RAJ KAPOOR AND ORS. A

v.

STATE AND OTHERS

October 26, 1979

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

Inherent powers vis-a-vis revisional powers of the High Court, nature of—Criminal Procedure Code, 1973 *Sections* 482 *and* 397.

Cinematograph Act 1952 *Section 5A—Whether the issuance of the certificate issued by the specialised Board of Film Censors bars the criminal Court's jurisdiction to try for offences under Sections* 292/293 *I.P.C.* C

Pursuant to the complaint filed by the second respondent against the appellants under sections 292/293 read with section 34 of the Penal Code for alleged punitive prurience moral depravity and shocking erosion of public decency of the film *Satyam, Shivam, Sundaram,* the Metropolitan Magistrate recorded the statement of three witnesses, including the complainant, in a preliminary inquiry under section 200 of the Code of Criminal Procedure and holding that a D *prima facie* case existed for summoning the appellants, made an order directing issue of summons for their attendance. The appellants applied against the order to the High Court of Delhi under section 482 of the Code of Criminal Procedure, but the High Court, being of opinion that a revision petition lay against that order, decided to entertain it under section 397 of the Code. As the certified copy of the order of the Metropolitan Magistrate was not filed along with the petition, it was rejected by the High Court on August 3, 1979, E as not competent.

Allowing the appeal by special leave the Court,

HELD :

(Per Iyer J.)

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The opening words of Section 482 of the Code of Criminal Procedure contradict the contention whether the inherent powers of the High Court under Section 482 stands repelled when the revisional power under section 397 overlaps because nothing in the Code, not even section 397 can affect the amplitude of the inherent power preserved in so many terms by the language of Section 482. Still, a general principle pervades this branch of law when a specific provision is made; easy resort to inherent power is not right except under G compelling circumstances. Not that there is absence of jurisdiction but that inherent power should not invade areas set apart for specific power under the same code. [1085 G-H, 1086A]

While it is true that Section 482 is pervasive, it should not subvert legal interdicts written into the same code, such for instance, in section 397(2). In short, there is no total ban on the exercise of inherent power where abuse of H the process of the Court or other extraordinary situation excites the Court's jurisdiction. The limitation is self-restraint, nothing more. [1086 A-B, G]

A The policy of law is clear that interlocutory orders, pure and simple, should not be taken upto the High Court resulting in unnecessary litigation and delay. At the other extreme, final orders are clearly capable of being considered in exercise of inherent powers, if glaring injustice stares the Court in the face. In between there is a *tertium quid* where it is more than a purely interlocutory order and less than a final disposal. The present case falls under that category where the accused complain of harassment through the Court's process. In B this third category (*tertium quid*) the inherent power can be exercised. [1086G-H, 1087A]

Merely because a copy of the order has not been produced despite its presence in the records of the Court, it cannot be said that the entire revisory power stands frustrated and the inherent power stultified. [1087D-E]

When the order *in original* is before the Court, to dismiss the petition for C non production of a *copy of it* is to bring the judicial process into pejoration and if a copy were so sacred that the original were no substitute for it some time could have been granted for its production which was not done. In law, as in life a short cut may prove a wrong cut. The content of the power so far as the present situation is concerned is the same, be it under section 397 or section 482 of the Code. [1087E-G]

D *Madhu Limaye* v. *State of Maharashtra,* A.I.R. 1978 SC 47 at 51, followed.

The Film Censor Board acting under section 5A of the Cinematograph Act, 1952, is specially entrusted to screen off the silver screen pictures which offensively invade or deprave public morals through over-sex. A certificate by a high powered Board of Censors with specialised composition and statutory mandate is not a piece of utter consequence. It is relevant material important E in its impact, though not infallible in its verdict. But the Court is not barred from trying the case because the certificate is not conclusive. Nevertheless, the magistrate shall not brush aside what another tribunal has, for similar purpose found. [1088E-F]

A Board's certificate does not bar the criminal Court's jurisdiction to try for the offences under sections 292/293 Penal Code. Once a certificate under F the Cinematograph Act is issued, the Penal Code *pro tanto* will not hang limp. May be, even a rebuttable presumption arises in favour of the statutory certificate but could be negatived by positive evidence. An act of recognition of moral worthiness by a statutory agency is not opinion evidence but an instance or transaction where the fact in issue has been asserted, recognised or affirmed. The Court will examine the film and judge whether its public policy, in the given time and clime, so breaches public morals or depraves G basic decency as to offend the penal provisions. A view of the film may tell more than volume of evidence will and maybe any court before making up its mind, may like to see the picture from the angle of Sections 292/293 I.P.C. There is no meaningful alternative for an intelligent eye. [1088G-H, 1089A, E, 1090A-B]

Finality and infallibility are beyond Courts which must interpret and ad- H minister the law with pragmatic realism, rather than romantic idealism or recluse extremism. Yet, especially when a special statute (the Cinematograph Act) has set special standards for films for public consumption and created a special Board to screen and censor from the angle of public morals and the

like, with its verdicts being subject to higher review, inexpert criminal Courts must be cautious to "rush in" and indeed must "fear to tread", lest the judicial process should become a public footpath for any highway man wearing a moral mask holding up a film-maker who has travelled the expensive and perilous journey to exhibition of his "certificated" picture. Omniscience is not the property of a judge. [1084E-F, 1089D]

(*Per Pathak J.*)

In a trial for the offences under sections 292/293 of the Indian Penal Code a certificate granted under s. 6 of the Cinematograph Act by the Board of Censors does not provide an irrebuttable defence to accused who have been granted such a certificate, but it is certainly a relevant fact of some weight to be taken into consideration by the criminal Court in deciding whether the offence charged is established. Regard must be had by the court to the fact that the certificate represents the judgment of a body of persons particularly selected under the statute for the specific purpose of adjudging the suitability of films for public exhibition, and that judgment extends to a consideration of the principal ingredients which go to constitute the offences under ss. 292 and 293 of the Indian Penal Code. At the same time, the Court must remind itself that the function of deciding whether the ingredients are established is primarily and essentially its own function, and it cannot abdicate that function in favour of another, no matter how august and qualified be the statutory authority. [1091 A-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 621 of 1979.

Appeal by Special Leave from the Judgment and Order dated 23-8-1979 of the Delhi High Court in Crl. Misc. No. 13/79.

B. K. L. Iyengar, M. Iyengar and *P. R. Ramasesh* for the Appellants.

R. N. Sachthey for Respondent No. 1.

Arun Kapil, Shiv Kumar and *R. K. Jain* for Respondent No. 2.

The following Orders were delivered :

KRISHNA IYER, J. In our constitutional order, fragrant with social justice, broader considerations of final relief must govern the judicial process save where legislative interdict plainly forbids that course. The dismissal by the High Court, on a little point of procedure, has led to this otherwise avoidable petition for special leave, at a time when torrents of litigation drown this Court with an unmanageable flood of dockets. The negative order under challenge was made by the High Court refusing to exercise its inherent power under s. 482 of the Criminal Procedure Code (the Code, for short) because the subject fell under its revisional power under s. 397 and this latter power was not unsheathed because a *copy of the short order* of the trial court had not been filed as required, not by the Code, but by a High Court rule, although the *original order*, together with all the records, had been sent for and was before the court ! A besetting sin

A of our legal system is the tyranny of technicality in the name of finical legality, hospitably entertained sometimes in the halls of justice. Absent orientation, justicing becomes 'computering' and ceases to be social engineering.

The story briefly. Only a woodcut of the profile of the case will B do. A unique *pro bono publico* prosecution was launched by a private complainant, claiming (before us) to be the President of a Youth Organisation devoted to defending Indian cultural standards, *inter alia,* against the unceasing waves of celluloid anti-culture, arraigning, together with the theatre owner, the producer, actors and photographer C of a sensationally captioned and loudly publicised film by name *Satyam, Sivam, Sundaram,* under Ss. 282, 283 and 34 Indian Penal Code (hereinafter referred to as the Penal Code) for alleged punitive prurience, moral depravity and shocking erosion of public decency.

Were there serious merit in the charge, a criminal prosecution would serve to sanitize the polluted celluloid, hand cuff cinemas run- D ning erotic and amok, and become a curial super-censorship of salacious films. Why not? Were it otherwise, the precarious film producer had to face a new menace to public exhibition easily set in motion through the process of the court by any busy body willing to blackmail of wanting to harass, prodded by rival producers. Especially when a special statute (the Cinematograph Act) has set special E standards for films for public consumption and created a special board to screen and censor from the angle of public morals and the like, with its verdicts being subject to higher review, inexpert criminal courts must be cautious to 'rush in' and, indeed, must 'fear to tread', lest the judicial process should become a public footpath for any high way man wearing a moral mask holding up a film maker who has travelled F the expensive and perilous journey to exhibition of his 'certificated' picture. Omniscience, if one may adapt a great thought of Justice Holmes, is not the property of a judge. We pronounce no, opinion at this stage, on the merits of the rival stances with reference to the picture *Satyam, Sivam, Sundaram.*

G The trial court examined a few witnesses and, thereafter, issued summons to the appellants who, naturally, were scared by this novel process and rushed for refuge to the High Court. A petition under s. 482 to quash the proceedings was moved. The learned judge held :

> "a revision under s. 397 lay against an order summoning H the accused persons. Once the revision petition lies, the petition canot be entertained under the inherent powers of this Court.

Therefore, the petition has to be treated as a petition for revision under Section 397(1) of the Code. A petition under Section 397(1) of the Code ought to be accompanied by a copy of the order impugned. [See Rule 3-A of Chapter 1-A(b) of Volume V, High Court Rules and Orders of the Punjab High Court, as applicable to Delhi]. The original summons filed, are not orders and no revision lies against those summons. The revision lies only against the order summoning the petitioners.

Revision petition against the order of summoning without filing certified copy of the order summoning the petitioners, is not competent. The revision petition is accordingly dismissed for want of certified copy of the impugned orders."

Thus, the inherent power was repelled because a revision lay and the revision was rejected because a copy of the order was not filed though the original itself was in the file. Thus the merits of the revision remain to be decided and preliminary skirmishes on points of procedure in a criminal prosecution have consumed well over a year.

Two questions may be formulated for decision—one of jurisdiction and consequent procedural compliance, the other of jurisprudence as to when, in the setting of the Penal Code, a picture to be publicly exhibited can be castigated as prurient and obscene and violative of norms against venereal depravity. Art, morals and law's manacles on aesthetics are a sensitive subject where jurisprudence meets other social sciences and never goes alone to bark and bite because State-made straight-jacket is an inhibitive prescription for a free country unless enlightened society actively participates in the administration of justice to aesthetics.

The world's greatest paintings, sculptures, songs and dances, India's lustrous heritage, the Konaraks and Khajurahos, lofty epics, luscious in patches, may be asphyxiated by law, if prudes and prigs and State moralists prescribe paradigms and proscribe heterodoxies. It is plain that the procedural issue is important and the substantive issue portentous.

The first question is as to whether the inherent power of the High Court under s. 482 stands repelled when the revisional power under s. 397 overlaps. The opening words of s. 482 contradict this contention because nothing in the Code, not even s. 397 can affect the amplitude of the inherent power preserved in so many terms by the language of s. 482. Even so, a general principle pervades this branch of law when a specific provision is made; easy resort to inherent power is not

A right except under compelling circumstances. Not that there is absence of jurisdiction but that inherent power should not invade areas set apart for specific power under the same Code. In *Madhu Limaye's case*(1) this Court has exhaustively and, if I may say so with great respect, correctly discussed and delineated the law beyond mistake. While it is true that s. 482 is pervasive it should not subvert legal B interdicts written into the same Code, such, for instance, in s. 397(2). Apparent conflict may arise in some situations between the two provisions and a happy solution :

> "would be to say that the bar provided in sub-section (2) of section 397 operates only in exercise of the revisional C power of the High Court meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one or the other principle enunciated above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But then if D the assailed is purely on an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the 1898 Code, the High Court will refuse to exercise its inherent power. But in case the impugned order clearly brings about a situation which is an E abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in Section 397(2) can limit or affect the exercise of the inherent power by the High Court. But such cases would be few and far between. The High Court must exercise the inherent power F very sparingly. One such case would be the desirability of the quashing of a criminal proceeding initiated illegally, vexatiously or as being without jurisdiction."(2)

In short, there is no total ban on the exercise of inherent power where abuse of the process of the court or other extra-ordinary situa- G tion excites the court's jurisdiction. The limitation is self-restraint, nothing more. The policy of the law is clear that interlocutory orders, pure and simple, should not be taken up to the High Court resulting in unnecessary litigation and delay. At the other extreme, final orders are clearly capable of being considered in exercise of inherent power, if glaring injustice stares the court in the face. In

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(1) *Madhu Limaye* v. *State of Maharashtra* AIR 1978 SC 47

(2) AIR 1978 SC 47 at 51.

between is a *tertium quid*, as Untwalia, J. has pointed out as for example, where it is more than a purely interlocutory order and less than a final disposal. The present case falls under that category where the accused complain of harassment through the courts process. Can we state that in this third category the inherent power can be exercised? In the words of Untwalia. J. : A B

> "The answer is obvious that the bar will not operate to prevent the abuse of the process of the Court and/or to secure the ends of justice. The label of the petition filed by an aggrieved party is immaterial. The High Court can examine the matter in an approprate case under its inherent powers. The present case undoubtedly falls for exercise of the power of the High Court in accordance with Section 482 of the 1973 Code, even assuming, although not accepting, that invoking the revisional power of the High Court is impermissible." C

I am, therefore, clear in my mind that the inherent power is not rebuffed in the case situation before us. Counsel on both sides, sensitively responding to our allergy for legalistics, rightly agreed that the fanatical insistence on the formal filing of a copy of the order under cassation need not take up this court's time. Our conclusion concurs with the concession of counsel on both sides that merely because a copy of the order has not been produced, despite its presence in the records in the court, it is not possible for me to hold that the entire revisory power stands frustrated and the inherent power stultified. D E

When the order, *in original*, is before you, to dismiss the petition for non-production of a *copy of it is to* bring the judicial process into pejoration, and, if a copy were so sacred that the original were no substitute for it some time could have been granted for its production, which was not done. In law, as in life, a short cut may prove wrong cut. I disinter the cassation proceeding and direct it to be disposed of *de novo* by the High Court. The content of the power, so far as the present situation is concerned, is the same, be it under s. 397 or s. 482 of the Code. F G

The next point urged before us by Shri Iyengar is that once a certificate under the Cinematograph Act is granted, the homage to the law of morals is paid and the further challenge under the Penal Code is barred. Jurisprudentially speaking, law, in the sense of command to do or not to do, must be a reflection of the community's cultural norms, not the State's regimentation of aesthetic expression or artistic creation. Here we will realise the superior jurisprudential value of H

A *dharma,* which is a beautiful blend of the sustaining sense of morality, right conduct, society's enlightened consensus and the binding force of norms so woven as against positive law in the Austinian sense, with an awesome halo and barren autonomy around the legislated text is fruitful area for creative exploration. But morals made to measure by statute and court is a risky operation with portentous impact on B fundamental freedoms, and in our constitutional order the root principle is liberty of expression and its reasonable control with the limits of 'public order, decency or morality'. Here, social dynamics guides legal dynamics in the province of 'policing' art forms.

It is deplorable that a power for good like the cinema, by a subtle C process, and these days, by a ribald display, vulgarises the public palate. pruriently infiltrates adolescent minds, commercially panders to the lascivious appetite of rendy crowds and inflames the lecherous craze of the people who succumb to the seduction of sex and resort, in actual life, to 'horror' crimes of venereal violence. The need to D banish cinematographic pornos and the societal strategy in that behalf had led to the Cinematograph Act, 1952. The Censor Board, under this Act, is charged with power to direct doctoring, tailoring, sanitizing and even tabooing films so that noxious obscenity may not be foul and erotic aroma make mass appeal.

E I am satisfied that the Film Censor Board, acting under s. 5A, is specially entrusted to screen off the silver screen pictures which offensively invade or deprave public morals through over-sex. There is no doubt—and counsel on both sides agree—that a certificate by a high-powered Board of Cansors with specialised composition and statutory mandate is not a piece of utter inconsequence. It is relevant F material, important in its impact, though not infallible in its verdict. But the Court is not barred from trying the case because the certificate is not conclusive. Nevertheless, the magistrate shall not brush aside what another tribunal has for similar purpose, found. May be, even a rebuttable presumption arises in favour of the statutory certificate but could be negatived by positive evidence. An act of recognition of G moral worthiness by a statutory agency is not opinion evidence but an instance or transaction where the fact in issue has been asserted, recognised or affirmed.

I am not persuaded that once a certificate under the Cinematograph Act is issued the Penal Code, *pro tanto,* will hang limp. The Court H will examine the film and judge whether its public display, in the given time and clime, so breaches public morals or depraves basic decency as to offend the penal provisions. Statutory expressions are not

petrified by time but must be up-dated by changing ethos even as popular ethics are not absolutes but abide and evolve as community consciousness enlivens and escalates. Surely, the *satwa* of society must rise progressively if mankind is to move towards its timeless destiny and this can be guaranteed only if the ultimate value-vision is rooted in the unchanging basics, Truth—Goodness—Beauty, *Satyam, Sivam, Sundaram*. The relation between Reality and Relativity must haunt the court's evaluation of obscenity, expressed in society's pervasive humanity, not law's penal prescriptions. Social scientists and spiritual scientists will broadly agree that man lives not alone by mystic squints, ascetic chants and austere abnegation but by luscious love of Beauty, sensuous joy of companionship and moderate non-denial of normal demands of the flesh. Extremes and excesses boomerang although some crazy artists and film directors do practise Oscar Wilde's observation : "Moderation is a fatal thing. Nothing succeeds like excess".

All these add up to one conclusion that finality and infallibility are beyond courts which must interpret and administer the law with pragmatic realism, rater than romantic idealism or recluse extremism.

After all, Cohen's words, in Reason and Law, are good counsel : "The law is not a homeless, wandering ghost. It is a phase of human life located in time and space."(1)

I reject the extreme contention that a board certificate bars the criminal court's jurisdiction to try for offences under s. 292/293 I.P.C.

The general guide-lines, so far as is necessary, have been given. Since we are directing the High Court to re-hear the case, there is no room for further examination of the law except to sketch the perspective. The inter-action and cross-fertilisation of law and morality are interesting subjects for research and the guardian role of the court to paint paradigms of virtue or prescribe parameters of morals is too moot for glib assertion. Public policy on good morals is woven by society from within, although when degeneracy goes deep the State cannot sleep. Speaking generally, government-prescribed morality often turns out to be a remedy which aggravates the malady. But law's imperatives and court's commands can work well once popular institutions and voluntary groups mobilise the basic virtues and catalise the buried values. Spiritual secular movements, at a time of value crisis, are the salvationary agents of society, with the State, keeping its police power unsheathed, activising the voluntary process towards goodness.

I hold that the proceeding was maintainable before the High Court and its rejection was wrong. I would, therefore, set aside that order

(1) M.R. Cohen, Reason and Law 4 (1950)

A but direct the court to proceed with the hearing and bring it to a close expeditiously. A view of the film may tell more than volumes of evidence will and, maybe, any court before making up its mind, may like to see the picture from the angle of s. 292/293 I.P.C. There is no meaningful alternative for an intelligent eye.

For the reasons assigned above. I allow the appeal and send the B case back for fresh disposal.

PATHAK, J. This is an appeal against an order of the High Court of Delhi rejecting a petition filed by the appellants for quashing an order summoning the appellants on a complaint filed by the second respondent in respect of offences under sections 292 and 293 read with section 34 of the Indian Penal Code. C

Pursuant to a complaint filed by the second respondent the Metropolitan Magistrate recorded the statement of three witnesses, including the complainant, in a preliminary inquiry under s. 200 of the Code of Criminal Procedure, and holding that a prima facie case existed for summoning the appellants, he made an order directing issue of sum- D mons for the petitioners attendance of the appellants. The appellants applied against the order to the High Court of Delhi under section 482 of the Code of Criminal Procedure, but the High Court, being of opinion that a revision petition lay against that order, decided to entertain it as a revision petition. As the certified copy of the order of the Metropolitan Magistrate summoning the appellants was not filed along E with the petition, it was rejected by the High Court on August 3, 1979 as not competent. The present appeal is directed against that order.

The questions which arises on the order of the High Court are whether (a) the petition filed by the appellants under s. 482 of the Code of the Criminal Procedure could be treated by the High Court as a revision petition under s. 397 of the Code, and (b) assuming F that it could be regarded as a revision petition, whether the High Court was right in rejecting it on the ground that a certified copy of the Metropolitan Magistrate's order summoning the appellants was not filed with it. After arguments before us had proceeded to a point, counsel for the parties agreed that the High Court should not have G rejected the revision petition at the stage it had reached and that the matter called for a decision on the merits. In the circumstances, the controversies embodied in the two questions become wholly academic, and it is unecessary to adjudicate on them.

But the further question which has been debated before us relates to the relevance and probative value of the certificate issued by the H Board of Censors certifying under s. 6 of the Cinematograph Act that the film "Satyam Shivam Sundaram" has been approved for public exhibition to an adult audience. We have been invited to express our

views on the point as, counsel urge, it will arise directly in the litigation pending before the High Court and the Metropolitan Magistrate and our observations, they say, would foreclose any further dispute on an issue of law of some importance. There is no difficulty in laying down that in a trial for the offences under ss. 292 and 293 of the Indian Penal Code a certificate granted under s. 6 of the Cinematograph Act by the Board of Censors does not provide an irrebuttable defence to accused who have been granted such a certificate, but it is certainly a relevant fact of some weight to be taken into consideration by the criminal court in deciding whether the offence charged is established. Regard must be had by the court to the fact that the certificate represents the judgment of a body of persons particularly selected under the statute for the specific purpose of adjudging the suitability of films for public exhibition, and that judgment extends to a consideration of the principal ingredients which go to constitute the offences under ss. 292 and 293 of the Indian Penal Code. At the same time, the court must remind itself that the function of deciding whether the ingredients are established is primarily and essentially its own function, and it cannot abdicate that function in favour of another, no matter how august and qualified be the statutory authority.

The order of the High Court rejecting the petition being erroneous it is set aside, and the High Court is directed to dispose of the petition on the merits within two weeks from today. In case the petition is dismissed on the merits by the High Court, it will direct the Court below to proceed with the trial expeditiously and to bring to an early close the case pending before it.

ORDER OF THE COURT

We direct the High Court to dispose of the petition on the merits as soon as may be, not later than one month from today. In case, the petition is dismissed on the merits, by the High Court, it will direct the Court below to proceed with the trial as soon as possible and to bring to an early close the case pending before it.

S.R. *Appeal allowed and remitted.*