SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Pankaj Butalia Vs. Central Board of Film Certification and Ors.

Pankaj Butalia Vs. Central Board of Film Certification and Ors.

SooperKanoon Citation : sooperkanoon.com/51588

Court : Delhi

Decided On : May-25-2015

Judge : Rajiv Shakdher

Appellant : Pankaj Butalia

Respondent : Central Board of Film Certification and Ors.

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % Judgment reserved on:

10. 04.2015 Judgment delivered on:

25. 05.2015 + WP(C) 675/2015 PANKAJ BUTALIA ..... Petitioner Versus CENTRAL BOARD OF FILM CERTIFICATION & ORS. ..... Respondents Advocates who appeared in this case: For the Petitioner: Mr Colin Gonsalves, Sr. Advocate with Ms Fatima Quraishi & Mr Kamlesh K. Mishra, Advocates For the Respondents: Mr Gaurav Sarin, Ms Shraddha Bhargava, Ms Veera Angrish & Mr Ajitesh K. Kir, Advocates. CORAM: HON'BLE MR. JUSTICE RAJIV SHAKDHER RAJIV SHAKDHER,J PREFATORY FACTS1 The issues which this writ petition throws up, reminds me of what Voltaire said ages ago I do not agree with what you have to say, but Ill defend to the death your right to say it. 1.1 The writ petition has been filed to assert the constitutional right of freedom of speech and expression of a documentarian and his ilk, conferred under Article 19(1)(a) of the Constitution. The petitioner is the producer of the film, who is aggrieved by the order passed by

the Film Certificate Appellate Tribunal (in short the FCAT), in appeal, as also by the order-inoriginal passed by the Central Board of Film Certification (in short the CBFC). 1.2 The FCAT order, is dated 11.09.2014, while the order of the CBFC is dated 30.12.2013. 1.3 The petitioner seeks to assert his right to show the documentary titled:

The Textures of Loss, without the stipulated deletions/ excisions, as according to him, nothing in the film falls within the ambit of clause (2) of Article 19 of the Constitution. There is also a challenge to the guidelines dated 06.12.1991 (1991 Guidelines), framed by the Ministry of Information and Broadcasting, Government of India, for guidance of CBFC, while sanctioning films for public exhibition. 1.4 The CBFC, by order dated 30.12.2013, had directed insertion of a disclaimer and four deletion/ excisions from the subject film. The FCAT, partially allowed the appeal of the petitioner, in as much as, it did away with two out of the four deletions, directed by the CBFC.

2. Before I deal with the submissions made by the counsels before me, it may be relevant to note certain brief facts, which have been set out in the writ petition. 2.1 It is averred that the petitioner, in 2005, began his research on the subject, which essentially attempts to capture, at least, from the point of view of the petitioner, the travails of persons who have been affected by violence, perpetrated from time to time in the Valley of Kashmir. 2.2 The shooting of the film, which, apparently, commenced in October, 2005, got concluded in April, 2012. The film though, got completely made, a year later, i.e., in 2013. 2.3 The final product is an approximately 61 minute documentary film, which the petitioner avers is based on case studies of persons, who were affected by long-term violence in Kashmir. 2.4 On the completion of the film, an application was made to the CBFC for certification of the film. This application was filed on 26.12.2013, with the regional office of the CBFC. 2.5 The petitioner avers that, on 27.12.2013, he received a telephonic call from a person, who claimed to be a clerk at the CBFC office. The conversation with the caller went something like this:

Sahib had seen the film, and that, he had suggested four deletions in the film. The petitioner was told to take note of the same and have them, accordingly, deleted.

2.6 It is stated that since, the petitioner, could neither follow the purport of the conversation, nor fathom as to whether the person who he was speaking to, had the relevant authority, he asked the person concerned, to put down everything that had been said to him, in writing, and thereafter, dispatch the same, by post or email to him. 2.7 The petitioner avers that, to his surprise, three days later he received the impugned order dated 30.12.2013, whereby deletions had been directed, in addition to a directive to insert a disclaimer. By this order, a certification for public viewing was issued in favour of the petitioners film, subject to the excisions and insertion of disclaimers, suggested in the said order. 2.8 According to the petitioner, what was even more surprising is the fact that the order of the CBFC, made a false assertion that he had been given an opportunity to make oral submissions which, he had not availed of. 2.9 The petitioner, being aggrieved, both by the content and the conclusion reached in the order dated 30.12.2013, lodged a protest by way of an email dated 02.01.2014, with the regional office of the CBFC. In the said communication, the petitioner, inter alia, made the following averments. (i) That the interval between making of the application by him and viewing of the film was so short, that there was no time to call him for viewing of the film along with the CBFC officials, much less, to give him an opportunity to make oral submissions. (ii) CBFC had given him no notice, which could be construed as an opportunity for making oral submissions in the matter. The telephone call, which was received by the petitioner, on 27.12.2013, ostensibly from a clerk, in the office of the CBFC, also did not mention of any possibility of a hearing before a decision was taken in the matter.

3. Since, the petitioner, did not get any response to his email, he escalated the matter with the Chairperson of the CBFC, by sending her an email dated 06.01.2014. By this communication, petitioner attempted to explain the manner in which he had been dealt with by the CBFC, and thus, in effect, sought the Chairpersons intervention in the matter. 3.1 Having received no response, the petitioner carried the matter in appeal, in accordance with the option given and indicated in the CBFCs letter dated 30.12.2013. The appeal, with FCAT, was filed in August, 2014. 3.2 The appeal was listed on 10.09.2014. The viewing of the film and the hearing of the appeal was, however, postponed to 11.09.2014. 3.3 It is the case of the petitioner that though, the viewing of the film was slated for 4.30 p.m.,

the screening took place only around 6.05 p.m., in view of the fact that the film slotted in earlier, took more than the expected time. 3.4 The petitioner avers that in so far as his film was concerned, the viewing was complete at 6.35 p.m., and that, only, the portions objected to, were viewed and, not the whole film. 3.5 It is asserted that the order was dictated by the Chairperson, immediately, upon viewing of the film. It is further submitted that the Chairperson, FCAT was the only person, who viewed the film, and, accordingly, passed and signed the impugned order. 3.6 The impugned order of FCAT, which is, dated 11.09.2014; the petitioner asserts, was received ten days later. 3.7 The petitioner, apparently, was not happy with the manner in which the appeal had been heard and dealt with and, therefore, decided to file a complaint dated 06.10.2014, with the Secretary to Government of India, Ministry of Information and Broadcasting, New Delhi (M.I.B). In this the petitioner sought to raise several issues with regard to the working of the CBFC and the FCAT. He also made it a point to assert that he had been asked to pay a sum of Rs. 2000, in cash, for booking the viewing-hall, qua which, he had not been issued a receipt. 3.8 In this communication, the petitioner also sought to bring out the discriminatory treatment meted out to his film, by comparing it with another film tiled:

Haider, which, according to him, also revolved around the travails faced by the people living in Kashmir. The subtext of the petitioners grievance was that while, a commercial film like Haider, had been cleared for unrestricted viewing; excisions/ deletions had been ordered qua his film. 3.9 The petitioner, did not stop at this, but also wrote to the Chairperson, FCAT, on 29.10.2014. By this communication, the petitioner sought review of the impugned order passed by the FCAT. The review was sought by drawing attention to certain parts of the film Haider, which also dealt with Indian Armys role in Kashmir. There was a reference to scenes, in the film Haider, which according to the petitioner, were far more critical of the Indian Army, than that part in the petitioners film, which was found fault with, by the FCAT.

4. The review, apparently, was also accompanied by the various judgements of the Supreme Court, which had dealt with similar orders, passed under the Cinematograph Act, 1952 (in short the 1952 Act). 4.1 Evidently, no further orders

were passed by the FCAT.

5. Aggrieved by the same, the petitioner lodged the instant petition under Article 226 of the Constitution. Notice in the petition was issued on 21.01.2015. Thereupon, after completion of pleadings, arguments in the matter were heard and judgement reserved. SUBMISSIONS BY COUNSELS6 Arguments on behalf of the petitioner were advanced by Mr Colin Gonsalves, while on behalf of the respondents, arguments were addressed by Mr Gaurav Sarin.

7. Before I proceed further, there is one aspect of the matter, which I need to deal with at the very outset. Mr Sarin, in the course of his submissions, brought to my notice a fact which the counsel for the petitioner, Mr Gonsalves, had not indicated right at the commencement of the hearing. Mr Sarin, based on an newspaper report, informed me that, while the writ petition was being prosecuted in this court, parallely, a writ petition had also been lodged in the Supreme Court, which was dismissed as withdrawn, and that fact, had neither been mentioned in the writ petition nor, had it been brought to the notice of the court. 7.1 Mr Sarin, with all the vehemence at his command, submitted that the petition ought to be dismissed on this short ground alone, as not only had this fact been kept back from the court, but that, the affidavit filed with the petition, to the effect that no petition / application had been filed before any other court or tribunal, to seek a similar relief, was clearly false. 7.2 The record shows that the petitioner lodged the instant writ petition for the first time with the Registry of this court, on 06.12.2014. During the course of the arguments advanced in the present petition, as noted above, it came to light that the petitioner had also filed an action under Article 32 of the Constitution, with the Supreme Court. This action was lodged in and around 16.12.2014. The petition was withdrawn on 12.01.2015, with liberty to proceed with the petition pending in this Court. This fact, though, was not brought to the notice of the court by the counsel for the petitioner till such time it was raised on 10.04.2015, i.e., the date when arguments were concluded by the counsel for the respondents. 7.3 Having regard to aforesaid facts, it is obvious that the manner in which the counsel for the petitioner has handled this aspect was inappropriate. However, having given some thought to the matter, according to me, while it was incumbent on the counsel for the petitioner to disclose this aspect to the court,

right at the commencement of the hearing, the petitioner, cannot be short-changed with regard to the legal rights he seeks to assert by way of this petition, on account of the failure on the part of his counsel to proceed in the matter as expected of him by the court. 7.4 I am also willing to overlook this infraction of the senior counsel, by giving him the benefit of doubt that the lapse occurred more on account of oversight rather than with intent to withhold information from the court. This is so, as neither the petitioner nor his counsel stood to gain by withholding the information. This is also the reason that I do not intend to proceed against the petitioner for making an averment in the affidavit accompanying the petition, which was not wholly accurate. 7.5 Therefore, I do not wish to deliberate further upon this aspect of the matter. The prayer made by the respondents counsel, on this score, is thus, rejected.

8. Moving on further, the submissions of Mr Gonsalves can briefly be summarized as follows: (i). That the 1991 guidelines are violative of the provisions of Article 19(1)(a) of the Constitution, in as much as, the provisions contained therein vest in the Censoring Authorities discretion which is far wider in amplitude than that provided in Clause (2) of Article 19 of the constitution. (ii). The impugned orders passed by the authorities below violate the petitioners fundamental right to freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution. None of the directions contained in the impugned orders, whether by way of insertion of a disclaimer or by deletions / excisions fall within the ambit of Article 19(2) of the Constitution, and that being so, the impugned directions are illegal and therefore, deserve to be set aside. (iii). The authorities below, in passing the impugned order, had failed to adhere to the rigour of the 1952 Act and the rules framed thereunder. The principles of natural justice were violated in as much as the petitioner was not granted a hearing before passing the impugned order as is required under Section 4 of the 1952 Act. Furthermore, the film was not placed before the Examining Committee as was the requirement of the aforementioned Act and the Rules. The Chairperson failed to place the matter before the Revising Committee. (iv). The FCAT failed to notice the aforementioned errors in appeal and acted with undue haste while reviewing the subject film, which resulted in the confirmation of a part of the order passed by the CBFC. 8.1 In support of the submissions, the learned counsel relied upon the following

judgments :Gajanan Visheshwar Birjur vs Union of India, (1994) 5 SCC550 S. Rangrajan vs P. Jagjivan Ram, (1989) 2 SCC57 Bobby Art International & Ors. vs Om Pal Singh & Ors., (1996) 4 SCC1and Indian Express Newspapers vs Union of India, (1985) 1 SCC641 9. Mr Sarin, on the other hand, who sought to support the order of CBFC as confirmed by the FCAT, made submissions, which can be broadly paraphrased as follows: (i). The 1991 Guidelines did not fall foul of the provisions of Article 19(2) of the constitution as contended by Mr. Gonsalves. The guidelines provided a broad parameter within which the Censoring Authorities had to function. The challenge to the guidelines was expansive and that no particular guideline was adverted to demonstrate its invalidity either with regard to the provisions of the 1952 Act or qua Article 19(2) of the Constitution. In support of this submission, reliance was placed on Bobby Art International & Ors. vs Om Pal Singh. (i). The petitioner could not be heard to make grievance, before this court, with regard to the direction to insert the disclaimer as he had himself indicated his, no objection, to its insertion in a letter dated 02.01.2014, addressed to CBFC. The petitioner was in effect estopped in law from making any submissions in this court vis--vis the said aspect and/or had waived his right qua insertion of the disclaimer. (ii). The removal of the expression disproportionate violence from the textual graphics / plate was in order as it sought to portray, unfairly, the actions taken by the security forces. The inclusion of the said expression, would demoralize the security forces and / or the police, who were actually the victims of the stone pelting incidents which occurred in the valley. (iii). The other deletion ordered qua the subject film which damns the country and the Government of India as a whole, is also, in order as it conveys an anti-national sentiment. The statement is seditious and would otherwise, fall within the ambit of Section 124-A of the Indian Penal Code, 1860 (in short the IPC). (iv). The petitioners allegations that there was a breach of principles of natural justice is untenable, for two reasons. First, that despite being given an opportunity to appear before the CBFC to present his point of view, he chose not to do so. Second, in the appeal, the FCAT, after hearing the petitioner partially set aside the order of the CBFC. (v). This court ought not to interfere with the impugned orders as they had been passed by a body of experts. The court while exercising writ jurisdiction under Article 226 of the Constitution is concerned with the decision making process and not with the decision itself. In

support of this submission, reliance was placed on the following judgments : Union Public Service Commission vs Jagannath Mishra, (2003) 9 SCC237 Directorate of Film Festivals vs Gaurav Ashwin Jain, (2007) 4 SCC737 Fedration of Rly. Officers Assn. vs Union of India, (2003) 4 SCC289and Shyam Babu Verma vs Union of India, (1994) 2 SCC521 REASONS10 In order to appreciate the impact of the impugned orders and the submissions made by counsels for the parties, I intend to extract the relevant portions of the order, which relate to insertions and/or deletions: CBFCs order dated 30.12.2013. Cut No.1. Location Cut Description Beginning A disclaimer Views expressed by individuals in the documentary are solely their own views. Their views are not intended to hurt/ defame any person, caste, community religion, institution or 2.

3.

4.

5. organization should be added in the beginning. 00:23:28 Delete Jehad is all right For them to 00:28:37 jehad is all right. 2(xiii) 00:39:24 Delete with disproportionate violence line to 00:39:36 from textual graphics/ plate 2(xiii) & 2(xv) 00:42:01 to Delete He had small .. there can tell line 00:

42. 11 2(xiii) & 2(xv) 00:44:04 Delete I beg Allah.. all their families line 2(xiv) FCATs Order dated 11.09.2014 .(a) The disclaimer as suggested by the CBFC is in order and the Tribunal does not find any justification to interfere with the recommendation of CBFC. (b) The 2nd suggested cut from, 00:23:28 to 00:28:37 Jehad is all right . For them to Jehad is all right is not at all justified. What has been missed out by CBFC is that real Jehad means doing something for the benefit of the society like educating children, health care etc. There is a clear message in this sentence which seems to have been overlooked by CBFC because the word Jehad is used. The recommendation is set aside. (c) The 3rd suggested cut from 00:39:34 to 00:39:36 from disproportionate violence line from textual graphics plate has been recommended by CBFC to be deleted. The expression With Disproportionate Violence does not do justice to the role of the security forces who faced a storm of stone throwing. The action of the forces was partly in self defense and secondly to deter occurrence of stone throwing

incidents. The Tribunal accordingly agrees with CBFC that the expression With Disproportionate Violence should be deleted as this could have a demoralizing effect on the security forces/ police who were actually victims of stone throwing incidents. (d) The 4th suggested cut from 00:41:01 to 00:42:11 from He has small There can tell. There is nothing objectionable in the sentence mentioned above and we see no justification for deleting this sentence. This is allowed to be retained. (e) The 5th suggested cut from 00:44:04 to 00:44:15 from I beg Allah.. all their families. This is most objectionable and CBFC has rightly directed this to be deleted. This sentence speaks against India as a nation and uses expression such as India be damned. We agree with CBFC for deletion of this as this is in violation of the Guidelines for exhibition of film for public exhibition and also borders on anti-national statement.

11. The reason that I extracted the CBFCs and FCATs deletions in their entirety, is that, one of the arguments advanced before me, by Mr Gonsalves, was that the manner in which the CBFC and FCAT had functioned, was a good enough reason to strike down the guidelines issued by the GOI. 11.1 Furthermore, a perusal of the order of the FCAT would show that the controversy before me, in effect, in so far as it relates to the impugned insertions/ deletions, has been narrowed down considerably. 11.2 However, before I proceed further in the matter, I must deal with the broad scheme of the 1952 Act. The understanding of the scheme is necessary to appreciate arguments advanced by Mr Gonsalves with regard to the purported illegality of the guidelines and breach of principles of natural justice. SCHEME OF THE 1952 ACT AND THEREUNDER: Re: Examination of Films 12. RULES FRAMED The 1952 Act is divided into four parts. Part I contains three sections, i.e., Section 1, 2 and 2A. They deal with: the short title, extent and commencement; definitions; and the manner in which the 1952 Act is to be applied in the State of Jammu & Kashmir. 12.1 Part II, which is really relevant for our purposes, contains Sections 3 to 9. Section 3 empowers the Central Government to constitute the CBFC. The details as to the constitution are provided in sub-section (1) of Section 3. Sub-section (2) of Section 3 deals with matters concerning salary and allowances of the chairperson of the CBFC and allowances or fees that members may receive for attending meetings. sub-section (3) of Section 3 empowers prescription of terms and conditions of service qua the

members of the CBFC. 12.2 Section 4, makes a provision for moving an application, with the CBFC, by a person, who is desirous of exhibiting a film, for getting it sanctioned to enable public exhibition of the film. 12.3 As indicated in the provision, the application for this purpose has to be made in the prescribed form whereupon, the CBFC, is entitled to pass, broadly, any of the following orders: (i) Sanction, the film for unrestricted public exhibition; with a caveat that the viewing may require parental guidance with respect to children below the age of 12 years. (ii) Sanction, the film for public exhibition which is restricted to adults. (iii) Sanction, the film for public exhibition which is restricted to members of any profession or class of persons, having regard to the nature, content and theme of the film. (iv) It may direct the applicant to carry out excisions or modifications, as may be deemed fit prior to the sanctioning of the film, under any of the aforementioned categories. (v) Refuse the sanction of film for public exhibition. 12.4 Before passing any order under Section 4, the CBFC, is required to give an opportunity to the applicant to represent his views in the matter. 12.5 Under Section 5, the Central Government is empowered to constitute and establish advisory panels, at regional centres, as it may deem fit, to enable CBFC to efficiently discharge its functions under the 1952 Act. The only caveat being, that such persons, should be qualified to gauge the effect of the films on the public. 12.6 The provision for certification is contained in Section 5A. The CBFC may accord any of the four certificates to a film, i.e., U, UA, A or S. The certificate granted by the CBFC, under sub-section (2) of Section 5A is required to be published in the Gazette of India. Furthermore, sub-section (3) of Section 5A, provides that subject to the provisions of the 1952 Act, a certificate granted by CBFC would remain valid through-out India for a period of ten (10) years. 12.7 Section 5B, sets out grounds on which the authority competent to grant the certificate may refuse to certify the film or any part of it, for public exhibition. 12.8 Pertinently, the grounds set out in sub-section (1) of Section 5B are identical to the grounds included in Article 19(2) of the Constitution, which empowers the State to impose reasonable restrictions on fundamental rights conferred on a citizen under Article 19(1)(a) of the Constitution. 12.9 Therefore, the competent authority, can refuse to grant a certificate to a film or any part of it, if it is against the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, public order, decency or morality or

involves defamation or contempt of court or is likely to incite the commission of any offence.

13. Under sub-section (2) of Section 5B, the Central Government has been empowered to issue directions as it may think fit, setting out the principles which should guide the competent authority in grant of certificates under the 1952 Act while sanctioning a film for public exhibition. This power is, however, subject to the provisions of sub-section (1) of Section 5B. 13.1 Pertinently, the 1991 guidelines, which have been assailed by the petitioner, are issued by the Central Government in exercise of powers under Section 5B (2) of the 1952 Act. The 1991 Guidelines have been issued in supersession of an earlier notification of M.I.B. dated 07.01.1978. 13.2 Any person aggrieved by the order of the CBFC, which either refuses the grant of a certificate, or grants a certificate, which does not meet his or her requirements, or contains a direction to carry out excisions or modifications, in the subject film - is entitled to prefer an appeal to a Tribunal (i.e., FCAT), under Section 5C. 13.3 The constitution of the FCAT, is prescribed under Section 5D. 13.4 Under sub-section (11) of Section 5D, the FCAT, after giving opportunity of hearing, both to the appellant as well as the CBFC, is empowered to make such order(s) as it thinks fit; whereupon, the CBFC, is required to pass an order in conformity with the directions issued thereto. 13.5 Under Section 5E the Central Government is empowered to suspend a certificate granted to a film or, even revoke such a certificate, if it is satisfied that the film in respect of which the certificate was granted was being exhibited in a form other than one in which it was certified or the film or any part thereof was being exhibited in contravention of the provisions of Part II or the rules made thereunder. 13.6 Under sub-section (2) of Section 5E the Central Government is further empowered to call upon such person, who has obtained rights in the film or, is the owner of the film or, even a person on whom both rights enure to deliver the certificate and all duplicate certificates granted qua the subject film. This power is to be exercised after giving due opportunity to the person concerned to represent his views, if he is likely to be impacted by the order. During the period of suspension the film is deemed to be an uncertified film. 13.7 Any person aggrieved by the order of the Central Government under Section 5E is entitled to seek a review under Section 5F, within the time prescribed. 13.8 Over and above the aforementioned powers, the Central

Government is also conferred with a revisional power under Section 6. The power of the Central Government is wide, as it begins with a non-obstante clause. Under this Section, the Central Government may, on its own motion, at any stage, call for the record of any proceeding, which is pending before or has been decided by the CBFC, or as the case may be, decided by the FCAT. 13.9 The Central Government, however, cannot interdict a proceeding which is pending, though not decided, by the FCAT. Under the said provision Central Government is entitled to make an enquiry into matters it considers necessary and, thereafter, make such orders as it deems fit whereupon, the CBFC, is required to dispose of the matter in conformity with such orders. Before passing any such order, the Central Government is required to give an opportunity to the affected party to present its views.

14. Section 6A is not relevant for our purposes. Section 7 pertains to penalties for contravening provisions contained in part II. Section 7A empowers seizure of films, which are exhibited without certification, or to an audience to which it ought not to be exhibited, or is exhibited in contravention of the provisions of the 1952 Act, or any order of the Central Government, FCAT or CBFC. Powers of search are conferred on the police, under sub-section (2) of Section 7A.

15. Section 7B pertains to delegation of powers by the Central Government to the chairman or any other member of CBFC, as if, the said action was taken or done by a full complement of the CBFC. 15.1 Section 7C to 7F are not relevant for the purposes of the present proceedings, and therefore, do not require elaboration. 15.2 Section 8, confers the power on the Central Government to make rules for the purposes of carrying into effect the provisions of Part II. 15.3 The power of exemption (subject to conditions and restrictions contained in its order qua exhibition of a film or a class of film), is conferred on the Central Government, under Section 9 of the 1952 Act. 15.4 Part III of the 1952 Act, contains Section 10 to 17, which again are not relevant for the purposes of the discussion qua issues raised in the present case. 15.5 Part II, contains the repeal provision, i.e., Section 18, whereby the Cinematograph Act of 1918, stood repealed.

16. Importantly, the Central Government in exercise of powers under Section 8 of the 1952 Act, has framed the Cinematograph (Certification) Rules, 1983 (in short the 1983 Rules). 16.1 An elaborate set of rules have been framed, but what is relevant for our purposes are rules 21, 22, 23, 24, 25 and 26. 16.2 Broadly, the rules provide for a very elaborate procedure for examination of films. Rule 21, prescribes the manner and the format in which an application is to be filed to seek certification. 16.3 Rule 22 prescribes that on receipt of an application under Rule 21, the regional officer is required to appoint an examining committee to examine the film. The constitution of examination committee is provided in sub-rule (2) of Rule 22. The manner in which the film is to be examined is also provided in various sub-rules of Rule 22. 16.4 What is of seminal importance, is that, under sub-rule (9) of Rule 22, after examination of the film, each member of the examining committee, attending the examination, before leaving the preview theatre, is required to record his/ her opinion in the prescribed form, setting out in clear terms, the reasons why he or she considers that the subject film should be given a particular certification. 16.5 Similarly, sub-rule (11) of Rule 22 prescribes that after the screening of the film, the examining officer, shall ensure the following: (a) the recommendation of every member of the Committee is recorded in unambiguous terms and each excision or modification is properly specified in clear terms with reason or reasons therefor; (b) the same is duly signed by the members of the Committee; and (c) where the report of any member of the Committee is incomplete, that fact is brought to the notice of the member concerned, before he/ she leaves the preview theatre. 16.6 Under sub-rule (12) of Rule 22, the examining officer after receiving recommendations of all members of the examining committee is required to send the recommendations within three working days to the chairperson. 16.7 Under Rule 23, the chairperson is empowered to direct the regional officer to take action in conformity with the recommendation of the examining committee either unanimously or by majority. In case the opinion of the members is divided, the chairperson has the final say in the matter. This provision is, however, subject to the power conferred on the chairperson to refer the film either on his/ her own motion or on the request of the applicant to a Revising Committee. 16.8 The manner, in which, the Revising Committee is to act, is pari materia with the provisions contained in the rules

pertaining to examining committee. See Rule 22(9) and 22(10). 16.9 Under Rule 25, the Regional Officer is required to convey to the applicant the orders passed by CBFC under Section 4 or 5A of the 1952 Act.

17. Rule 26, empowers the Regional Officer to issue a certificate qua the subject film after satisfying himself that the specified deletions or excisions have been made. PROCEDURAL INFRACTIONS18 The facts obtaining in the present case would show that the CBFC while passing the order dated 13.12.2013, gave no opportunity to the petitioner to represent his views with regard to the excisions or modifications as was the requirement under Section 4(2) of the 1952 Act. 18.1 As a matter of fact, the film was not viewed by the examining committee in terms of Rule 22, at least nothing has been placed on record to establish that. Though, a representation had been made to the chairperson by the petitioner vide email dated 06.01.2014, no action was taken qua the same. Under Rule 24, the chairperson was empowered to refer the matter to a Revising Committee.

19. In so far as the FCAT was concerned, though the petitioner has made a grievance with regard to its functions, the provisions of the Act and Rules, as framed, do not lay down a procedure, as to the manner of its functioning. 19.1 Though, sub-section (3) of Section 5D, provides that FCAT should consist of a chairperson and not more than four members, who are to be appointed by Central Government, there is no minimum quorum set out with regard to the manner of its functioning. 19.2 The FCAT is, thus, free to function only via the Chairperson or in benches, comprising of the chairperson or any member or, in benches, comprising of the chairperson or other members or only member or members. This deficiency, in my view, requires to be cured by suitable amendments to the act and the rules framed thereunder. In the interregnum, though what the FCAT needs to adhere to is the language of Section 5D(11), which requires the Tribunal to make an inquiry and hear the appeal, to mean, Tribunal as constituted. This would mean that entire complement of FCAT would be required to hear the appeal. The provision of quorum injects practical efficacy because at times for various reasons all appointees cannot convene. On the other hand, leaving decision making to only one appointee can lead to undesirable results. The entire purpose of having more than one person is to bring about diversity and domain expertise.

20. The challenge in this case though, has been raised by the petitioner, to the level of infringement of his fundamental right under Article 19(1)(a) of the Constitution. 20.1 Therefore, notwithstanding the aforesaid procedural infractions, some of which are substantive, what is required to be considered by me is: as to whether even if, one were to ignore the procedural infractions, the orders of FCAT and CBFC, could sustain, in the light of the assertions made on behalf of the petitioner. CHALLENGE TO THE GUIDELINES21 However, before I proceed to discuss the merits of the excisions or deletions ordered by CBFC, as modified by FCAT, let me deal with the challenge laid by the petitioner to the guidelines dated 06.12.1991. 21.1 It is the case of the petitioner that the guidelines ought to be quashed as no restriction on the right to freedom of speech and expression can be placed beyond what is provided under Article 19(2) of the Constitution. 21.2 In this context, it is thus, submitted by the petitioner, that the, guidelines empower the CBFC and the FCAT to impose their values and morality on a film maker which is not mandated by Article 19(2) of the Constitution. 21.3 In this context, I may only note that, which is, evident from the title of the 1991 guidelines itself which reads as follows:

Guidelines for Certification of Films for Public Exhibition. As is starkly evident, the 1991 Guidelines are mere a loadstar for the CBFC, and are not binding on them for a reason, which appears to be rather rudimentary. The reason being, that the 1991 Guidelines themselves, are framed by the Central Government in exercise of its powers under sub-section (2) of Section 5B of the 1952 Act. As indicated above, the said sub-section is subject to the provisions contained in sub-section (1) of Section 5B. Section 5B(1), replicates, in entirety, the provisions of Article 19(2) of the Constitution. In other words, what the CBFC is required to keep in mind, are the provisions of Section 5B(1) of the 1952 Act. 21.4 I must indicate here that during the course of arguments while a general submission was made on behalf of the petitioner that the guidelines were beyond the provisions of Article 19(2) of the Constitution, no attempt was made to demonstrate as to how, any particular guideline, did not fulfil the mandate of Section 5B (1) or Article 19(2) of the Constitution. 21.5 It must be borne in mind that both the Section and the provisions of the Constitution, inter alia, empower restrictions to be put where a film depicts scenes which are contrary to decency or morality, impinge upon

sovereignty and integrity of India, defames or incites an offence or disturbs public order or effects security of the State or impacts relations with Foreign States or constitutes contempt of court. These restrictions, obviously, paint a broad picture. The 1991 guidelines attempt to explain the nuances. 21.6 Having said so, in case of a conflict, the provisions of Section 5B(1), which is, presently, the same as Article 19 (2) of the Constitution will provide the road map as to whether a particular disclaimer ought to be ordered to be inserted or whether an excision/ deletion is mandated. The 1991 Guidelines by themselves are not bad in law, or ultra vires the Constitution as it sought to be contended but, an action taken in the guise of enforcing a guideline, may violate the fundamental right conferred on a citizen under Article 19(1)(a) as the restriction sought to be imposed (in whatever form) may fall outside the scope and ambit of Section 5B(1) of the 1952 Act or Article 19 (2) of the Constitution.

22. In this context, it would be pertinent to note that the role of CBFC in its capacity as a film certifier has come up for consideration in several cases before the Supreme Court. One such case, in which, the width and the amplitude of the guidelines came to fore was the Bobby Art International & Ors. vs Om Pal Singh. 22.1 The CBFC in that case had granted a certificate of exhibition to a film titled Bandit Queen, which was challenged by way of a writ petition. The writ petition was allowed, against which, a Letters Patent Appeal was filed. Upon dismissal of the appeal, the matter was carried in appeal to the Supreme Court. 22.2 Before the Supreme Court it was argued on behalf of the respondent, that the scenes of frontal nudity, rape and use of swear words, not only offended the guidelines but also violated the freedom of speech and expression. 22.3 In that context, the Supreme Court, while dealing with the challenge laid to the decision of the CBFC, examined the manner in which the guidelines are to be used and employed. 22.4 In doing so, the Supreme Court drew very heavily upon the Constitution Bench judgement in K.A. Abbas vs Union of India, (1970) 2 SCC780 The court, inter alia quoted from paragraphs 49, 50 and 51, of the judgement in K.A. Abbass case which, in my view, defines not only the role of the censors but also places in perspective as to what the guidelines actually stand for. 22.5 I do not intend to extract the said paragraphs in their entirety, but I do intend to extract certain portions of those paragraphs to bring home the point that guidelines are framed to

enable the censors to delete and/or excise that which does not adhere to the overall theme. The deletions/ excisions should make substantial allowance in favour of freedom, thus leaving a vast area for creating art to interpret life and society with some of its foibles, along with what is good. .49. We may now illustrate out meaning how even the items mentioned in the directions may figure in films subject either to their artistic merit or their social value overweighing their offending character. The task of the censor is extremely delicate and his duties cannot be subject of an exhaustive set of commands established by prior ratiocination. But direction is necessary to him so that he does not sweep within the terms of the directions vast areas of thought, speech and expression of artistic quality and social purpose and interest. Our standards must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read. The standards that we set for our censors must make a substantial allowance in favour of freedom thus leaving a vast area for creative art to interpret life and society with some with some of its foibles along with what is good. We must not look upon such human relationships as banned in to and for ever from human thought and must give scope for talent to put them before society 50. Therefore it is not the elements of rape, leprosy, sexual immorality which should attract the censor's scissors but how the theme is handled by the producer. It must, however, be remembered that the cinematograph is a powerful medium and its appeal is different. The horrors of war as depicted in the famous etchings of Goya do not horrify one so much as the same scenes rendered in colour and with sound and movement, would do. We may view a documentary on the erotic tableaux from our ancient temples with equanimity of read the Kamasutra but a documentary from them as a practical sexual guide would be abhorrent.

51. We have said all this to show that the items mentioned in the directions are not by themselves defective. We have adhered to the 43 points of T.P. O' Connor framed in 1918 and have made a comprehensive list of what may not be shown. Parliament has left this task to the Central Government and, in our opinion, this could be done. But Parliament has not legislated enough, nor has the Central Government filled in the gap. Neither has separated the artistic and the socially valuable from that which is deliberately indecent, obscene, horrifying or corrupting.

They have not indicated the need of society and the freedom of the individual. They have thought more of the depraved and less of the ordinary moral man. In their desire to keep films from the abnormal, they have excluded the moral. They have attempted to bring down the public motion picture to the level of home movies" (emphasis is mine) 22.6 Having noticed the observations of the court in K.A. Abbas, the Court in Bobby Art International went on to state as follows in paragraph 22 and 23 at page 14:

.22. The guidelines aforementioned have been carefully drawn. They require the authorities concerned with film certification to be responsive to the values and standards of society and take note of social changes. They are required to ensure that artistic expression and creative freedom are not unduly curbed". The film must be "judged in its entirety from the point of view of its over-all impact". It must also be judged in the light of the period depicted and the contemporary standards of the people to whom it relates, but it must not deprave the morality of the audience. Clause 2 requires that human sensibilities are not offended by vulgarity, obscenity or depravity, that scenes degrading or denigrating women are not presented and scenes of sexual violence against women are avoided, but if such scenes are germane to the theme, they be reduced to a minimum and not particularised.

23. The guidelines are broad standards. They cannot be read as one would read a statue. Within the breath of their parameters the certification authorities have discretion..

(emphasis is mine) 23. Thus, having regard to the above, the argument of Mr Gonsalves, that the 1991 guidelines permitted the CBFC to impose their own morality and/or views as to what was right or wrong, in the society, is misconceived. The reason being when CBFC is faced with the question as to whether any particular deletion ought to be made or not, the test it is bound to employ (which is evolved over a period of time by courts), is: does the deletion of the scene protect the least capable or the most sensitive or depraved amongst men, or if seen with equanimity, by an average man, does, it fit into the overall theme that the film seeks to portray. If the latter is true, the deletion is not mandated, whether it deals with the depiction of sex, use of swear words, violence

etc. Therefore, this submission of Mr Gonsalves being untenable, is rejected. TENABILITY OF INSERTIONS AND/OR DELETIONS

ORDER

ED24 This brings me to the other aspect of the matter, that is, the matter concerning the insertion of the disclaimer and the deletions directed by FCAT. 24.1 In so far as the disclaimer is concerned, the argument of Mr Sarin was simply this : the petitioner having already accepted the insertion of the same, in its letter dated 02.01.2014 addressed to CBFC, there was no scope for agitation. It was, therefore, the contention of Mr Sarin that no grievance could be made at this juncture with regard to the insertion of disclaimer. To put it succinctly, Mr. Sarin, sought to convey that the petitioner was estopped in law from raising an objection qua the insertion of the disclaimer and/or in any event had waived his right to contest the insertion of the disclaimer. 24.2 According to me, this submission of Mr Sarin must fail for two reasons. First, the said letter was written within few days of the petitioner, receiving a phone call, that certain deletions had been ordered qua his film. The letter was a portrayal of the petitioners anguish, directed towards, the manner, in which, the CBFC, had proceeded to deal with a sensitive subject. Notably, in the subsequent letter dated 06.01.2014, addressed to the Chairperson, no such concession was made. As a matter of fact, the petitioner made it a point to highlight the difficulties that a documentarian encounters - having regard to the fact that films made by them do not normally get released in commercial theatres. In this context, the petitioner, not only made a reference to the 1991 Guidelines, but also to the provisions of the Constitution. 24.3 Furthermore, even in the appeal filed with FCAT, the petitioner assailed the CBFCs order in its entirety. Therefore, the respondent, to my mind, cannot rely upon one stray sentence in a letter to contend that the petitioner had given up his right to challenge the insertion of the disclaimer. Plea of estoppel in law can sustain only if, it is shown that such a conduct caused detriment to other party who relied upon such action or conduct. Waiver on the other hand, required voluntary and intentional relinquishment of a known right. Here again the facts, which are demonstrative of the conduct, must enable drawing of such an inference. [See Provash Chandra Dalia vs Biswanath Banerjee 1989 Supp. (1) SCC487at paragraph 24 at page 498-499].. The facts as obtaining in this case do not establish that any detriment was caused to

respondent with the issuance of the petitioners letter dated 02.01.2014, nor is there a conscious and intentional relinquishment of rights, as alleged or at all. A collation of all circumstances, in fact, establish the petitioners intent to contest every part of the order passed by the CBFC. Besides, the allegation of the petitioner is that impugned orders infringe his fundamental right, which, to my mind, cannot be rejected either on a plea of waiver or estoppel. Fundamental rights cannot be bartered away. A concession made by person that he will not enforce his right qua an illegality, (which otherwise infringes his fundamental right) based on circumstances, mistake of law or otherwise, cannot be held against him. If one were to act otherwise it would dilute the very purpose of providing for fundamental rights in the Constitution. [See Olga Tellis Vs. Bombay Municipal Corporation and Ors., 1985 (3) SCC545 para 28 to 31, at pages 569 to 571].. 24.4 Second, the argument is flawed also for the reason that the disclaimer by itself, is quite superfluous. The disclaimer, in fact, says the obvious, which is views expressed by the individuals in the documentary are solely their own.

. The film being a documentary, largely recounts the first- hand accounts of individuals who suffered on account of the situation prevailing in the Valley. Therefore, the views expressed are necessarily of those who recount their sufferings to the interviewer. 24.5 As to the other part of the disclaimer, which is that they are not intended to hurt/ defame, any person, caste, community, religion, institution or organization..

- if accepted, would almost amount to acceptance of the fact that the portrayal of travails and tribulations of those who recount their sufferings are directed towards a particular, section of the society, caste, creed, religion, institution or organization. 24.6 The film maker seeks to thematically portray the sufferings of people caught in the tussle for supremacy between the militants and the State; the States endeavour being to prevent secessation. The collateral damage caused to a large section of people is the sub-text of the film. Therefore, in my view, the insistence, on having a disclaimer inserted, is completely untenable.

25. This position would also obtain with regard to the two deletions ordered by the FCAT. The first deletion is directed towards the use of the expression

disproportionate violence from the textual graphics/ plate, shown in the opening section of the film. The textual graphic seeks to convey that in 2010, active militancy, in Kashmir, was replaced with stone pelters. The impugned expression needs to be appreciated, in the context of the complete text, as it appears in the film. The full text reads as follows:

..The situation in kashmir took a turn for the worse in 2010. Militancy linked activities were replaced by a kind of spontaneous intifada. Thousands of stone pelting young men took to the streets in Srinagar and towns around. The paramilitary forces responded with disproportionate violence which resulted in the deaths of over a hundred young men. The most tragic deaths were those of two young boys Sameer and Wamik. Sameer was eight years old and Wamik was twelve (emphasis is mine) 25.1 According to the petitioner, the use of the expression disproportionate violence, is an articulation of his opinion; which, according to him, is shared by a large number of people, that killings, which took place in incidents of firing to quell stone pelting, could have been avoided. In other words, as per the petitioner, the opening of fire by police and para-military forces was not a proportionate response to stone pelting incidents. 25.2 I find cogency of thought and rationale in explanation given by the petitioner which, however, does not necessarily mean that it is a point of view with which every other person agrees. Unanimity of thought and views is not the test to be employed by censuring authorities in such like situations. The best response that a contrarian can give, is, to either profess his own point of view by producing another film or by writing a book or a blog (as is in vogue these days), and if, this is too tedious or expensive to ignore completely the medium espousing such unacceptable views. The response cannot be to ban, mutilate or destroy the work of another, with whom, one stridently disagrees. 25.3 Similarly, with respect to the second deletion, which FCAT ordered, the petitioners contention, is that, the conclusions arrived at in the impugned order were erroneous, as it was only a grief ridden statement made by an over-wrought father, on the death of his eight year old child. The father, according to the petitioner, blames himself for not being able to protect his son and, therefore, in grief, curses all those who in his opinion had a role in the death of his son. The petitioner avers, the objected part, was a minor part of the entire film - the deletion of which, would do injustice to the fathers sense of anger.

Pertinently, the petitioners submission is that, the overall tone of the film does not validate the sentiment expressed by the father. 25.4 In this context, the petitioner also made reference to the film Haider, in which the main protagonist, in the film, stands in the main square of the town, i.e., Lal Chowk in Srinagar and denounces, both India as well as the Indian Army. 25.5 It is the petitioners contention that such minor assertions made by a grief stricken father, cannot effect the resolve and resilience of the Country.

26. In order to appreciate the context of this deletion, it would be appropriate to, once again, set out the complete extract. For the sake of convenience, the same is extracted hereinafter. .. I beg Allah that this kind of an India be damned that the whole of this India be damned and of our Government here and all their families like theyve ruined our whole family..

. 26.1 FCAT in the impugned order has dealt with this aspect in a cryptic fashion, while sustaining the order of the CBFC. The relevant portion of the impugned order, dealing with this aspect of the matter, reads as follows:

..This is most objectionable and CBFC has rightly directed this to be deleted. This sentence speaks against India as a nation and uses expression such as India be damned. We agree with CBFC for deletion of this as this is in violation of the Guidelines for exhibition of film for public exhibition and also borders on anti-national statement.

26.2 In my opinion, the FCAT has completely misguided itself by not appreciating the context in which the statement has been made. As rightly contended by the petitioner, the father, who was grief stricken on account of the death of his eight year old son, was giving vent to his anger vis--vis the State machinery - his damnation was directed more towards the circumstances that prevail in that part of India rather than laying a challenge to the sovereignty and integrity of India. The statement seen in context of the circumstances, according to me, could not be categorized as antinational as is sought to be portrayed by the respondents.

27. I must, in this context, also note the submissions made by Mr Sarin, that went a step further, whereby he emphasised that the statement would constitute an

offence of sedition under provisions of Section 124A of the IPC. 27.1 In this context, one would have to note that the word sedition first of all appears only in the marginal note to Section 124A of the IPC and not in the body of the Section. Sedition, as defined under Section 124A, means a conduct whether by spoken or written words, or by signs or visible representation or otherwise, which brings or to tends to bring into hatred or contempt or attempts to excite disaffection towards government established by law in India. The explanations to the said Section are more telling. While explanation (i) says disaffection would include disloyalty and all feelings of enmity. Explanation (ii) and (iii) clarifies that comments expressing disapprobation of the measures taken by the government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection does not constitute an offence under this Section. Similarly, comments which disapprove of administrative or other action of the government without exciting or attempting to excite, hatred, contempt or disaffection, would not constitute an offence under Section 124A. 27.2 Therefore, the substratum of the offence of sedition under Section 124A of the IPC is the intention with which the language is used and, in judging the intention, the utterances or the speech made should be looked at holistically and fairly without giving undue weight to isolated passages. 27.3 The Supreme Court in Balwant Singh & Anr. vs State of Punjab, 1995 3 SCC214 while dealing with a charge against the appellants before it, under Section 124A and 153A of the IPC, was confronted with the following utterances:

1. Khalistan Zindabad.

2. Raj Karega Khalsa, and 3. Hindustan Nun Punjab Chon Kadh Ke Chhadange, Hun Mauka Aya Hai Raj Kayam Karan Da 27.4 These were utterances made by the appellants, in public, immediately upon the assassination of Indias former Prime Minister, Mrs. Indira Gandhi. The appellants were, inter alia, charged under Section 124 A of the IPC. 27.5 In the context of the aforesaid, the Supreme Court made the following observations vis--vis the provisions of Section 124A :

A plain reading of the above section would show that its application would be attracted only when the accused brings or attempts to bring into hatred or

contempt or excites or attempts to excite disaffection towards the Government established by law in India, by words either written or spoken or visible signs or representations etc. Keeping in view the prosecution evidence that the slogans as noticed above were raised a couple of times only by the appellant and that neither the slogans evoked a response from any other person of the Sikh community or reaction from people of other communities, we find it difficult to hold that upon the raising of such casual slogans a couple of times without any other act whatsoever, the charge of sedition can be founded 27.6 Qua the objected utterances incorporated in the subject film (when seen in the light of the aforesaid observations of the Supreme Court) one can only conclude that the words used by the grieving father of the dead child, were not directed to bring into hatred or contempt, or made with an attempt to excite disaffection towards the Indian government. Damnation of the State in the context of the tragedy which visited the concerned person, in my view, could not be construed as an act of sedition. It is not even the case of the respondents that based on the material available, any proceedings for sedition were commenced against the person who made the said utterances.

28. The other argument of Mr Sarin that the utterances would prejudice the minds of the viewers or would propagate anti-national sentiments, hatred or contempt against the government established by law, or was an attempt to excite disaffection towards the State, are nothing but a reformulation of the provisions of Section 124A of the IPC. None of the apprehension expressed by Mr Sarin, can be attributed to the utterances of the distraught father.

29. Mr Sarins argument that this court should not interdict the orders of the authorities below, based on the principle that decisions rendered by an expert body, ought not to be interfered with, only because a court has a different view of the matter, is not applicable in the facts of this case. 29.1 The limitation of judicial review, which was propounded by Mr Sarin based on the judgements of the Supreme Court cited by him, in my view, has no applicability, to the instant case. This is a case, in which, the petitioner pleads infringement of his constitutional right to freedom of speech and expression. The Supreme Court, time and again, has emphasized that censorship is permissible mainly qua social interest which

are specified under Article 19(2) of the Constitution, so as to maintain values and standards of society. 29.2 Since, right to censor films, shown in whatever form, as against print media, constitutes a prior restraint, it should, necessarily be reasonable, so that it is saved by well accepted principles of judicial review. 29.3 Therefore, if the orders of the censoring authorities, as in this case, fail to apply the test which the courts have evolved, which is, that : in deciding as to whether a deletion is to be ordered or not, the censors, should view it from the perspective of a reasonable, strong minded, firm and courageous men and not from the point of view of weak and vacillating minds, nor of those who scent danger in every hostile point of view - the court would be constrained to intervene in the matter and right the wrong, which resulted in trampling upon the constitutional right of freedom of speech and expression conferred upon the aggrieved party.

30. In this context, one is reminded of the observations made by the Supreme Court in the case of S. Rangrajan vs Jagjivan Ram & Ors,. (1989) 2 SCC574where the court was called upon to examine the correctness of the judgement of the Divison bench of the Madras High Court, which had revoked the U certificate issued to a Tamil Film Ore Oru Gramathile (In One Village). The film dealt with the subject of reservations. The protagonist of the film, in effect, conveyed that reservation policy ought not to be based on caste, but on the principle of economic backwardness. The Examining Committee had unanimously rejected the application for grant of certificate. The aggrieved party sought a review by the Revising Committee. Nine out of the eight members favoured granting of the certificate whereupon, the Chairman referred the matter to a Second Revising Committee. By a decision of five to four, the Second Revising Committee recommended issuance of a U certificate, subject to deletion of certain scenes. The minority view, which was articulated by four members, came to the following conclusion: (i) the film treated the subject of reservation irresponsibly; (ii) the reservation policy formulated by the Government had been projected in a highly biased and distorted fashion; (iii) the appeal in the film that the India is one is a hollow appeal, which in effect touched upon the caste sensitivity of the Brahmins, i.e., the forward caste; and (iv) lastly, one of the members, who formed part of the minority view, went to the extent of saying that the exhibition of the film would create a law and order problem, while the other member felt that the film would

hurt the feelings and sentiments of certain sections of the public. 30.1 The Division Bench while allowing the appeal and revoking the U certificate relied largely upon the minority view expressed by the Second Revising Committee. The Supreme Court, while reversing the decision of the Division Bench, made the following crucial observations, and in doing so drew upon the wisdom contained in the judgements delivered by earlier courts. I can do no better than to extract the observations of the Court made in that behalf:

.40 Movie is the legitimate and the most important medium in which issues of general concern can be treated. The producer may project his own message which the others may not approve of. But he has a right to "think out" and put the counter appeals to reason. It is a part of a democratic give-and-take to which no one could complain. The State cannot prevent open discussion and open expression, however, hateful to its policies. As Professor Freund puts it: "The State may not punish open talk, however, hateful, not for hypocritical reason that Hyde Parks are a safety-valve, but because a bit of sense may be salvaged from the odious by minds striving to be rational, and this precious bit will enter into the amalgam which we forge.

41. When men differ in opinion, both sides ought equally to have the advantage of being heard by the public."

(Benjamin Franklin). If one is allowed to say that policy of the Government is good, another is with equal freedom entitled to say that it is bad. If one is allowed to support the governmental scheme, the other could as well say, that he will not support it. The different views are allowed to be expressed by proponents and opponents not because they are correct, or valid but because there is freedom in this country for expressing even differing views on any issue. 42. He argued, if we may say so correctly, that the guarantees of freedom of speech and of the press are measures adopted by the people as the ultimate rulers in order to retain control over the Government, the people's legislative and executive agents..

(emphasis is mine) 30.2 In the context, of the argument raised before the court, that the film could create a law and order situation, the court had this to say:

.45 The problem of defining the area of freedom of expression when it appears to conflict with the various social interests enumerated under Article 19(2) may briefly be touched upon here. There does indeed have to be a compromise between the interest of freedom of expression and social interests. But we cannot simply balance the two interests as if they are of equal weight. Our commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a "spark in a powder keg".

46. Our remarkable faith in the freedom of speech and expression could be seen even from decisions earlier to our Constitution. In Kamal Krishna Sirkar v. Emperor, AIR1935 Cal 636, the Calcutta High Court considered the effects of a speech advocating a change of Government. There the accused was convicted under Sec. 124A of Penal Code for making a speech recommending 'Bolshevik' form of Government to replace the then existing form of Government in Calcutta. While setting aside the conviction and acquitting the accused, Lord Williams, J., who delivered the judgment observed (at p. 637): "All that the speaker did was to encourage the youngmen, whom he was addressing, to join the Bengal Youth League and to carry on a propaganda for the purpose of inducing as large a number of people in India as possible to become supporters of the idea of communism as represented by the present Bolshevik system in Russia. It is really absurd to say that speeches of this kind amount to sedition. If such were the case, then every argument against the present form of Government and in favour of some other form of Government might be allowed to lead to hatred of the Government, and it might be suggested that such ideas brought the Government into contempt. To suggest some other form of Government is not necessarily to bring the present Government into hatred or contempt."

47. To the same effect is the observation by the Bombay High Court in Manohar Damodar Patil v. Government of Bombay, AIR1950 Bom.

210. There the writer of an article in a newspaper was convicted for an offence under the Press (Emergency Powers) Act, 1931, for incitement to violence. The writer had suggested the people to follow the example of China by rising against Anglo- American Imperialism and their agents. He had also suggested his readers to pursue the path of violence, as the Chinese people did, in order that AngloAmerican Imperialism should be driven out of this country. Chagla C.J., while quashing the conviction said: "It is true that the article does state that the working class and the toiling masses can get hold of power through the path of revolution alone. But the expression 'revolution' is used here, as is clear from the context, in contradistinction to reformism or gradual evolution. The revolution preached is not necessarily a violent revolution As the writer has not stated in this article that the toiling masses should take up arms and fight for their rights and thus achieve a revolution we refuse to read this expression as inciting the masses to violent methods."

.50. This takes us to the validity of the plea put forward by the Tamil Nadu Government. In the affidavit filed on behalf of the State Government, it is alleged that some organisations like the Tamil Nadu Scheduled Castes/Scheduled Tribes People's Protection Committee, Dr. Ambedkar People's Movement, the Republican Party of India have been agitating that the film should be banned as it hurt the sentiments of people belonging to Scheduled Caste/Scheduled Tribes. It is stated that the General Secretary of the Republican Party of India has warned that his party would not hesitate to damage the cinema theatres which screen the film. Some demonstration made by people in front of "The Hindu" office on March 16, 1988 and their arrest and release on bail are also referred to. It is further alleged that there were some group meetings by Republican .Party members and Dr. Ambedkar People's Movement with their demand for banning the film. With these averments it was contended for the State that the exhibition of the film will create very serious law and order problem in the State.

51. We are amused yet troubled by the stand taken by the State Government with regard to the film which has received the National Award. We want to put the anguished question, what good is the protection of freedom of expression if the State does not take care to protect it?. If the film, is unobjectionable and cannot

constitutionally be restricted under Article 19(2), freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence. That would tantamount to negation of the rule of law and a surrender to blackmail and intimidation. It is the duty of the State to protect the freedom of expression since it is a liberty guaranteed against the State. The State cannot plead its inability to handle the hostile audience problem. It is its obligatory duty to prevent it and protect the freedom of expression.

30.3 In this context also see the observation of Supreme Court in the case of Shreya Singhal vs Union of India, 218 (2015) DLT370(SC), while examining the provision of Section 66A and 69A of Information and Technology Act, 2000:

....13. This leads us to a discussion of what is the content of the expression freedom of speech and expression. There are three concepts which are fundamental in understanding the reach of this most basic of human rights. The first is discussion, the second is advocacy, and the third is incitement. Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in....

31. Having regard to the standards evolved by the court in judging the tenability of decisions taken by censoring authorities, I have no doubt in my mind, that the impugned decisions fall foul of the test referred to above. Therefore, the impugned decision of CBFC, as confirmed by FCAT, is set aside. A U certificate will be issued to the subject film, without insertion of the disclaimer or the deletions/ excisions ordered by FCAT vide its order dated 11.09.2014. The writ petition is disposed of accordingly. Parties will, however, bear their own costs. RAJIV SHAKDHER, J MAY25 2015 kk

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com