnesses. In support of the arguments, learned counsel for the petitioner relies upon the judgments reported as (2003) 8 SCC 361 (State of Bihar Vs. Lal Krishna Advani and others) and (2015) 5 SCC 283 (Sanjay Gupta and others Vs. State of Uttar Pradesh and others) to contend that the reputation is fundamental right and the petitioner has a right to protect the reputation of the family in such proceedings.

8. On the other hand, learned Advocate General pointed out that the terms of reference are primarily in respect of police encounter between eight under trials prisoners and the role of officers and employees who are responsible and the circumstances in which eight under-trial prisoners escaped from the Central Jail. It is contended that manner of absconding of the deceased under-trials is the subject matter of inquiry before the

Commission which fact is not affecting the reputation of the family members of the deceased prisoners. It is also argued that the family members of the deceased under trials have filed affidavits which are in terms of Rule 5 (2) (b) of the Rules which contemplates that all persons acquainted with the subject matter of inquiry to furnish a statement to the Commission relating to such matter as may be specified in the notification. On the other hand, the statements and the affidavits of the Police and Jail officials have been categorized in terms of Rule 5 (2) (a) of the Rules which is to provide an opportunity of being heard in the inquiry to the affected persons. Therefore, the family members of the deceased under trials are in the category of the persons acquainted with the subject matter, whereas the Police and Jail officials are in the category of persons who are to be provided an opportunity of hearing in terms of Section 8B of the Act. It is pointed out that the judgments referred to by learned counsel for the petitioner are not applicable to the facts of the present case as in L. K. Advani's case (supra), the adverse comments were recorded against Shri L. K. Advani without giving any opportunity of hearing and when the terms of inquiry referred to the Commissions of Inquiry was to enquire into the facts and circumstances leading to communal disturbances in the District of Bhagalpur and adjacent areas on 24.10.1989 and to enquire into whether these disturbances were pre-planned and, if so, the elements responsible for the same. In terms of the said reference certain remarks were recorded by the two members of the Commission which were expunged by the Division Bench of Patna High Court in the case of Lal Krishna Advani (L. K. Advani) and others Vs. State of Bihar and others reported as AIR 1997 Patna 15. The said order was affirmed in a judgment in L. K. Advani's case (supra) referred to above.

9. In Sanjay Gupta's case (supra), a devastating fire engulfed a consumer fair in which as many as 64 persons lost their life. The Commission of Inquiry was appointed to find out the facts and the causes

on account of which the aforesaid accident occurred and the determination of liability and the extent thereof. A writ petition under Article 32 of the Constitution of India was filed seeking damages from the organizers of the consumer show. During pendency of writ petition, the Commission gave its report on 5.6.2007. The Respondents No.10 to 12, organizers of the event were summoned after examination of 45 witnesses and that the report was given without affording an opportunity of cross-examination of the witnesses. In these circumstances, the Court appointed another Hon"ble Judge as one man Commission finding that the procedure has not been followed by the Commission properly.

10. Learned Advocate General has also pointed out that the expression used to Section 8B (b) of the Act is that if the Commission is of opinion that the reputation of any person is likely to be prejudicially affected by the inquiry, the Commission shall give that person a reasonable opportunity of being heard in the inquiry. That provision of Section 8B (b) are not applicable to the petitioners as the petitioners are not the persons whose reputation is likely to be affected by the inquiry, as the conduct of the family members is not being examined by the Commission. In fact, the Commission is not even examining the reputation of the deceased under trials but the conduct of escaping from Central Jail. It is reputation of the police and jail officials which is under cloud and not that of the deceased under-trials, which is apparent from the terms of reference. The judgments in the cases of L.K. Advani's case (supra) and Sanjay Gupta's case (supra) pertain to the reputation or conduct of the persons being examined by the Commission of Inquiry.

11. The scope of Commission of Inquiry has been delineated by Division Bench of Nagpur High Court, a predecessor Court of this Court, in the case of M. V. Rajwade I.A.S., Dist. Magistrate Vs. Dr. S. M. Hassan and others reported as AIR 1954 Nagpur 71 that an inquiry under the Act is of a different character. There is no accuser, no accused

and no specific charges for trial; nor is the Government, under the law, required to pronounce, one way or the other, on the findings of the Commission. In the aforesaid case, the Court has held as under:-

"12. An enquiry under the Commissions of Inquiry Act, 1952, on the other hand, is of wholly different character. There is no accuser, no accused and no specific charges for trial; nor is the Government, under the law, required to pronounce, one way or the other, on the findings of the Commission. "In re Maharaja Madhava Singh", 32 Cal 1 (PC) (D), was a case of the Commissioners appointed by the Viceroy and Governor- General in Council for the purpose of enquiring into the truth of a certain imputation against the Maharajah, in which their Lordships of the Privy Council observed: "It is sufficient to say that the Commission in question was one appointed by the Viceroy himself for the information of his own mind, in order that he should not act in his political and sovereign character otherwise than in accordance with the dictates of justice and equity, and was not in any sense a Court, or, if a Court, was not a Court from which an appeal lies to His Majesty in Council."

The "ratio decidendi" in this case was that the Commission was not a Court. So far as the question regarding the maintainability of an appeal to His Majesty in Council was concerned, the answer thereto followed from the main decision. These observations apply "mutatis mutandis" to the instant case. The Commission in question was obviously appointed by the State Government "for the information of its own mind", in order that it should not act, in exercise of its executive power, "otherwise than in accordance with the dictates of justice and equity" in ordering a departmental enquiry against its officers. It was, therefore, a fact finding body meant only to instruct the mind of the Government without producing any document of a judicial nature. The two cases are parallel, and the decision must be, as in - "In re Maharaja Madhava Singh (D)", that the Commission was not a Court."

12. It is the said principle of law which was approved by the Constitutional Bench in a judgment in the case of Shri Ram Krishna Dalmia Vs. Shri Justice S. R. Tendolkar and others reported as AIR 1958 SC 538. Such is the view taken by the seven Judges Bench of Supreme Court in the case of State of Karnataka Vs. Union of India reported as AIR 1978 SC 68 and in the case of Kehar Singh and another Vs. State of Delhi Admn. reported as AIR 1988 SC 1883. The Supreme Court in the case of Ram Krishna Dalmia (supra) held that the only power the Commission has is to inquire and make a report and embody

therein its recommendations. The Commission has no power to adjudicate in the sense of passing an order which can be enforced by itself. The relevant extract reads as under:-

"8.....As has been stated by the High Court itself in the latter part of its judgment, the only power that the Commission has is to inquire and make a report and embody therein its recommendations. The Commission has no power to adjudication in the sense of passing an order which can be enforced proprio vigore. A clear distinction must, on the authorities, be drawn between a decision which, by itself, has no force and no penal effect and a decision which becomes enforceable immediately or which may become enforceable by some action being taken. Therefore, as the Commission we are concerned with is merely to investigate and record its findings and recommendations without having any power to enforce them, the inquiry or report cannot be looked upon as a judicial inquiry in the sense of its being an exercise of judicial function properly so called and consequently the question of usurpation by Parliament or the Government of the powers of the judicial organs of the Union of India cannot arise on the facts of this case and the elaborate discussion of the American authorities founded on the categorical separation of powers expressly provided by and under the American Constitution appears to us, with respect, wholly inappropriate and unnecessary and we do not feel called upon, on the present occasion, to express any opinion on the question whether even in the absence of a specific provision for separation of powers in our Constitution, such as there is under the American Constitution, some such division of powers-legislative, executive and judicial - is, nevertheless implicit in our Constitution. In the view we have taken it is also not necessary for us to consider whether, had the Act conferred on the appropriate Government power to set up a Commission of Inquiry with judicial powers, such law could not, subject, of course, to the other provisions of the Constitution, be supported as a law made under some entry in List I or List II authorising the setting up of Courts read with these two entries, for a legislation may well be founded on several entries."

It is the said judgment which has been referred to with approval in later judgments even after insertion of Section 8B and 8C vide Central Act No.79/1971 w.e.f. 13.12.1971. In the case of T.T. Antony Vs. State of Kerala, (2001) 6 SCC 181, it was again held that the report and findings of the Commission of Inquiry are meant for information of the Government. The Court held as under:-

"33. It is thus seen that the report and findings of the Commission of Inquiry are meant for information of the Government. Acceptance of the report of the Commission by the Government would only suggest that being bound by the rule of law and having duty to act fairly, it has endorsed to act upon it. The duty

of the police -- investigating agency of the

State -- is to act in accordance with the law of the land. This is best described by the learned Law Lord -- Lord Denning -- in R. V. Metropolitan Police Commr. (All ER, at p. 769) where he observed as follows: "I hold it to be the duty of the Commissioner of Police, as it is of every Chief Constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or no suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself." 34. Acting thus the investigating agency may with advantage make use of the report of the Commission in its onerous task of investigation bearing in mind that it does not preclude the investigating agency from forming a different opinion under Sections 169 / 170 Cr.P.C. if the evidence obtained by it supports such a conclusion. In our view, the courts, civil or criminal, are not bound by the report or findings of the Commission of Inquiry as they have to arrive at their own decision on the evidence placed before them in accordance with law."

13. That the Division Bench of the Patna High Court which expunged the remarks in the report in the case of Shri Lal Krishna Advani held as under :-

"12. In these backgrounds, it can be safely gathered that reputation is a part of fundamental right and personal liberty as guaranteed under Article 21 of the Constitution of India. Therefore, having regard to the importance of such a right, Section 8-B of the Act casts a mandatory duty on the Commission to give a reasonable opportunity to the person whose conduct or reputation is likely to be prejudiced by such inquiry or the findings recorded therein. Under the safeguards as provided under Section 8-B a person whose conduct or reputation is going to be criticised has got a legitimate right to defend his/her case and cross-examine witness before such findings are recorded.

13. Therefore, apart from the individual interest of the person concerned, with a view to have a public confidence as well, it is just and proper to allow such person to have full satisfaction, while participating in the proceeding where his or her conduct was being criticised. While dealing with identical question with regard to scope of Section 8-B of the Act, the Andhra Pradesh High Court in the case of Shri K. Vijaya Bhaskar Reddy v. Government of Andhra Pradesh, AIR 1996 Andh Pra 62 held thus (at p. 71 of AIR) :--

"31. x x x x

In our view such a report would neither satisfy the purposes of the Act or do justice to the cause and the rights of the persons whose interest the Parliament thought it fit to protect by enacting Ss. 8-B and 8-C of the Act. From the point of view of public confidence as well as from the point of view of protection of

rights of the category of persons dealt with in Section 8-B and 8-C the impartiality of the Commission is of paramount importance. It is but just and proper to allow such persons to "raise" the plea of rule against bias to have the satisfaction that the proceedings are conducted impartially, which will be commensurate with the spirit of the Act and will also inspire confidence in the public about the enquiry conducted by the Commission, rather than to preclude them from raising the plea of bias, Giving our most anxious consideration to this question we are inclined to think that allowing-persons envisaged in S. 8-B to raise the plea of bias which is but a concomitant of the rule of natural justice before the Commission of Inquiry would be in tune with the spirit and the object of the Act."

14. In an appeal against the said order, the Supreme Court in Lal

Krishna Advani's case (supra) held as under:-

"6. The High Court, while referring to a decision reported in *State of J & K and others v. Bakshi Gulam Mohammad* (AIR 1967 SC 122), observed that when an authority takes a decision, which may have civil consequences and affects the right of a person, the principles of natural justice would at once come into play. Reputation of an individual is an important part of one's life. The High Court then quoted a passage from a decision of this Court reported in *Smt. Kiran Bedi v. Committee of Inquiry* [(1989) 1 SCC 494] which passage (SCC p.515, para 25) contains the observations from an American decision in *D.F. Marion V. Minnie Davis* (55 American LR 171) and reads as follows :

"The right to enjoyment of a private reputation, unassailed by malicious slander is of ancient origin, and is necessary to human society. A good reputation is an element of personal security, and is protected by the Constitution equally with the right to the enjoyment of life, liberty and property."

Some decisions, to which our attention has been drawn by Shri Harish N. Salve, learned senior counsel appearing for the respondent No.1, may be referred: *Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni* (1983 (1) SCC 124), wherein it was observed that right to reputation is a facet of right to life of a citizen under Article 21 of the Constitution. He has also referred to the International Covenant on Civil and Political Rights, 1965 (ICCPR), recognizing the right to have opinions and the right of freedom of expression subject to the right of reputation of others. The Covenant provides :

"1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain

restrictions, but these shall only be such as are provided by law and are necessary;

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals."

It is thus amply clear that one is entitled to have and preserve, one's reputation and one also has a right to protect it. In case any authority, in discharge of its duties fastened upon it under the law, traverses into the realm of personal reputation adversely affecting him, it must provide a chance to him to have his say in the matter. In such circumstances right of an individual to have the safeguard of the principles of natural justice before being adversely commented upon by a Commission of Inquiry is statutorily recognised and violation of the same will have to bear the scrutiny of judicial review. A reference may be made to *Peter Thomas Mahon Vs Air New Zealand Ltd* (1984 AC 808)."

15. Thus we find that the report of the Commission or the inquiry being conducted is to inquire and make a report and embody therein its recommendations. The Commission has no power to adjudicate or to pass an order which can be enforced. Such report by itself has no force and no penal effect nor it becomes enforceable immediately or which may become enforceable by some action being taken. Therefore, as the function of the Commission is merely to investigate and record its findings and recommendations without having any power to enforce them, the inquiry or report cannot be looked upon as a judicial inquiry in the sense of its being an exercise of judicial function properly so called.

16. The next question which arises is whether the family members of deceased under trials can claim the opportunity of hearing because their reputation is likely to be adversely affected. The said question needs to be examined that what is meant by the expression "reputation". Any damage to the reputation confers civil right to claim damages from the wrong doer and also right to prosecute the offender in terms of Section 499 of IPC. But in the present case, the petitioners are not asserting any of these rights but protection of their right to reputation in terms of Section 8B of the Act.

17. The right of reputation is a constituent of fundamental right

under Article 21 of the Constitution. It is an "individual fundamental right". It has been so held in recent judgment by the Hon"ble Supreme Court in the case of Subramanian Swamy Vs. Union of India and others reported as (2016) 7 SCC 221. The relevant extract reads as under:

"34. The reference to international covenants has a definitive purpose. They reflect the purpose and concern and recognise reputation as an inseparable right of an individual. They juxtapose the right to freedom of speech and expression and the right of reputation thereby accepting restrictions, albeit as per law and necessity. That apart, they explicate that the individual honour and reputation is of great value to human existence being attached to dignity and all constitute an inalienable part of a complete human being. To put it differently, sans these values, no person or individual can conceive the idea of a real person, for absence of these aspects in life makes a person a non-person and an individual to be an entity only in existence perceived without individuality.

(Emphasis Supplied).

xxx xxx

144. The aforementioned authorities clearly state that balancing of fundamental rights is a constitutional necessity. It is the duty of the Court to strike a balance so that the values are sustained. The submission is that continuance of criminal defamation under Section 499 IPC is constitutionally inconceivable as it creates a serious dent in the right to freedom of speech and expression. It is urged that to have defamation as a component of criminal law is an anathema to the idea of free speech which is recognised under the Constitution and, therefore, criminalisation of defamation in any form is an unreasonable restriction. We have already held that reputation is an inextricable aspect of right to life under Article 21 of the Constitution and the State in order to sustain and protect the said reputation of an individual has kept the provision under Section 499 IPC alive as a part of law. The seminal point is permissibility of criminal defamation as a reasonable restriction as understood under Article 19(2) of the Constitution. To elucidate, the submission is that criminal defamation, a pre- Constitution law is totally alien to the concept of free speech. As stated earlier, the right to reputation is a constituent of Article 21 of the Constitution. It is an individual"s fundamental right and, therefore, balancing of fundamental right is imperative. The Court has spoken about synthesis and overlapping of fundamental rights, and thus, sometimes conflicts between two rights and competing values. In the name of freedom of speech and expression, the right of another cannot be jeopardised.

We are in respectful agreement with the aforesaid enunciation of law. Reputation being an inherent component of Article 21, we do not think it should be allowed to be sullied solely because another individual can have its freedom. It is not a restriction that has an inevitable consequence which impairs circulation of

thought and ideas. In fact, it is control regard being had to another person's right to go to court and state that he has been wronged and abused. He can take recourse to a procedure recognised and accepted in law to retrieve and redeem his reputation. Therefore, the balance between the two rights needs to be struck. "Reputation" of one cannot be allowed to be crucified at the altar of the other's right of free speech. The legislature in its wisdom has not thought it appropriate to abolish criminality of defamation in the obtaining social climate."

18. The Supreme Court in the case of Kiran Bedi vs. Committee

of Inquiry reported as (1989) 1 SCC 494 held that the Reputation is a personal right and the right to reputation is put among those absolute personal rights equal in dignity and importance to security from violence.

The Court held as under:-

"24. In Corpus Juris Secundum, Volume 77 at page 268 is to be found the statement of law in the following terms:

"It is stated in the definition Person, 70 C.J.S. p. 688 note 66 that legally the term "person" includes not only the physical body and members, but also every bodily sense and personal attribute, among which is the reputation a man has acquired. Blackstone in his Commentaries classifies and distinguishes those rights which are annexed to the person, jura personarum, and acquired rights in external objects, jura rerum; and in the former he includes personal security, which consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation. And he makes the corresponding classification of remedies. The idea expressed is that a man's reputation is a part of himself, as his body and limbs are, and reputation is a sort of right to enjoy the good opinion of others, and it is capable of growth and real existence, as an arm or leg. Reputation is, therefore, a personal right, and the right to reputation is put among those absolute personal rights equal in dignity and importance to security from violence. According to Chancellor Kent as a part of the rights of personal security, the preservation of every person's good name from the vile arts of detraction is justly included. The laws of the ancients, no less than those of modern nations, made private reputation one of the objects of their protection.

The right to the enjoyment of a good reputation is a valuable privilege, of ancient origin, and necessary to human society, as stated in Libel and Slander Section 4, and this right is within the constitutional guarantee of personal security as stated in Constitutional Law Section 205, and a person may not be deprived of this right through falsehood and violence without liability for the injury as stated in Libel and Slander Section 4 .

Detraction from a man's reputation is an injury to his personality, and thus an injury to reputation is a personal injury, that is, an injury to an absolute personal right.

25. In D.F. Marion v. Davis (55 ALR 171), it was held :

"The right to the enjoyment of a private reputation, unassailed by malicious slander is of ancient origin, and is necessary to human society. A good reputation is an element of personal security, and is protected by the Constitution equally with the right to the enjoyment of life, liberty, and property."

26. In view of the foregoing discussion and the reasons already stated in our order dated August 18, 1988, we are of the view that the two petitioners namely, Smt. Kiran Bedi and Jinder Singh clearly fell within the category of persons contemplated by Section 8-B of the Act and were consequently entitled to the same treatment as has been accorded by the Committee to the persons to whom notice has been issued by it under the said section. As a consequence, we are further of the opinion that our answer to point (iii) has to be that the Committee was not justified in calling upon the two petitioners to stand in the witness box for cross-examination at the very initial stage of the enquiry. In this connection, it has to be borne in mind that Section 8-B inter alia contemplates an opportunity being given to the person governed by the said section to produce evidence in his defence whereas Section 8-C inter alia gives him the right to cross-examine the witnesses who depose against him. Not only that calling upon a person governed by Section 8-B to produce evidence in his defence at the very inception of the inquiry is a contradiction in terms inasmuch as in this situation such a person would really be required to disprove statements prejudicial to him of such witnesses who are yet to be examined, it would also reduce the right of cross-examination by such person to a mere formality for the obvious reason that by the time the witnesses who are to be cross-examined are produced, the defence of such person which would normally constitute the basis for the line and object of cross-examination would already be known to such witnesses and they are likely to refashion their statements accordingly."

19. A perusal of the judgment shows that the reputation is a part of himself, as his body and limbs are. The reputation is a sort of right to enjoy the good opinion of others, and it is capable of growth and real existence, as an arm or leg. Reputation is thus a personal right, and the right is reputation is among those absolute personal rights equal in dignity and importance to security from violence. It has been further held that Section 8B contemplates an opportunity being given to the person and to produce evidence in his defence. Whereas Section 8C gives right to cross examine the witness deposed against him. Therefore, if any witness examined by the Commission deposes against the reputation of the family

of the deceased under trials such family members may have a right of cross examination. But the reputation being right of a person, therefore, the family members cannot claim any right of reputation of the deceased under trials. The same is discussed hereinafter.

20. The question is whether any harm to the reputation is an action in persona and whether the cause of action to sue for harm to reputation survives to the legal heirs. The consistent view of the Courts in India is that the cause of action to claim damages for malicious prosecution, species of damage to the reputation, does not survive to the legal heirs. Such is the view of Patna High Court in the case of Punjab Singh and others Vs. Ramautar Singh and others reported as AIR 1920 Patna 841, Rustomji Dorabji Vs. W.H. Nurse and Parthasarathi reported as AIR 1921 Mad 1 as also in the case of Bhim Sain Vs. Muhammad Ali reported as AIR 1929 Lahore 807. The Single Bench of this Court in the judgment in the case of Ratanlal Bhannalal Mahajan Vs. Baboolal Hajarilal Jain and others reported as AIR 1960 MP 200 the Court has held as under :-

"8. Although the section speaks of right to-prosecute or defend any action surviving to the executors or administrators still it indicates the limits within which the maxim "actio personalis moritur cum persona" should be confined and those limits should be held equally applicable to legal heirs. For there is no reason whatsoever why the maxim should be limited in its application to the case of executors or administrators who might be administering the estate for the general body of heirs or legatees and not the heirs themselves.

The word "personal injuries" which occurs in this section has created certain conflict of authorities. While it is held by the Calcutta High Court In ILR 31 Cal 993, Krishna Behari Sen v. Corporation of Calcutta and AIR 1927 Cal 277, Bhupendra v. Chandramoni, that words "other personal injuries" have to be read ejusdem generis only with assault and therefore confined to physical injuries. On the other hand it has been held by the Bombay, Patna and Madras High Courts that they ought to be react ejusdem generis with defamation as well as assault. Vide ILR 47 Bom 716 : (AIR 1923 Bom 408), Motilal v. Harnarayan, ILR 44 Mad 357 : (AIR 1921 Mad 1) (FB), Rustomji Dorabji v. W.H. Nurse and AIR 1920 Pat 841, Punjab Singh v. Ramautar Singh Das, J . in the last mentioned case observed :

"the question for our determination is what effect must be given to the words "or other personal injuries not causing the death of the party." "As a matter of ordinary construction* said Lord Bramwell in *Great Western Rly. Co., v. Swindon and Cheltenham Rly. Co.* 1884-9 AC 787, "where several words are followed by a general expression as here which is much applicable to the first and other words as to the last, that expression is not limited to the last, but, applies to all".

9. It is argued on behalf of the respondents that the general words, viz., "other persona] injuries not causing the death of the party," do not apply to defamation at all but only apply to assault and therefore those general words can be read as- *ejusdem generis* only with assault and not with defamation. With this contention I am wholly unable to agree. It seems to me that defamation is a personal injury not causing the death of the party, and in the same way it may be said in this case that malicious prosecution is a personal injury not causing the death of the party. It will be noticed that the words deliberately chosen by the legislature are "personal injury" and not "physical injury". The words "personal injury" have a wider significance than the words "physical injury" and in my view they apply to all kinds of injury whether physical or otherwise. In my view, the general words in Section 89, Probate and Administration Act, must be read *ejusdem generis* with the word "defamation", and when so read it is clear to my mind that Section 89, Probate and Administration Act, expressly excludes from its operation all causes of action in respect of personal injuries not causing the death of the party. It seems to me therefore that the cause of action for malicious prosecution did not survive to the legal representatives of Khub Lal. This view is supported by a long series of decisions of the Bombay High Court and the Madras High. Court."

21. In the case of *Melepurath Sankunni Ezhuthassan Vs.*

Thekittil Geopalankutty Nair reported as (1986) 1 SCC 118, the Court was examining the provisions of Section 306 of Indian Succession Act, 1925. It was held that the cause of action for defamation does not survive for death of the appellant on the basis of maxim "actio personalis moritur cum persona".

"7. Where a suit for defamation is dismissed and the plaintiff has filed an appeal, what the appellant-plaintiff is seeking to enforce in the appeal is his right to sue for damages for defamation and as this right does not survive his death, his legal representative has no right to be brought on the record of the appeal in his place and stead if the appellant dies during the pendency of the appeal. The position, however, is different where a suit for defamation has resulted in a decree in favour of the plaintiff because in such a case the cause of action has merged in the decree and the decretal debt forms part of his estate and the appeal from the decree by the defendant becomes a question of benefit or detriment to the estate of the plaintiff respondent which his legal representative

is entitled to uphold and defend and is, therefore, entitled to be substituted in place of the deceased respondent-plaintiff."

22. The Supreme Court in Subramaniyan Swamy's case (supra)

has also discussed the maxim *actio personalis cum moritur persona* and held that it applies to those cases where a plaintiff dies during the pendency of a suit filed by him for damages for personal injuries sustained by him. The Court held as under:-

"173. In *M. Veerappa v. Evelyn Sequeira*, a two-Judge Bench distinguished the authority in *Melepurath Sankunni Ezhuthassan* as there was a subsisting decree and came to hold thus: (*M. Veerappa case*, SCC p. 565, para 10)

"10. ... The maxim of *actio personalis moritur cum persona* has been held inapplicable only in those cases where the injury caused to the deceased person has tangibly affected his estate or has caused an accretion to the estate of the wrongdoer vide *Rustomji Dorabji v. W.H. Nurse* and *Ratanlal Bhannalal Mahajan v. Baboolal Hajarilal Jain* as well as in those cases where a suit for damages for defamation, assault or other personal injuries sustained by the plaintiff had resulted in a decree in favour of the plaintiff because in such a case the cause of action becomes merged in the decree and the decretal debt forms part of the plaintiff's estate and the appeal from the decree by the defendant becomes a question of benefit or detriment to the estate of the plaintiff which his legal representatives are entitled to uphold and defend (vide *Gopal v. Ramchandra* and *Melepurath Sankunni Ezhuthassan v. Thekittil Geopalankutty Nair*)."

174. The aforesaid enunciation of law makes it clear how and when the civil action is not maintainable by the legal heirs. The prosecution, as envisaged in Explanation 1, lays two postulates, that is, (i) the imputation to a deceased person is of such a nature that would have harmed the reputation of that person if he was living, and (ii) the said imputation must be intended to be hurtful to the feelings of the family or other near relatives. Unless the twin tests are satisfied, the complaint would not be entertained under Section 199 CrPC. The said Explanation protects the reputation of the family or relatives. The entitlement to damages for personal injury is in a different sphere whereas a criminal complaint to be filed by the family members or other relatives under twin tests being satisfied is in a distinct compartment. It is more rigorous. The principle of grant of compensation and the principle of protection of reputation of family or near relative cannot be equated. Therefore, we do not find that any extra mileage is given to the legal heirs of a deceased person when they have been made eligible to initiate a criminal action by taking recourse to file a criminal complaint."

23. The abovesaid judgments are thus that the reputation of the family is likely to be affected, therefore, they have a right of opportunity

of hearing is not tenable as the reputation is a personal cause of action which does not survive to the legal representatives. The claim of harm to reputation dies with the person whose reputation is said to have been affected. It is only for an offence under Section 499 of IPC, Explanation 1, the legal heirs have a right to prosecute. It has been so held by the Supreme Court in Subramaniyan Swamy's case (supra). Therefore, the argument that the reputation of the family is likely to be affected is not tenable, inter alia, for the reason that firstly even the reputation of the deceased under trials is not in question as the scope of terms of reference of the Commission is not as to whether the deceased under trials were terrorist or anti-national persons or members of the SIMI activist. The Commission was to examine the manner of escape of under-trials. The terms of reference is to examine the conduct of officers with employees responsible under which eight under trial prisoners escaped from the Central jail. Secondly, even if the findings of the Commission touches the reputation of deceased under trials, such observations will not confer any right to the family members to seek opportunity of hearing in terms of Clause 8B (b) of the Act.

24. In respect of demand of documents, most of them relate to jail breaking. The family members of the deceased under trials are not concerned with such documents as they are alien for such aspect of the inquiry. Since the reputation is a personal right, the family members of the deceased under-trials have no right to adduce evidence in terms of Section 8B (b) of the Act. The petitioner is not a person whose reputation is likely to be affected in terms of Section 8B (b) of the Act. The function of the Commission is to collect facts, record findings and give recommendations which are not per se enforceable.

25. Since the Commission is a fact finding inquiry, therefore, the family members of the deceased under-trials cannot claim a right of participation in such proceedings. The limited right is given to the persons

whose reputation is likely to be affected. The petitioner does not fall in such category. The terms of reference do not pertain to the reputation of the family members. The family members are appearing before the Commission only in terms of Rule 5 (2) (b) of the Rules as a person acquainted with the subject matter of inquiry. The role of the family members is to furnish the statement relating to the matter as specified in terms of reference only.

26. In view of the above, we do not find any merit in the present petition. Accordingly, the same is dismissed.