

CASE NO.:
Appeal (civil) 613 of 2005

PETITIONER:
Director General, Directorate General of Doordarshan & Ors.

RESPONDENT:
Anand Patwardhan & Anr.

DATE OF JUDGMENT: 25/08/2006

BENCH:
Dr. AR. Lakshmanan & Lokeshwar Singh Panta

JUDGMENT:
J U D G M E N T

Dr. AR. Lakshmanan, J.

The appellant in the present matter is Doordarshan who have decided not to telecast the documentary film made by the respondent titled "Father, son and Holy War". The respondent is a filmmaker. The respondent no.1 in 1995 submitted his documentary film, "Father, son and Holy War", to the appellant for telecast on National network Doordarshan.

Respondent no.1 was to provide a U-matic Certificate for the same to be aired by Doordarshan.

The documentary film was in two parts, the film dealt with social realities and issues such as patriarchy, violence, fundamentalism, suppression of women etc. Part-I was given 'U' Certificate and Part-II was given 'A' Certificate by the Censor Board.

A few lines about the film and the producer:- Father, Son and Holy War is the third part of a trilogy of documentary films against communal violence that the author made from the mid 1980's to the mid 1990's. His two earlier films In Memory of Friends (1990) (on building communal peace in strife torn Punjab) and Ram Ke Naam/In the Name of God (1992) (on the Ayodhya crisis) looked at the question of class and caste. Both films won National Awards but both were rejected by Doordarshan on the grounds that they would create law and order problems. In the end, the author won the cases in the High Court and the films were finally telecast by Doordarshan. No law and order problems resulted and the telecasts were well received.

Father, Son and Holy War (1995) was also shot during this period. It looks at the question of gender along with the issue of religious violence. What triggered this way of looking was the incident of Sati in Deorala and that fact that thousands of young men were celebrating the death of Roop Kanwar. This led the author to examine the male psyche behind violence \026 and the idea that women were property. It is common knowledge that very often sexual violence against women accompanies communal riots. This may be because the "enemy's" women are seen as his property and so, worthy of abduction or destruction.

The first part of Father, Son and Holy War ("Trial by Fire") looks at the problems faced by Hindu and Muslim women within their own religions. Part 2 (Hero Pharmacy) examines the construction of the values of "manhood". As the film proceeds we become privy to the inner psyche of men and

begin to learn how men are socialized into believing that violence is desirable. The film looks at the rhetoric of street sellers of aphrodisiac who create feelings of male insecurity and impotence in their audience and then offer their cheap medicine as a cure. It then looks at the rhetoric of communal politicians (both Hindus and Muslims) and see that they too are appealing largely to their male audiences, they too are taunting them for their impotence, but the medicine they offer for the creation of "real men" is hatred against the other community.

On 14.8.1996, the appellant issued a circular which stated that Doordarshan will not telecast any 'A' certified adult or U/A feature film on it. On 28.2.1997, the respondent handed over a copy of the U-matic Certificate of the documentary film to the appellant. However, Doordarshan still refused to telecast the documentary film.

On 22.9.1998, the respondent no.1, filed a writ petition before the Bombay High Court against the refusal of Doordarshan to telecast the documentary film, which was disposed off by the Division Bench by directing Doordarshan to take a decision on the application of respondent no.1 within a period of six weeks.

A selection Committee was constituted on 10.8.1998 by the appellant to preview the documentary film produced by respondent no.1. The selection Committee observed that, "The documentary entitled 'Father, Son & Holy War' depicts the rise of Hindu fundamentalism and male chauvinism without giving any solution how it could be checked. The violence and hatred which is depicted in the whole documentary will have an adverse effect on the minds of the viewers\005" This decision of the Selection Committee was communicated to the respondents on 20.8.1998.

Against this the respondent no.1 approached Bombay High Court. A Division Bench of the Bombay High Court allowed the writ and directed the appellant to telecast the respondent no.1 documentary film "Father, son and the Holy War" within a period of six weeks in the evening slot. This decision by the High Court was challenged by the appellant by way of a Special Leave Petition in this Court. This Court observed that, the Committee which was constituted to consider the proposal of the respondent was not validly constituted as required under the guidelines of Doordarshan and therefore the decision taken by the Committee was without jurisdiction. This court went ahead to order on 12.12.2001 the constitution of a new Committee in accordance with para 5(ii) of the Guidelines of Doordarshan to consider the proposal of the respondent within three months of the constitution of such Committee.

A Committee was duly constituted and on 6.8.2002, the committee viewed the documentary film and was of the opinion that, "the film has a secular message relevant to our times and our society\005however, the film contains scenes and speeches, which can influence negative passions\005and the committee would like a larger committee with representatives of religion and politics also to see the film and form an opinion before it is open to public viewing."

A larger committee was constituted and viewed the documentary film. The said committee on 5.6.2003 recommended the screening of this documentary film on Doordarshan while observing that, "it may alienate sections of Indian society and screening may lead to reactions by organized groups."

On 11.7.2003, the Prasar Bharati Board pre-viewed the documentary film and was of the opinion that the

documentary film contained scenes which could promote violence, its production quality was unsatisfactory and its telecast would be violative of the policy of the Doordarshan of not screening "A" certified movies. This decision of Doordarshan was communicated to the respondent no.1 on 18.7.2003.

A contempt petition was filed by respondent no.1 alleging the disobedience of the order of the High Court dated 12.12.2001. The High Court disposed off the petition by holding that the respondent was aggrieved of the decision of Prasar Bharati Board, and it was open to him to challenge the same before an appropriate forum.

The respondent filed a writ petition in the Bombay High Court and directed Doordarshan to exhibit the documentary film of the respondent no.1, "Father, son and Holy War" on channel I or II within 12 weeks from the date of the judgment on a convenient day and time as fixed by Doordarshan. It is against this decision of the High Court of Bombay the Doordarshan has come on appeal to this Court. .

We heard Mr. Rajeev Sharma, learned counsel appearing for the appellants and Mr. Prashant Bhushan, learned counsel appearing for the respondent. We have viewed the screening of the documentary film titled "Father, son and the Holy War" which is the subject matter of the present case before us. We have also carefully perused all the documents presented by both the parties before us.

Mr. Rajeev Sharma, learned counsel appearing for the Doordarshan submitted that the decision not to telecast the film of the respondent is based on valid and germane considerations and no film maker can claim that he has a vested right that a film made by him must be telecast on Doordarshan. He submitted that as a matter of policy the Doordarshan do not telecast films which are certified as "A" or "UA". Admittedly Part one of the film in question has been certified as "U" and Part two as "A". The policy of Doordarshan of not telecasting "A" or "UA" films has not been challenged by the respondent here. Therefore, the Doordarshan cannot be directed to telecast the film contrary to its policy. Learned counsel also submitted that the telecast of the film is likely to give rise to communal violence and riots and that Doordarshan has reached the remote corners of the country. It has a wide audience which mainly consists of illiterate and average persons who will be largely affected due to screening of the film.

Mr. Prashant Bhushan, learned counsel appearing on behalf of the respondent submitted that the refusal by Prasar bharti to telecast the film is a clear violation of the respondent's fundamental right under Article 19(1)(a) of the Constitution. He urged that the film carries a strong message for unity and secular India and there is no justification to prevent its telecast on Doordarshan. It is submitted that the Doordarshan has a policy of telecasting award winning films and documentaries and the action of the Doordarshan in refusing to screen the film contrary to the said policy is totally unfair, unjust and arbitrary. Learned counsel further submitted that the Censor Board has approved the film and the guidelines of Doordarshan in telecasting the film cannot be substantially different from the guidelines laid down under the Cinematographic Act, 1952. In any event, according to the learned counsel unless the said guidelines are read down they would be liable to be struck down as grossly violating the fundamental rights guaranteed by Article 19(1)(a) of the Constitution.

In view of the rival submissions, the following substantial questions of law arise for adjudication by this Court.

- (a) Whether any film producer has a right to insist that his film must be shown on Doordarshan?
- (b) Whether the High Court was justified in directing the screening of the film certified as U/A.
- Notwithstanding the fact as a matter of policy, Doordarshan does not telecast adult film?
- (c) Whether the policy of Doordarshan of not telecasting adult movies can be said to be violative of Article 19(1)(a) of the Constitution of India as has been held by the High Court?
- (d) Whether or not it is open to the High Court to substitute its opinion for that of the competent authority as to whether a film is fit for being telecast on a public medium such as Doordarshan?

In the instant case, the documentary of the respondent has been cleared by the Central Board for Film Certification, the Film Certification Board, which is a body of experts was obviously not of the view that the film promotes communal violence, otherwise, the film would not have been certified by the Board for public exhibition. In view of this background, we are unable to appreciate the view taken by the Prasarbharti Board.

The film of the respondent no doubt deals with the communal violence. At the same time, we also listen to a stirring speech made by a woman activist on a street who exhorts people to "remember their neighbours" during communal riots. The film contains a narrative of a muslim woman, a social worker who has been raped by the communal murderers of her husband and that of a Hindu mill worker whose children were killed in the bomb blast which occurred in the aftermath of the communal riots. The attempt of the film maker is to portray the miseries of the innocent victims of the communal riots. These sequences convey an obvious message of communal harmony as an ordinary muslim slum dweller is seen in the closing sequences of the film re-building the destroyed home of his Hindu neighbour. The message of the filmmaker cannot be gathered by viewing only certain portions of the film in isolation but one has to view it as a whole. There are scenes of violence, social injustices but the film by no stretch of imagination can be said to subscribe to the same. They are meant to convey that such social evils are evil. There cannot be any apprehension that it is likely to affect public order or it is likely to incite commission of an offence. We are shocked at the observation of the Prasar Bharati Board that the film is not suitable due to unsatisfactory production quality and that the film has nothing specific to convey in public interest. The documentary was given two awards in 42nd National Film Festival of 1995 conducted by the Ministry of Information and Broadcasting, Government of India as Best Investigative Film and Best film on social issues. It is, therefore, highly irrational and incorrect to say that the documentary which was selected as best investigative film and best film on social issues promote violence and its production quality was unsatisfactory and that the film has no specific message to convey. The documentary has won several awards in the International film festivals. However, the Prasar Bharati Board strangely comments that the film had nothing specific to convey in public interest. This view of the Prasar Bharati is in contrast with the opinion expressed by the two committees constituted by the appellants. The first committee held that the film had a secular message relevant to our times and our society and it was a critique of the current concept of masculinity and the violence it legitimises. The second committee said that it was a very good film and must be shown. Ordinarily the decision

of the selection committee in all cases shall be final as per para 5(viii) of the guidelines laid down by the Ministry of Information and Broadcasting for telecasting films. However, it appears that the appellants were bent upon rejecting the film and the decision of the committee was overruled by the Prasar Bharati Board under the pretext that the guidelines prohibit Doordarshan from exhibiting any film which is granted 'A' certificate and since part II i.e. Hero Pharmacy has been granted 'A' certificate telecast of the said film is not permitted under the guidelines framed by the Ministry of Information and Broadcasting.

In the instant case, the guidelines relied upon by the Doordarshan are not even framed under the Cinematograph Act but they are merely internal guidelines for the guidance of the officials of the Doordarshan. Therefore, in our view, it would not be proper to deny telecast of an award winning documentary merely on the ground that part II of the said documentary is certified as "A" by the Censor Board. In our view, a documentary cannot be denied exhibition on Doordarshan simply on account of its "A" certification or "UA" certification. Mr. Rajeev Sharma made an attempt to object to certain scenes in the documentary especially one scene where a person is seen selling aphrodisiacs on the road and while doing so is making certain remarks on the sexuality of males. As indicated in paragraphs supra, a film must be judged from an average, healthy and common sense point of view. If the said yardstick is applied and the film is judged in its entirety and keeping in view the manner in which the filmmaker has handled the theme, it is impossible to agree that those scenes are offended by vulgarity and obscenity. It is interesting to note that these objections were not even raised by any of the committees constituted for the purpose of assessing the film.

OBSERVATIONS:

One of the most controversial issues is balancing the need to protect society against the potential harm that may flow from obscene material, and the need to ensure respect for freedom of expression and to preserve a free flow of information and idea. The Constitution guarantees freedom of expression but in Article 19(2) it also makes it clear that the State may impose reasonable restriction in the interest of public decency and morality.

The crucial question therefore, is, 'what is obscenity?'

The law relating to obscenity is laid down in Sec.292 of the Indian Penal Code, which came about, by Act 36 of 1969.

Under the present sec.292 and sec.293 of the Indian Penal Code, there is a danger of publication meant for public good or for bona fide purpose of science, literature, art or any other branch of learning being declared as obscene literature as there is no specific provision in the act for exempting them from operations of those sections.

The present provision is so vague that it becomes difficult to apply it. The purposeful omission of the definition of obscenity has led to attack of Section 292 of the Indian penal Code as being too vague to qualify as a penal provision. It is quite unclear what the provisions mean. This unacceptably large 'grey area', common in laws restricting sexual material, would appear to result not from a lack of capacity or effort on the part of drafters or legislators.

The Indian Penal Code on obscenity grew out of the English Law, which made court the guardian of public morals. It is important that where bodies exercise discretion, which may interfere in the enjoyment of constitutional rights, that discretion must be subject to adequate law. The effect of provisions granting broad discretionary regulatory powers is

unforeseeable and they are open to arbitrary abuse.

In Samaresh Bose & Anr. v. Amal Mitra & Anr (1985)

4 SCC 284 it was observed by this Court: "The concept of obscenity is moulded to a very great extent by the social outlook of the people who are generally expected to read the book. It is beyond dispute that the concept of obscenity usually differs from country to country depending on the standards of morality of contemporary society in different countries. In our opinion, in judging the question of obscenity, the Judge in the first place should try to place himself in the position of the author and from the viewpoint of the author. The judge should thereafter place himself in the position of a reader of every age group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have in the minds of the readers. The judge should thereafter apply his judicial mind dispassionately to decide whether the book in question can be said to be obscene within the meaning of Section 292, IPC by an objective assessment of the book as a whole and also of the passages complained of as obscene separately."

This is one of the few liberal judgments the courts have given. The point to worry about is the power given to the judge to decide what he/she thinks is obscene. This essentially deposits on the Supreme Court of India, the responsibility to define obscenity and classify matters coming on media as obscene or otherwise. This Court has time and again adopted the test of obscenity laid down by Cockburn CJ. The test of obscenity is, 'whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and in whose hands a publication in media of this sort may fall.'

Interestingly, this test of obscenity, which was laid down in the Hicklin case in 1869, is the only test in India to determine obscenity.

The Encyclopedia definition of obscenity states, 'By English law it is an indictable misdemeanor to show an obscene exhibition or to publish any obscene matter, whether it be writing or by pictures, effigy or otherwise.' The precise meaning of "obscene" is, however, decidedly ambiguous. It has been defined as something offensive to modesty or decency, or expressing or suggesting unchaste or lustful ideas or being impure, indecent or lewd".

In the United States, obscene material is any material or performance, if: the average person applying contemporary community standards would find that the subject matter taken as a whole appeals to the prurient interest; the subject matter depicts or describes in a patently offensive way, sexual conduct of a type described in this section; and the subject matter, taken as a whole, lacks serious literary, artistic, political, educational or scientific value.

Therefore, one can observe that, the basic guidelines for the tier of fact must be:

- (a) whether " the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest\005.;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic political, or scientific value.

The Constitution of India guarantees everyone the right to freedom of expression. India is also a party to the International Covenant on Civil and Political Rights and therefore bound to respect the right to freedom of expression guaranteed by Article 19 thereof, which states:

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 form of art, or through any other media of his choice.

This right guaranteed by the Indian constitution is subject to various restrictions. Like, respect of the rights or reputation of others; protection of national security or of public order, or of public health or morals etc.

The catchword here is 'reasonable restriction' which corresponds to the societal norms of decency. In the present matter, the documentary film Father, Son and Holy War depicts social vices that are eating into the very foundation of our Constitutional. Communal riots, caste and class issues and violence against women are issues that require every citizen's attention for a feasible solution. Only the citizens especially the youth of our Nation who are correctly informed can arrive at a correct solution. This documentary film in our considered opinion showcases a real picture of crime and violence against women and members of various religious groups perpetrated by politically motivated leaders for political, social and personal gains.

This film so far as our opinion goes does not violate any Constitutional provision nor will create any law and order problems as the Doordarshan fears. This movie falls well within the limits prescribed by our Constitution and does not appeal to the prurient interests in an average person, applying contemporary community standards while taking the work as a whole, the work is not patently offensive and does not proceed to deprave and corrupt any average Indian citizen's mind.

In addition we are emphasizing here on the fact that many Committees have screened this documentary film including a committee set up by the appellants themselves involving media experts, representatives of various religions and politics, who have opined that, "It is a very good film and must be shown. It may alienate sections of Indian society and screening may lead to reactions by organized groups. In the unanimous view of the committee that protest is an important part of Indian democracy and was a part of its fight for independence, which is also a compelling reason for the film to be shown. Keeping these in mind the committee recommends that the screening of the film be preceded by a discussion in which alternative views are given by persons with different views." As we see, only Doordarshan has an opposition with airing the documentary film stating policy related difficulties. To this we are of the view that, since the Central Board of Film Certification has already cleared the documentary film in question by award of U/A certificate, the policy of Doordarshan of non-telecast of 'A' certified films will not stand on the way of this film being aired. A blanket ban as this one will be in violation of Article 19(2) of the Constitution which guarantees right of a citizen to express himself/herself. The Supreme Court has clarified on this regard way back in 1970, in the case of K.A. Abbas vs The Union of India & Anr, (1970) 2 SCC 780 where this Court held that, "Sex and obscenity are not always synonymous and it is wrong to classify sex as essentially obscene or even indecent or immoral." In yet another case of Ramesh vs. Union of India, (1988 (1) SCC 668) this court has observed that, "\005that the effect of the words must be judged from the standards of reasonable, strong minded, firm and courageous men, and not

those of weak and vacillating minds, nor of those who scent danger in every hostile point of view. This, in our opinion, is the correct approach in judging the effect of exhibition of a film or of reading a book. It is the standard of ordinary reasonable man or as they say in English law "the man on the top of Claapham omnibus."

Hence, in our view, the correct approach to be taken here is to look at the documentary film as a whole and not in bits, as any message that is purported to be conveyed by way of a film cannot be conveyed just by watching certain bits of the film. In the present situation the documentary film is seeking to portray certain evils prevalent in our society and is not seeking to cater to the prurient interests in any person.

Therefore, we have no hesitation in saying that this documentary film if judged in its entirety has a theme and message to convey and the view taken by the appellants that the film is not suitable for telecast is erroneous.

In this regard, the guidelines issued by the Central Government to evaluate films gain importance and can be referred to. Clause 3 of the Guidelines reads as follows:

"Clause 3: The Board of Film Certification shall also ensure that the film:

(i) is judged in its entirety from the point of the overall impact; and

(ii) is examined in the light of the period depicted in the film and the contemporary standards of the country and the people to which the film relates, provided that the film does not deprave the morality of the audience."

It was held in *Bobby Art International & Ors v Om Pal Singh Hoon & Ors* (1996) 4 SCC 1, K A Abbas (Supra) that a film was required to be viewed as a whole, and in the context of the message that the filmmaker desired to communicate.

In this film too, scenes must be seen in the context of the message of exploitation of women through insecurities created in men and the film must be evaluated in its entirety.

In *LIC of India v Prof. Manubhai D. Shah with UOI v Cinemart Foundation* (1992) 3 SCC 637, it was held that merely because a film was critical of the State Government, DD could not deny selection and publication of the film. This film was an award winning film about the Bhopal Gas Tragedy. Likewise, in *S.Rangarajan v. P. Jagjivan Ram & Ors* (1989) 2 SCC 574, it has been observed that Censors should not have an orthodox or conservative outlook, but must be responsive to change and must go with the current climate. The state cannot prevent open discussion, however hateful to its policies. This was about a film that criticized the existing reservation policy and proposed an alternative system based on economic deprivation.

We also are aware that the documentary film made by respondent no.1 has won many National and International awards. The documentary film won National Awards in two categories viz "Best Investigative Film" and "Best Film on Social Issues" in the 42nd National Film Festival 1995, conducted by the Ministry of Information and Broadcasting. The documentary film also won Special Jury Award in Israel, Japan and Canada. Keeping these facts in view we find it absurd that a documentary film that has won the National award is facing problems for it being screened on the National Television.

CONCLUSION:

In our opinion, the respondent has a right to convey his perception on the oppression of women, flawed understanding of manhood and evils of communal violence through the documentary film produced by him. As already noticed, this film has won awards for best investigative film and best film on social issues at the national level. The documentary film has won several awards at the international level as well. The freedom of expression, which is legitimate and constitutionally protected, cannot be held to ransom on a mere fall of a hat. The film in its entirety has a serious message to convey and is relevant in the present context. Doordarshan being a State controlled agency funded by public funds could not have denied access to screen the respondent's documentary except on specified valid grounds.

The refusal of the appellants to telecast the film in the current case in the face of unanimous recommendations by their own Committees set up in accordance to the direction of this Court is an issue to be addressed apart. The High Court of Bombay has not substituted its discretion for that of the authorities. On the contrary, the High Court has ruled that when the decision making process has itself resulted in the recommendations to telecast; it is not open to the Doordarshan to find other means just to circumvent this recommendation. The High Court has only corrected the failure of Doordarshan to follow through with their own decision making process on the pretext of a Circular which being non-statutory cannot be used to limit right of expression. Besides the Circular, in terms, applies only to feature films and not to documentaries. Before ruling thus, the High Court viewed the film for itself which is a process followed innumerable times before even by this Court in cases concerning the official media to satisfy itself the recommendations of the Expert Committee was not patently absurd. Thus, it is not a case where the High Court has substituted its judgment for that of the decision-making authority but one where the decision made by due process has been upheld by the High Court. In our view, the Doordarshan being a National Channel controls airwaves, which are public property. The right of the people to be informed calls for channelizing and streamlining Doordarshan's control over the national telecast media vehicle.

We also are of the view that, Doordarshan all through the present matter has been displaying a sad reluctance in telecasting this film, which was made almost ten years ago. We can trace a history of Doordarshan not telecasting many films in spite of them being award winning films at the national and international level, this can be seen in the case of films like "In Memory of Friends", "Ram ke Naam" etc. In addition an interesting observation that can be arrived is that Doordarshan has been finding flimsy excuses time and again as clear from the facts in not telecasting the documentary film in question every time the film was sought to be aired either at the instance of the respondent or due to the orders of the court. This in our view is highly irrational and is blatant violation of the right guaranteed under Article 19(1)(a) of the Constitution. This behavior of Doordarshan would justify us in stating that Doordarshan is being dictated by rules of malafides and arbitrariness in taking decisions with regard to In light of the above, the instant appeal at the instance of Doordarshan is devoid of any merits. Thus, the impugned judgment deserves to be upheld and sustained by this Court.

In the result, the appeal is dismissed and the orders passed by the learned Judges of the Division Bench are affirmed. However, there will be no order as to costs.

The appellant-Doordarshan is directed to exhibit the entire documentary film of the respondent Father, Son and Holy War on Channel No. 1 or 2 within 8 weeks from today on such convenient date and time as may be fixed by Doordarshan.

