

A RAJKAPOOR S/O PRITHVIRAJ KAPOOR

v.

LAXMAN S/O KISHANLAL GAVAI

December 14, 1979

B [V. R. KRISHNA IYER AND R. S. PATHAK, JJ.]

Indian Penal Code 1860 (45 of 1860), Ss. 79 and 292 Cinematograph Act 1952—S. 5A(1A)—Cinema film granted censor certificate for public exhibition—Complaint for prosecution of producer that film is obscene, corrupts public morals—Such prosecution whether sustainable.

C *Words and phrases—'Justified'—Meaning of—Indian Penal Code 1860, S. 79.*

Section 79 I.P.C. provides that nothing is an offence which is done by any person who is justified by law in doing it, or, who by reason of a mistake of fact in good faith, believes himself to be justified by law, in doing it.

D The respondent-complainant alleged that the film *Satyam Shivam Sundaram* was by its fascinating title misleadingly foul and beguiled the guideless into degeneracy and that obscenity, indecency and vice were writ large on the picture, constituting an offence under s. 292 I.P.C. The Magistrate after examining some witnesses, took cognizance of the offence and issued notice to the appellant-producer of the film. Thereupon the appellant moved the High Court under section 482 Cr. P.C. on the score that the criminal proceeding was an abuse of the judicial process and that no prosecution could be legally sustained as the film had been duly certified for public show by the Central Board of Film Censors. The High Court, however dismissed the petition.

E In the appeal to this Court it was contended on behalf of the appellant that once a certificate sanctioning public exhibition of a film had been granted by the competent authority under the Cinematograph Act, 1952, there was a justification for its display thereafter, and by virtue of the antidotal provisions in section F 79 I.P.C., the public exhibition, circulation or distribution of the film, even if it be obscene, lascivious or tending to deprave or corrupt public morals, could not be an offence, s. 292 I.P.C. notwithstanding.

Allowing the appeal,

G HELD: 1. The prosecution is unsustainable because section 79 I.P.C. is exculpatory when read with section 5-A of the Cinematograph Act, 1952 and the certificate issued thereunder, and is therefore quashed. [517 G]

2. It is an antinomy to say that under section 5A(1A) of the Act, the Board certifies a film as suitable for public exhibition and for section 292 I.P.C. to punish such exhibition unless the ground covered by the two laws be different. [516 B]

H 3. The Penal Code is general, the Cinematograph Act is special. The scheme of the latter is deliberately drawn up to meet the explosively expanding cinema menace if it were not strictly policed. The cinema is a great instrument for public good if geared to social ends and can be a public curse if directed to

anti-social objectives. So the Act sets up a Board of Censors of high calibre and expertise, provides hearings, appeals and ultimate judicial review, the pre-censorship and conditional exhibitions and other policing strategies to protect state and society. [516D; G-H] A

4. Neither the Penal Code nor the Cinematograph Act can go beyond the restrictions sanctioned by Part III of the Constitution and once the special law polices the area it is *pro tanto* out of bounds for the general law. Section 79 I.P.C. resolves the apparent conflict between section 292 I.P.C. and part II of the Act relating to certification of films. If the Board blunders, the Act provides remedies. [517 B-C] B

5. Jurisprudentially viewed, an act may be an offence, definitionally speaking; but a forbidden act may not spell inevitable guilt if the law itself declares that in certain special circumstances, it is not to be regarded as an offence. The chapter on General Exceptions operates in this province. Section 79 makes an offence, a non-offence, only when the offending act is actually justified by law or is *bona fide* believed by mistake of fact to be so justified. [517 E] C

6. Once the Board of Censors, acting within their jurisdiction and on an application made and pursued in good faith, sanctions the public exhibition of a film, the producer and connected agencies enter the statutory harbour and are protected because s. 79 exonerates them in view of the *bona fide* belief that the certificate is justificatory. [517 F] D

7. Freedom of expression is fundamental. The Censor is not the moral tailor setting his own fashions but a statutory gendarme policing films under Article 19(2) from the angle of public order, decency or morality concepts themselves dynamic, and which cannot be whittled down to strifle expression nor licentiously enlarged to promote a riot of sexual display. [518 E] E

K. A. Abbas v. The Union of India & Anr. [1971] 2 SCR 446; referred to.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 773 of 1979.

Appeal by Special Leave from the Judgment and Order dated 13-8-1979 of the Madhya Pradesh High Court in Misc. Criminal Case No. 279/79. F

Mrs. K. Hingorani for the Appellant.

The Judgment of the Court was delivered by

KRISHNA IYER, J.—Sublime titles of cinematograph films may enchant or entice and only after entry into the theatre the intrinsic worth of the picture dawns on the viewer. The experience may transform because the picture is great or the audience may lose lucre and culture in the bargain. Mere titles may not, therefore, attest the noxious or noble content of the film. Sometimes the same film may produce contrary impacts and what one regards as lecherous, another may consider elevating. Be that as it may a well published film *Satyam, Sivam, Sundaram* became G
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A the subject matter of a prosecution presumably a *pro bono publico* proceeding, by the respondent against the petitioner and others who are the producer, actor, photographer, exhibitor and distributor of that film. The complaint alleged that the fascinating title was misleadingly foul and beguiled the guileless into degeneracy. If the gravamen of this accusation were true, obscenity, indecency and vice are writ large on the picture,

B constituting an offence under s. 292 I.P.C. The Magistrate, after examining some witnesses, took cognizance of the offence and issued notice to the accused. Thereupon, the producer, namely, the present petitioner, moved the High Court under s. 482 Cr. P.C. on the score that the criminal proceeding was an abuse of the judicial process and engineered by

C ulterior considerations and that no prosecution could be legally sustained in the circumstances of the case, the film having been duly certified for public show by the Board of Censors. The High Court, however, dismissed the petition, ignoring the contention that the film had been given 'A' certificate by the Central Board of Film Censors and finding in the prosecution nothing frivolous or vexatious nor any material to quash the proceedings. The aggrieved film producer has arrived in this Court

D hopefully, and pressed before us one principal objection founded on s. 79 I.P.C. to neutralise s. 292 I.P.C. We do not find this contention apparent in the High Court's judgment, but since the facts are admitted and the question of law is of some moment, we have chosen to hear the petitioner on the invalidatory plea that once a certificate sanctioning

E public exhibition of a film has been granted by the competent authority under the Cinematograph Act, 1952 (for short, the Act), there is a justification for its display thereafter, and by virtue of the antidotal provisions in s. 79 of the Penal Code, the public exhibition, circulation or distribution or the production of the film, even if it be obscene, lascivious or tending to deprave or corrupt public morals, cannot be an

F offence, s. 292 I.P.C. notwithstanding. The absolution is based upon the combined operation of s. 5A of the Act and s. 79 of the Penal Code.

G The issue is of some importance since the cinema is one of the major mass media with millions of viewers and many millions in investment. The respondent-complainant, despite notice having been served on him, did not enter appearance. We requested the Additional Solicitor General, Shri Banerjee, to help the court unravel the legal tangle and he responded promptly and eruditely rendered industrious assistance. We record our appreciation of the services of Shri Banerjee.

H The sole point for decision is the legal effect of the combined operation of s. 5A of the Act and s. 79 I.P.C. But we will assume for purposes of argument that the facts stated in the complaint *prima facie*

attract the offence under s. 292 I.P.C. Supposing such film has been certified by the Central Board of Film Censors, acting within their jurisdiction under the Act, thereby sanctioning the public exhibition of the film, does it furnish a justification in law in doing the act which, in the absence of such certification, may constitute an offence under s. 292 I.P.C. ? **A.**

Section 79 I.P.C. runs thus : **B.**

79. Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it.

The argument is irresistible that if the performance of the act which constitutes the offence is *justified by law*, i.e. by some other provision, then s. 79 exonerates the doer because the act ceases to be an offence. Likewise, if the act were done by one "who by reason of a mistake of fact in good faith believes himself to be justified by law in doing it" then also, the exception operates and the *bona fide* belief, although mistaken, eliminates the culpability. The resolution of the problem raised in this case thus becomes simplified. If the offender can irrefutably establish that he is actually *justified by law* in doing the act or, alternatively, that he entertained a mistake of fact and in good faith believed that he was justified by law in committing the act, then, the weapon of s. 79 demolishes the prosecution. **C.**

Does a certificate issued under s. 5A(1A) of the Act amount to justification in law for public exhibition of the film, be it obscene or not, or, at any rate, does it generate a belief induced by a mistake of fact, namely, the issuance of the certificate and its effect that the certificate-holder is justified by law in exhibiting the film ? **D.**

We are thrown back upon a study of the anatomy of the Cinematograph Act and the efficacy of a certificate under s. 5A as a justification within the meaning of s. 79 of I.P.C. "Justified" according to Black's Legal Dictionary means : **E.**

Done on adequate reasons sufficiently supported by credible evidence, when weighed by unprejudiced mind, guided by common sense and by correct rules of law. **F.**

The Shorter Oxford English Dictionary assigns this meaning for "justification".

The showing in court that one had sufficient reason for doing that which i.e. is called to answer; the ground for such a plea. **G.**

The showing in court that one had sufficient reason for doing that which i.e. is called to answer; the ground for such a plea. **H.**

A Lexically, the sense is clear. An act is justified by law if it is warranted, validated and made blameless by law. Is a legal sanction permitting a thing a legal justification for doing it? Maybe, there is a fine semantic shade between mere legal sanction, which is passive, and clear legal justification which is active. For the work-a-day world of meanings, between 'permissive' and 'justificative' 'thin partition do their bounds divide'. It is an antinomy to say that under s. 5A(1A) of the Act the Board certifies a film as suitable for public exhibition and for s. 292 I.P.C. to punish such exhibition unless the ground covered by the two laws be different. Although it may be plausible to say that what is merely certified as suitable for show by a law may not go the length of holding that it is justified by law. Such niceties need not deter us once we grasp the sweep of the Cinematograph Act.

Indeed, the Penal Code is general, the Cinematograph Act is special. The scheme of the latter is deliberately drawn up to meet the explosively expanding cinema menace if it were not strictly policed. No doubt, the cinema is a great instrument for public good if geared to social ends and can be a public curse if directed to anti-social objectives. The freedom of expression, the right to be equally treated and the guarantee of fair hearing before heavy investments in films are destroyed belong to Indian citizens under the Constitution. But all freedom is a promise, not a menace and, therefore, is subject to socially necessary restraints permitted by the Constitution. Having regard to the instant appeal of the motion picture, its versatility, realism, and its coordination of the visual and aural senses. what with the art of the cameraman with trick photography, vistavision and three dimensional representation, the celluloid art has greater capabilities of stirring up emotions and making powerful mental impact so much so the treatment of this form of art on a different footing with pre-censorship may well be regarded as a valid classification, as was held in *K. A. Abbas*⁽¹⁾. Maybe, art cannot be imprisoned by the bureaucrat and aesthetics can be robbed of the glory and grace and free expression of the human spirit if governmental palate is to prescribe the permit for exhibition of artistic production in any department, more so in cinema pictures. So it is that a special legislation viz. the Act of 1952, sets up a Board of Censors of high calibre and expertise, provides hearings, appeals and ultimate judicial review, pre-censorship and conditional exhibitions and wealth of other policing strategies. In short, a special machinery and processual justice and a host of wholesome restrictions to protect State and society are woven into the fabric of the Act. After

(1) *K. A. Abbas v. The Union of India & Anr.* [1971] 2 S. C. R. 446.

having elaborately enacted such a legislation can it be that a certificate granted under it by expert authority can be stultified by a simple prosecution or a shower of prosecutions for an offence under s. 292 I.P.C., driving the producer to satisfy a 'lay' magistrate that the certificate of the Board of Censors notwithstanding, the film was offensive? The Board under s. 5B has to consider, before certification, all the points s. 292 I.P.C. prescribes. Indeed, neither the Penal Code nor the Cinematograph Act can go beyond the restrictions sanctioned by Part III of the Constitution and once the special law polices the area it is *pro tanto* out of bounds for the general law. At least as a matter of interpretation, s. 79 I.P.C. resolves the apparent conflict between s. 292 I.P.C. and Part II of the Act relating to certification of films. If the Board blunders, the Act provides remedies. We are sure the public-spirited citizen may draw the attention of the agencies under the Act to protect public interest.

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The general issues of art and the role of the State have already been referred to by us in an earlier appeal from the Delhi High Court relating to the same film. There s. 79 I.P.C. was not considered by us because the contention was not urged before us. The present decision will bind the court that hears that case.

D.

The position that emerges is this. Jurisprudentially viewed, an act may be an offence, definitionally speaking but; a forbidden act may not spell inevitable guilt if the law itself declares that in certain special circumstances it is not to be regarded as an offence. The chapter on General Exceptions operates in this province. Section 79 makes an offence a non-offence. When? Only when the offending act is actually justified by law or is *bona fide* believed by mistake of fact to be so justified. If, as here, the Board of Censors, acting within their jurisdiction and on an application made and pursued in good faith, sanctions the public exhibition, the producer and connected agencies do enter the statutory harbour and are protected because s. 79 exonerates them at least in view of their *bona fide* belief that the certificate is justificatory. Thus the trial court when it hears the case may be appropriately apprised of the certificate under the Act and, in the light of our observations, it fills the bill under s. 79 it is right for the court to discharge the accused as the charge is groundless. In the present case, the prosecution is unsustainable because s. 79 is exculpatory when read with s. 5A of the Act and the certificate issued thereunder. We quash the prosecution.

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Two things deserve mention before we close. Prosecutions like this one may well be symptomatic of public dissatisfaction with the Board of Censors not screening vicious films. The ultimate censo-

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A rious power over the censors belongs to the people and by indifference, laxity or abetment, pictures which pollute public morals are liberally certificated, the legislation, meant by Parliament to protect people's good morals, may be sabotaged by statutory enemies within. Corruption at that level must be stamped out. And the Board, alive to its public duty, shall not play to the gallery; nor shall it restrain aesthetic expression and progressive art through obsolete norms and grandma inhibitions when the world is wheeling forward to glimpse the beauty of Creation in its myriad manifestations and liberal horizons. A happy balance is to

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C "...consider, on the one hand, the number of readers they believe would tend to be depraved and corrupted by the book, the strength of the tendency to deprave and corrupt, and the nature of the depravity or corruption; on the other hand, they should assess the strength of the literary, sociological and ethical merit which they consider the book to possess. They should then weigh up all these factors and decide whether on balance the publication is proved to be justified as being for the public good."⁽¹⁾

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Going to the basics, freedom of expression is fundamental. The censor is not the moral tailor setting his own fashions but a statutory gendarme policing films under Art. 19(2) from the angle of public order, decency or morality. These concepts are themselves dynamic and cannot be whittled down to stifle expression nor licentiously enlarged to promote a riot of sensual display.

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Anyway, the appeal must succeed and we extinguish the prosecution by the order.

F N.V.K.

Appeal allowed.

(1) *Calder and Boyars Ltd.*, [1969] 1 OB 151 at 172.