

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

TUESDAY, THE 27TH DAY OF SEPTEMBER 2016/5TH ASWINA, 1938

WP(C).No. 27418 of 2016 (B)

PETITIONER(S) :

JAYAN CHERIAN,
KALAPURACKAL (H), RANDAR P.O, MUVATTUPUZHA,
ERNAKULAM (DISTRICT), KERALA 686 673,
REPRESENTED BY THE POWER OF ATTORNEY HOLDER,
JIJO KURIAKOSE, AGED 32 YEARS, S/O. KURIAKOSE,
KAALAYIL HOUSES, MAALAM P.O, KOTTAYAM 686 031.

BY ADVS. SRI.SANTHOSH MATHEW
SRI.ARUN THOMAS
SRI.JENNIS STEPHEN
SRI.ALPHIN ANTONY
SRI.VIJAY V. PAUL

RESPONDENT(S) :

1. UNION OF INDIA,
REPRESENTED BY THE SECRETARY, MINISTRY OF INFORMATION
AND BROADCASTING "A" WING, SHASTRI BHAVAN,
NEW DELHI 110 001.
2. THE REGIONAL OFFICER,
CENTRAL BOARD OF FILM CERTIFICATION,
CHITRANJALI STUDIO COMPLEX, THIRUVALLAM,
THIRUVANANTHAPURAM- 695 027.
3. THE REGIONAL OFFICER,
CENTRAL BOARD OF FILM CERTIFICATION, 35- HADDOWS ROAD,
SHASTRI BHAVAN, CHENNAI- 600 006.

BY ADV. SRI.N.NAGARESH, ASSISTANT SOLICITOR GENERAL
BY ADV. SRI.K.R.RAJKUMAR, C.G.C.

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION
ON 02-09-2016, THE COURT ON 27-09-2016 DELIVERED THE
FOLLOWING:

APPENDIX

PETITIONER(S)' EXHIBITS :

- EXHIBIT P1 A TRUE COPY OF THE LETTER ISSUED BY THE REGIONAL OFFICER, THIRUVANANTHAPURAM REGIONAL OFFICE DIRECTING THE PETITIONER TO APPEAR BEFORE THE REVISING COMMITTEE.
- EXHIBIT P2 A TRUE COPY OF THE LETTER DATED 25TH JULY 2016 ISSUED BY THE REGIONAL OFFICER, THIRUVANANTHAPURAM.
- EXHIBIT P3 A SCREENSHOT OF THE LAST CLIP IN THE FILM WHERE HARIS UNVEILS THE PAINTING.

RESPONDENT(S)' EXHIBITS :

- EXHIBIT R1: TRUE COPY OF REVISING COMMITTEE REPORT DATED 15.07.2016.

//TRUE COPY//

P.S.TO JUDGE.

Msd.

C.R.

P.B.SURESH KUMAR, J.

W.P.(C) No.27418 of 2016

Dated 27th September, 2016.

J U D G M E N T

The petitioner is the producer, director and script writer of the feature film, "KA bodyscapes". According to the petitioner, "KA bodyscapes" ('the film') portrays through its protagonists the attitude of the society towards homosexuality and feminism. It is stated that the film revolves around the experiences of three protagonists in the film, Haris, a gay free spirited painter, his love interest, Vishnu, a Hanuman bhakt from a conservative Hindu right wing family and Sia, a feminist from a conservative Muslim family. According to the petitioner, the film touches upon the aggression shown by right wing activists towards artists and writers and it highlights the struggles of their friend Sia, who rebels against dehumanising surveillance at her work place and misogynist punishments meted out to menstruating women.

2. The petitioner approached the second respondent, the Regional Officer of the Central Board of Film Certification ('the Board' for short) for certification of the film for public exhibition under the Cinematograph Act, 1952 ('the Act'). On receipt of the application, the Board constituted an Examining Committee as provided for under Rule 22 of the Cinematograph (Certification) Rules, 1983 ('the Rules'). The Examining Committee, after viewing the film, recommended to the Board to refer the film to the Revising Committee, as provided for under Rule 24 of the Rules. On the basis of the recommendation made by the Examining Committee, the Chairman of the Board referred the film to the Revising Committee at the Regional Office of the Board at Chennai. The Revising Committee consisting of a member of the Board and eight others, after viewing the film, recommended to the Board to refuse certification to the film on the ground that it contravenes paragraphs 1(a), 1(d), 2(vii), 2(ix), 2(xii), 2(xiii), 3 (i) and 3(ii) of the Guidelines issued by the Central Government for certification of film for public exhibition ('the Guidelines').

The decision of the Revising committee has been forwarded to the petitioner as per Ext.P2 communication. The petitioner is aggrieved by the said decision of the Revising Committee and hence, this writ petition.

3. A counter affidavit has been filed in this matter by the respondents supporting the impugned decision. According to the respondents, the film contains scenes that promote gay and homosexuality, nudity that contains vital parts of the male nude body and there are many vulgar scenes and dialogues throughout the film, which contravenes para 2 (vii) of the Guidelines which provides that films for public exhibition shall not contain scenes offending human sensibilities by vulgarity, obscenity or depravity. It is also stated in the counter affidavit that the film contains scenes showing menstrual blood and sanitary napkins, posting of pictures of menstrual blood stains in the sanitary napkins in the face book etc. that contravenes para 2(ix) of the Guidelines which provides that films for public exhibition shall not contain scenes degrading or denigrating women in any manner. It is

also stated in the counter affidavit that the film contains scenes that are ridiculing, insulting and humiliating Hindu Religion, in particular, portraying Hindu Gods in poor light with both visuals and dialogues by throwing off the portrait of Lord Hanuman to the floor, the Hindu God 'Hanuman' is shown as coming in the Books titled 'I am a Gay' and other homosexual books that contravenes Para 2(xii) of the Guidelines which provides that films for public exhibition shall not contain visuals or words contemptuous of racial, religious or other groups. In short, the stand of the respondents is that the film was refused certification as it contravenes Guidelines in paragraphs 1(a), 1(d), 2(vii), 2(ix), 2(xii), 2(xiii), 3(i) and 3(ii) of the Guidelines.

4. Heard the learned counsel for the petitioner as also the learned Central Government Counsel for the respondents.

5. I am conscious of the fact that the petitioner has a right of appeal against the impugned decision before the film certification appellate tribunal, but I propose to decide the matter on merits since the film is entangled in the dispute since

April 2016 and since an expeditious resolution of the dispute is warranted, for, films of the instant nature which are addressed to the contemporary audience would lose its significance and charm by passage of time.

6. A film is a medium for expressing and communicating ideas, thoughts, messages, information, feelings and emotions. The right of a film maker to make and exhibit his film, is part of his fundamental right of freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution. Section 5B(1) of the Act provides that a film shall not be certified for public exhibition if, in the opinion of the authority competent to grant certificate, the film or any part of it is against the interests of the sovereignty and integrity of India, the security of the State, friendly relationship 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. The restriction contained in Section 5B(1) of the Act is the restriction introduced in the light of the provisions contained in Article 19(2) of the Constitution. Section 5B(2)

provides that subject to the provisions contained in Section 5B (1), the Central Government may issue such directions as it may think fit setting out the principles which shall guide the authority competent to grant certificates under the Act in sanctioning films for public exhibition. It is in exercise of the power conferred on the Central Government under Section 5B (2) of the Act that the Guidelines have been formulated by the Central Government. As far as the present case is concerned, the petitioner has no case that the Guidelines or any one of them is unreasonable and offends the provision contained in Article 19 (2) of the Constitution. As such, since the film is intended for public exhibition, the same has to be in conformity with the Guidelines.

7. In the context of obscenity contained in a book while deciding the issue whether the same can be permitted to be circulated, the Apex Court in **Ranjit D. Udeshi v. The State of Maharashtra**, (AIR 1965 SC 881), held that treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more and if the rigid

test, of treating sex as the minimum ingredient, were accepted, hardly any artist or writer will be able to do his creative work. It is also held by the Apex Court in the said case that an overall view of the obscene matter in the setting of the whole work would be necessary to ascertain whether the matter is objectionable. It is also held in the said case that while examining the issue, the interest of the contemporary society, particularly the influence of books etc., must not be overlooked. Paragraphs 16, 21 and 22 of the said decision of the Apex Court read thus :

“16. The important question is whether this test of obscenity squares with the freedom of speech and expression guaranteed under our Constitution, or it needs to be modified and, if so, in what respects. The first of these questions invites the court to reach a decision on a constitutional issue of a most far reaching character and we must beware that we may not lean too far away from the guaranteed freedom. The laying down of the true test is not rendered any the easier because art has such varied facets and such individualistic appeals that in the same object the insensitive sees only obscenity because his attention is arrested, not by the general or artistic appeal or message which he cannot comprehend, but by what he can see, and the intellectual sees beauty and art but nothing gross. The Indian Penal Code does not define the word 'obscene' and this delicate

task of how to distinguish between that which is artistic and that which is obscene has to be performed by courts, and in the last resort by us. The test which we evolve must obviously be of a general character but it must admit of a just application from case to case by indicating a line of demarcation not necessarily sharp but sufficiently distinct to distinguish between that which is obscene and that which is not. None has so far attempted a definition of obscenity because the meaning can be laid bare without attempting a definition by describing what must be looked for. It may, however, be said at once that treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more. It is not necessary that the angels and saints of Michael Angelo should be made to wear breeches before they can be viewed. If the rigid test, of treating with sex as the minimum ingredient, were accepted hardly any writer of fiction today would escape the fate Lawrence had in his days. Hald the book-shop would close and the other half would deal in, nothing but moral and religious books which Lord Campbell boasted was the effect of his Act.

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21. The Court must, therefore, apply itself to consider each work at a time. This should not, of course, be done in the spirit of the lady who charged Dr. Johnson with putting improper words in his Dictionary and was rebuked by him. "Madam, you must have been looking for them." To adopt such an attitude towards Art and Literature would make the Courts a Board of Censors. An overall view of the obscene matter in the setting of the whole work would, of course, be necessary, but the

obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the books if likely to fall. In this connection the interests of our contemporary society and particularly the influence of the book etc. on it must not be overlooked. A number of considerations may here enter which it is not necessary to enumerate, but we must draw attention to one fact.

22. We may now refer to Roth's case, (1957) 354 US 476 : 11 Law Ed 2nd 1498, to which a reference has been made. Mr. Justice Brennan, who delivered the majority opinion in that case observed that if obscenity is to be judged of by the effect of an isolated passage or two upon particularly susceptible persons, it might well encompass material legitimately treating with sex and might become unduly restrictive and so the offending book must be considered in its entirety. Chief Justice Warren on the other hand made "Substantial tendency to corrupt by arousing lustful desires" as the test. Mr. Justice Harlan regarded as the test that it must "tend to sexually impure thoughts". In our opinion, the test to adopt in our country (regard being had to our community 'mores') is that obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech and expression and obscenity is treating with sex in a manner appealing to the carnal side of human nature, or having that tendency. Such a treating with sex is offensive to modesty and decency but the extent of such appeal in a particular book etc., are matters for consideration in each individual case."

In **K.A. Abbas v. Union of India**, (1970) 2 SCC 780, the Apex Court, in the context of Cinematograph Act, following the decision in **Ranjit D. Udeshi**, held that it is not the elements of sexual immorality which should attract the censor's scissors, but how the theme is handed by the producer. Paragraph 50 of the decision of the Apex Court in the said case reads thus :

“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 or read the Kamasutra but a documentary from them as a practical sexual guide would be abhorrent.”

The decision of the Revising Committee, as forwarded to the petitioner as per Ext.P2 communication, reads thus :

“The Revising Committee felt that the entire content of the

Malayalam feature film 'KA BODY SCAPES' is ridiculing, insulting and humiliating Hindu Religion, in particular portraying Hindu Gods in poor light. Derogatory words are used against women. The Hindu God 'Hanuman' is shown as coming in the Books titled 'I am a Gay' and other Homo-sexual books. The film has also references to lady masturbating, highlighting 'Gay' by many 'Gay' posters. The film offends human sensibilities by vulgarity, obscenity or depravity. As the film violates guidelines 1(a), 1(d), 2(vii), 2(ix), 2(xii), 2(xiii), 3(i) and 3(ii), therefore, the Certificate is 'Refused'."

Paragraphs 1(a), 1(d), 2(vii), 2(ix), 2(xii), 2(xiii), 3(i) and 3(ii) of the Guidelines, which are relevant in the context, read thus :

- “1. The objectives of film certification will be to ensure that--
- (a) the medium of film remains responsible and sensitive to the values and standards of society; x x x x
 - (d) The medium of film provides clean and healthy entertainments; x x x x
2. In pursuance of the above objectives, the Board of Film Certification shall ensure that --
- (vii) human sensibilities are not offended by vulgarity, obscenity or depravity; x x x x
 - (ix) scenes degrading or denigrating women in any manner are not presented; x x x x
 - (xii) visuals or words contemptuous of racial, religious or other groups are not presented; x x x x
 - (xiii) visuals or words which promote communal, obscurantist, anti-scientific and anti-national attitudes are not presented;
- x x x x

- (3) The Board of Film Certification shall also ensure that the film--
- (i) is judged in its entirety from the point of view of its overall impacts; 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."

The correctness of the impugned decision has to be examined in the light of the principles and guidelines referred to above.

8. As noted above, the impugned order is passed in exercise of the power of the State to impose restrictions on the fundamental right of freedom of speech and expression guaranteed to the petitioner. Since the same is a restriction on the fundamental right guaranteed to the petitioner under Article 19(1) (a) of the Constitution, the same has to be viewed with suspicion, and the burden is heavy on the authorities to show that the restrictions are reasonable and permissible under law. Though the respondents have attempted to support the impugned decision by supplementing reasons in the counter affidavit, I do not propose to advert to the said reasons, for, it is settled that the orders have to stand by the reasons stated

therein itself. The essence of the impugned decision is that the contents of the film is insulting and humiliating Hindu religion and that the film contains scenes which are vulgar and obscene. To demonstrate the stand that the contents of the film are insulting and humiliating Hindu religion, it is stated in the impugned order that the Hindu God Hanuman is shown in the film as coming in the books titled 'I am a Gay'. Likewise, to demonstrate the vulgarity, it is stated in the impugned order that the film refers to masturbating women and homosexuality. There is no other reference in the impugned order with reference to the specific scenes in the film which violate the Guidelines. It is relevant to note that the impugned order bans the exhibition of the film. If the objection concerns only the depiction of the Hindu God Hanuman in the manner indicated in the impugned order and the reference to masturbation of women and homosexuality, there is no need to ban the exhibition of the film altogether, for, the objectionable scenes could be deleted or modified. It is thus evident that the basis of the impugned order is not as disclosed in the impugned order.

Since the decision is that the film is not fit for public exhibition, it has to be on the basis that the theme of the film offends the Guidelines. There is no such statement in the impugned order. Further, mere reference to homosexuality and masturbation of women may not amount to obscenity or vulgarity. As stated by the Apex Court, only if the entire theme is disclosed, the question whether the reference to homosexuality and masturbation of women would amount to vulgarity or obscenity can be ascertained. There is nothing in the impugned order as to the context in which those references have been made in the film. True, some persons may hold an orthodox or conservative view in matters like this, but that by itself is not sufficient to come to the conclusion that the contents of the film are contemptuous of religious groups. As held by the Apex Court, the question whether a scene is vulgar or obscene is to be determined in the context of the work as a whole. When the respondents take the most extreme step of banning the exhibition of the film, allegedly made spending approximately one crore rupees, according to me, an order in the nature of

one impugned is far from satisfactory. In this context, we must also bear in mind that freedom to think and act differently is an essential feature of democracy. The said freedom includes freedom to react and respond to same situations differently and distinctly. One cannot expect everybody to express themselves in the same manner. After all, film making is a creative work. If freedom to express one's ideas is not conceded, there will not be any creativity at all. Looking at one or two scenes or expressions in the film, it cannot be said that the film offends religious sentiments or that it is vulgar and obscene. In the said view of the matter, according to me, the matter has to be reconsidered by the Revising Committee, after affording the petitioner an effective opportunity for hearing.

In the result, the writ petition is allowed, the impugned order is set aside and the Revising Committee of the Board is directed to give notice to the petitioner indicating clearly the reason for banning the exhibition of the film altogether with specific reference to the theme of the film and the relevant guidelines. Thereafter, the petitioner should be

heard on the reasons disclosed to him. The suggestion, if any, of the petitioner to delete the objectionable scenes, modify the theme etc., wherever necessary, conforming to the Guidelines, shall also be considered by the Revising Committee. If the Revising Committee maintains that the film is not suitable for public exhibition even with the modifications/suggestions, if any, made by the petitioner, an order has to be passed stating the objections as to the theme with reference to the scenes in the film and the Guidelines. The order should also disclose the suggestions/modifications made by the petitioner and the reasons for not accepting the same. The above direction shall be complied with, within one month from the date of receipt of a copy of this judgment.

Sd/-

P.B.SURESH KUMAR, JUDGE.

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