

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. _____ OF 2010
[Arising out of S.L.P.(C) No. 8931 of 2007]

State of Maharashtra & Ors. — Appellants

VERSUS

Sangharaj Damodar Rupawate & Ors. — Respondents

J U D G M E N T

D.K. JAIN, J.:

Leave granted.

2. This appeal, by special leave, filed by the State of Maharashtra and its functionaries, arises out of the judgment dated 26th April, 2007 delivered by the High Court of Judicature at Bombay in Writ Petition No.1721 of 2004. By the impugned judgment, passed in an application under Section 96 of the Code of Criminal Procedure, 1973 (for short “the Code”) read

with Article 226 of the Constitution of India, the High Court has set aside and quashed notification dated 20th December, 2006, issued in the name of Governor of Maharashtra in exercise of the powers conferred by sub-section (1) of Section 95 of the Code, directing forfeiture of every copy of the book captioned as “Shivaji – Hindu King in Islamic India” written by one Prof. James W. Laine.

3.The three writ petitioners, who are respondents No.1, 2 and 3 herein, are respectively stated to be a well known lawyer and a public activist in the Ambedkarite movement, intended to mobilize the deprived sections of the society; (ii) a well-known film maker, whose documentaries are stated to be known the world over for their artistic finesse, conveying democratic and secular message and (iii) a social activist. Respondents No. 4 to 6 impleaded as such vide this Court’s order dated 29th August, 2007 respectively are Prof. James W. Laine, the author of the book, Oxford University Press, India, the publisher through its Constituted Attorney Mr. Manzar Sayed Khan and Mr. Vinod Hansraj Goyal, proprietor of Rashtriya Printing Press, Delhi, the printer of the book.

4.For the purpose of appreciation of the questions raised, the foundational facts may be noticed. These are:

On 28th May, 2003, respondent No. 5, the publisher entered into an agreement with Oxford University Press, U.S.A. for publishing in India a paper-bound book entitled “Shivaji – Hindu King in Islamic India” authored by Prof. James W. Laine (respondent No.4), a Professor of Religious Studies, Macalester College, U.S.A. The said book was originally published by Oxford University Press, Inc., U.S.A. As per the terms of the agreement, respondent No.5 agreed to reprint the book without any changes or deletions. In all, 803 copies of the book were published i.e. 488 copies in June and 315 copies in October, 2003 and was released in July 2003 and 215 copies were sold in the month of July itself.

On 10th November 2003, the publisher (respondent No.5) received a letter from four historians whereby the publisher and the author had been asked to retract the objectionable statement complained of and tender an apology. Mr. Manzar Sayed Khan, expressed regrets for the said statement and informed the objectors that instructions had been issued to all

his offices in India to immediately withdraw all copies of the book from circulation. After withdrawal of the book from circulation, a mob at Pune blackened the face of a Sanskrit Scholar Shri Shashikant Bahulkar whose name appeared in the acknowledgement of the book, having helped the author, Prof. James W. Laine, by providing him with some information during his visit to Pune. This incident was widely reported in the press. On 28th December, 2003, the author Prof. James W. Laine sent a fax, apologising for the mistake, if any, committed in writing the passage and stated that he only was responsible for the said statement written in the book, and the publisher was not at all responsible for the same. On 5th January, 2004, a mob of 100 to 125 persons allegedly belonging to the Sambhaji Brigade ransacked Bhandarkar Oriental Research Institute (BORI), Pune and destroyed a large number of books and rare manuscripts. This incident was also widely reported in the press.

On 7th January, 2004, respondent No.4, the author in an interview, explained the reason for writing the book and expressed deep anguish at the destruction of rare manuscripts

and books in BORI, Pune. Four days after the alleged incident i.e. on 9th January, 2004, the State of Maharashtra, the appellant herein, registered a first information report (for short “FIR”) at Deccan Police Station, Pune, against respondents No. 4 to 6 i.e. Prof. James W. Laine, the author, Mr. Manzar Sayed Khan, the publisher and Mr. Vinod Hansraj Goyal, the printer of the book under Sections 153, 153-A and 34 of the Indian Penal Code, 1860 (for short “the IPC”).

On 15th January, 2004, in exercise of powers conferred by sub-section (1) of Section 95 of the Code, the Government of Maharashtra issued a notification declaring that every copy of the aforementioned book shall be forfeited to the Government. The said notification was challenged in the Bombay High Court by respondents No.1 to 3 herein. However, during the pendency of the petition, this notification was withdrawn and another notification dated 20th December, 2006 was issued. The notification reads as follows:

“GENERAL ADMINISTRATION DEPARTMENT
Mantralaya, Mumbai 400 032,
dated the 20th December, 2006

NOTIFICATION

CODE OF CRIMINAL PROCEDURE, 1973.

No. BAP-2004/422/C.R.113/2004/XXXIV. –
Whereas, Shri Chhatrapati Shivaji Maharaj is revered by various sections of the people domiciled in the State of Maharashtra;

And Whereas, the Oxford University Press having its office at YMCA Library Building, Jai Singh Road, New Delhi 110 001, has in the Year 2003, published a book, captioned as “SHIVAJI – Hindu King in Islamic India” written by one Shri James W. Laine, having ISBN 019 5667719 containing 127 pages (hereinafter referred to as “the said Book”);

And Whereas, the said author has in his said Book, made several derogatory references specified in the Schedule appended hereto regarding Shri Chhatrapati Shivaji Maharaj, in particular about his parentage and the Bhosale family to which he belonged;

And Whereas, publication of the said Book containing the said derogatory references is prejudicial to the maintenance of harmony between different groups and has disturbed the public tranquillity;

And Whereas, the publication and circulation of the said Book, has not only already resulted in causing enmity between the persons who revere Shivaji and other persons who may not so revere; but is likely to continuously cause such enmity;

And Whereas, the said author has in the “ACKNOWLEDGMENTS” to the said Book has expressed gratitude to the “Bhandarkar Oriental Research Institute, Pune” and the librarian and other Scholars therein;

And Whereas, after publication of the said book, there was agitation against the said “Bhandarkar Oriental Research Institute, Pune”, by members of an association called as “Sambhaji Brigade” and certain

other people revering Shri Chhatrapati Shivaji Maharaj;

And Whereas, for publication of the said Book, an offence under sections 153, 153A read with Section 34 of the Indian Penal Code has been registered in the Deccan Gymkhana Police Station, Pune as C.R. No. 10 of 2004.

And Whereas, for the reasons aforesaid, the Government of Maharashtra is of the opinion that the circulation of the said Book containing scurrilous and derogatory references against Shri Chhatrapati Shivaji Maharaj has resulted in causing enmity between various communities and has led to acts of violence and disharmony and that any further circulation of the said Book is likely to result in breach of peace and public tranquillity and in particular between those who revere Shri Chhatrapati Shivaji Maharaj and those who may not; and cause disturbances to public tranquillity and maintenance of harmony between such groups and as such the said Book should be forfeited;

Now, therefore, in exercise of the powers conferred by sub-section (1) of Section 95 of the Code of Criminal Procedure, 1973 (2 of 1974), read with Section 21 of the General Clauses Act, 1897 (10 of 1897) and of all other powers enabling it in that behalf and in supersession of the Government Notification, General Administration Department, No. BAP-2004/422/C.R.113/2004/XXXIV, dated the 15th January 2004, the Government of Maharashtra hereby declares that every copy of the said Book shall be forfeited to the Government.

Schedule

1. “So when Shivaji opened his eyes on the world, he was nurtured by a mother who had been deserted by her husband and left to give birth in a hill

fortress 60 kms. North of Pune.” (Introduction page 4).

2. “Looking back from the coronation in 1674, the Killing of Afzal Khan in 1659 was not simply an act of courage, it was premeditated violence in the service of the Brahmanic world order.” (Chapter II, *The Epic Hero*, page 25).

3. “Thus Shivaji could argue that his family should not be classified a Kunbi peasant or shudra clan, but was, in fact, related to Rajput, Aryan Kshatriyas. This led to a general ambiguity about the status of all Marathas.” (Chapter IV “The Patriot”, page 66).

4. “Here we have a kind of Brahmin prejudice that Marathas might make admirably fierce warriors but will not have prudence of the Brahmins. Thus Ranade argues that the national movement drew on the talents and loyalty of all classes, but he maintains the critical importance of the Brahmins Ramdas and Dadaji in his narrative. (Chapter IV “The Patriot”, page 76).

5. “In other words, Shivaji’s secularism can only be assured if we see him as motivated less by patriotism than by simple quest of power.” (Chapter IV “The Patriot”, page 77).

6. “Shivaji’s parents were married under trying circumstances. They were children, and Jijabai’s parents opposed the match, considering themselves, as Jadhava (Yadavas), to be too aristocratic to accept a groom from the Bhosles, a clan not accepted as one of ninety-six upper class Maratha families. (Chapter V “Cracks in the Narrative”, page 91).

7. “The repressed awareness that Shivaji had an absentee father is also revealed by the fact that Maharashtrians tell jokes naughtily suggesting that his guardian Dadaji Konddev was his biological

father.” (Chapter V “Cracks in the Narrative”, page 93).

8. “One could assume, as Sarkar did, that he (Shivaji) agreed to go to Aurangzeb’s court in Agra because he had hopes (sic) of being made Mughal Viceroy of the Deccan. Had he received such an honour (sic), it is doubtful that he would have planned a coronation eight years later, but would have conducted his career much as his father did as an Aadil Shahi noble and Governor of Bangalore.” (Chapter V “Cracks in the Narrative”, page 99).

By order and in the name of the Governor of Maharashtra,

MANISHA MHAISKAR,
Joint Secretary to Government.”

5.In view of the said development, with the leave of the Court, the petition was amended and challenge to notification dated 20th December, 2006 was laid mainly on the grounds that: (1) there was no material to show that the publication of the book had resulted in disturbance of public tranquillity or maintenance of harmony between various groups as set out therein, and (2) the publication does not disclose any offence under Section 153-A of the IPC. Finding substance in both the grounds, as stated above, by the impugned judgment, the High Court has quashed and set aside the notification dated 20th December, 2006 by observing thus:

“We called upon the learned Associate Advocate General to show us any material in their possession which would indicate, that the publication of the book is causing enmity between various communities and which were those communities. The learned Associate Advocate General was unable to produce or disclose any such material or which were the groups based on religion, race, language or religion or caste or communities who do not revere Shree Chhatrapati Shivaji Maharaj. The only answer was, that the order is based upon the grounds set out in the notification. In our opinion, to make a legal order under Section 95 of the Code of Criminal Procedure, apart from the fact that offence as set out therein must be indicated, the notification must disclose the grounds based on which the State has formed an opinion, that the author by his publication sought to promote or attempted to promote disharmony or feeling of enmity between various groups as set out therein. All that is pointed out to us is, that subsequent to the publication of the book, there was an agitation against Bhandarkar Oriental Research Institute, Pune by members of an Association called as “Sambhaji Brigade” and certain other people revering Shree Chhatrapati Shivaji Maharaj. We pointedly asked the learned Associate Advocate General whether the employees of the Bhandarkar Institute, Pune constituted that group or class. It was fairly conceded before us that it was not so. Whether a group of employees would constitute a group is not required to be answered. In other words, there is nothing on record to show that the publication was likely to promote disharmony or feeling of enmity between various groups, as likely to cause disturbance to public tranquillity and maintenance of harmony between various groups. Bhandarkar Oriental Research Institute Pune, enjoys an international reputation as a research institute in the State of Maharashtra. It was unfortunate that for whatever reasons the said institute was

vandalized and precious documents destroyed History is the loser.”

6.Being aggrieved, the State of Maharashtra and its functionaries are before us in this appeal.

7.We have heard Mr. Shekhar Naphade, learned Senior Counsel appearing on behalf of the petitioners; Mr. Prashant Bhushan, learned counsel appearing on behalf of the respondents No.1 to 3 and Ms. Kamini Jaiswal, learned counsel appearing on behalf of the respondents No.4 to 6.

8.Prefacing his arguments with the historical perspective of rivalry between Brahmins and Marathas, both at the social and the political level, Mr. Naphade submitted that some of the words used in the book and culled out in the notification under different items clearly try to resurrect the social and political tensions between Brahmins and Marathas and try to drive a wedge between the said two communities. It was submitted that the notification in question clearly sets out that the book contains derogatory references to Chhatrapati Shivaji Maharaj and is prejudicial to the maintenance of harmony between different groups and that in fact it had disturbed the social

tranquillity of the State. It was contended that the notification has to be read in its entirety and if it is so read, it clearly refers to threat to maintenance of harmony between two groups, which is clearly demonstrated by an attack on Bhandarkar Institute by Sambhaji Brigade as a sequel to the publication and circulation of the book. While candidly conceding that the operative part of the notification does not specifically refer to conflict between Brahmins and Marathas, learned counsel urged that the notification has to be read in the historical background and if it is so read, the only possible conclusion is that the two groups referred to in the notification mean Brahmins on the one hand and Marathas on the other. According to the learned counsel, it is a settled rule of interpretation that while construing any notification of this nature, the historical background can be taken into account.

9.Mr. Naphade also contended that in a criminal case the burden of establishing that a case under Sections 153 and 153-A of the IPC is made out, is on the State, whereas, while judging the action of the Government under Section 95 of the Code, the parameters are qualitatively different inasmuch as

there is a presumption that the notification is valid and the burden to show that the decision of the Government to forfeit the book is without any foundation, is on the writ petitioners.

10. Learned counsel also argued that the subjective satisfaction of the Government as contemplated in Section 95 of the Code cannot be canvassed either in an application under Section 96 of the Code or in a writ petition under Article 226 of the Constitution. According to the learned counsel, neither the High Court nor this Court can sit in appeal over the Government's decision to forfeit the book. Relying on the decision of the Bombay High Court in the case of *Gopal Vinayak Godse Vs. The Union of India and Others*¹, learned counsel submitted that if a book has a tendency to create a rift between the two different communities, then Article 19(1)(a) of the Constitution cannot be pressed into service, even on the ground that the book contains historical truth.

11. As regards the concession of the counsel for the State before the High Court, as recorded in the impugned judgment, it is pleaded in the written submissions that the concession so made

¹ AIR 1971 Bombay 56

was clearly under misconception of law and facts. It is pleaded that the concession made by an Additional Advocate General is not binding on the Government. In support of the said stand, reference is made to the decisions of this Court in *M.T. Khan and Others Vs. Govt. of A.P. and Others*² and *Periyar and Pareekanni Rubbers Ltd. Vs. State of Kerala*³. Learned counsel also placed reliance on the decision of this Court in *Baragur Ramachandrappa and Others Vs. State of Karnataka and Others*⁴ in support of his proposition that Sections 95 and 96 of the Code, when read together, are clearly preventive in nature and are designed to pre-empt any disturbance to public order and, therefore, if a forfeiture is called for in public interest, it must have pre-eminence over any individual interest.

12.Per contra, Mr. Prashant Bhushan, while emphasizing that the book in question, which makes historical investigation to discover and interpret Shivaji, the great hero of 17th Century in India and Maharashtra in particular, is a scholarly, historical piece about a much revered and admired historical figure of India, vehemently submitted that even if there were any critical

² (2004) 2 SCC 267

³ (1991) 4 SCC 195

⁴ (2007) 5 SCC 11

comments about Shivaji Maharaj, banning the book would strike at the very root of the fundamental right to freedom of expression in a democracy. It was asserted that there is nothing disparaging or malicious about Shivaji and his parents in the book as alleged in the notification. Learned counsel maintained that there is no scurrilous matter in the book which is prejudicial to the maintenance of public tranquillity along with law and order and, in any case, it is the primary responsibility of a Government to prevent mischief-maker from taking the law into their own hands. In support of the proposition that it is for the State to maintain public order and the books, films, etc. cannot be banned merely based on an apprehension of clashes, learned counsel placed reliance on the decision of this Court in *S. Rangarajan Vs. P. Jagjivan Ram and Others*⁵.

13. Learned counsel also urged that on facts in hand, the conditions requisite for invoking Section 95 of the Code are not fulfilled inasmuch as apart from the fact that detailed grounds have not been provided to the respondents, it is evident from the notification that all that has been stated therein is that the book contains scurrilous and derogatory references to Shri

⁵ (1989) 2 SCC 574

Chhatrapati Shivaji Maharaj and that has caused enmity between various communities and has led to acts of violence and disharmony and that any further circulation of the book is likely to result in breach of peace and public tranquillity and in particular, between those who revere Shri Chhatrapati Shivaji Maharaj and those who may not. It was also pleaded that the notification is neither based on grounds that offence under Section 153-A of the IPC was made out nor it has been shown that how the references are derogatory or scurrilous and above all, even the communities, who were alienated from each other or whose religious beliefs were hurt, have not been named or identified.

14. Learned counsel then contended that paragraphs in the book, complained of, do not constitute an offence either under Section 153 or under Section 153-A of the IPC as in the notification there is no allegation that the book has caused or likely to cause enmity between different classes of the society or has created a situation of hatred between or among particular religions/castes/social groups as contemplated in Section 153-A of the IPC. It is pointed out that the notification does not even

identify the communities, which, according to the Government, were allegedly alienated from each other or whose religious beliefs had been wounded. Reliance was placed on the decision of this Court in *Manzar Sayeed Khan Vs. State of Maharashtra and Another*⁶, relating to the same book, wherein, while holding that the book did not make out an offence under Section 153-A of the IPC, the FIR registered against the Author of the book (respondent No.4) was quashed. Reliance was also placed on the decisions of this Court in *Bilal Ahmed Kaloo Vs. State of A.P.*⁷ and *Harnam Das Vs. State of Uttar Pradesh*⁸. Learned counsel thus asserted that there was no justification whatsoever for ordering forfeiture of the book and the impugned notification is a gross misuse of Section 95 of the Code.

15.Before evaluating the rival contentions, a brief reference to the relevant provisions of the Code and the precedents on the point would be necessary.

16.Section 95 of the Code reads as follows:

⁶ (2007) 5 SCC 1

⁷ (1997) 7 SCC 431

⁸ AIR 1961 SC 1662

“95. Power to declare certain publications forfeited and to issue search-warrants for the same.—(1) Where—

(a) any newspaper, or book, or

(b) any document,

wherever printed, appears to the State Government to contain any matter the publication of which is punishable under section 124A or section 153A or section 153B or section 292 or section 293 or section 295A of the Indian Penal Code (45 of 1860), the State Government may, by notification, stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter, and every copy of such book or other document to be forfeited to Government, and thereupon any police officer may seize the same wherever found in India and any Magistrate may by warrant authorise any police officer not below the rank of sub-inspector to enter upon and search for the same in any premises where any copy of such issue or any such book or other document may be or may be reasonably suspected to be.

(2) In this section and in section 96,--

(a) "newspaper" and "book" have the same meaning as in the Press and Registration of Books Act, 1867 (25 of 1867);

(b) "document" includes any painting, drawing or photograph, or other visible representation.

(3) No order passed or action taken under this section shall be called in question in any Court otherwise than in accordance with the provisions of section 96.”

17.Section 96 of the Code, relevant for the purpose, is as under:

“96. Application to High Court to set aside declaration of forfeiture. — (1) Any person having any interest in any newspaper, book or other document, in respect of which a declaration of forfeiture has been made under section 95, may, within two months from the date of publication in the Official Gazette of such declaration, apply to the High Court to set aside such declaration on the ground that the issue of the newspaper, or the book or other document, in respect of which the declaration was made, did not contain any such matter as is referred to in sub-section (1) of section 95.

(2)

(3)

(4) The High Court shall, if it is not satisfied that the issue of the newspaper, or the book or other document, in respect of which the application has been made, contained any such matter as is referred to in sub-section (1) of section 95, set aside the declaration of forfeiture.

(5)”

18. Section 95 of the Code is an enabling provision, which, in the circumstances enumerated in the Section, empowers the State Government to declare that copy of a newspaper, book or document be forfeited to the Government. It is evident that the provision deals with any newspaper, book or document which is printed. The power to issue a declaration of forfeiture under the provision postulates compliance with twin essential conditions, viz., (i) the Government must form the opinion to

the effect that such newspaper, book or document contains any matter, the publication of which is punishable under Section 124-A or Section 153-A or Section 153-B or Section 292 or Section 293 or Section 295-A of the IPC, and (ii) the Government must state the grounds of its opinion. Therefore, it is mandatory that a declaration by the State Government in the form of notification, to the effect that every copy of the issue of the newspaper, book or document be forfeited to Government, must state the grounds on which the State Government has formed a particular opinion. A mere citation of the words of the Section is not sufficient. Section 96 of the Code entitles any person having any interest in any newspaper, book or other document, in respect of which a declaration of forfeiture is made under Section 95 of the Code, to move the High Court for setting aside the declaration on the ground that it does not contain any such matter as is referred to in sub-section (1) of Section 95.

19.Undoubtedly, the power to forfeit a newspaper, book or document is a drastic power inasmuch as it not only has a direct impact upon the due exercise of a cherished right of

freedom of speech and expression as envisaged in Article 19(1)(a) of the Constitution, it also clothes a police officer to seize the infringing copies of the book, document or newspaper and to search places where they are reasonably suspected to be found, again impinging upon the right of privacy. Therefore, the provision has to be construed strictly and exercise of power under it has to be in the manner and according to the procedure laid down therein.

20. The scope and width of a somewhat similar provision contained in Section 99A of the Code of Criminal Procedure, 1898 (for short “the 1898 Code”) was examined by a Constitution Bench of this Court in *Harnam Das Vs. State of Uttar Pradesh* (*supra*). Speaking for the majority, A.K. Sarkar, J. held that in that case though the order of forfeiture passed by the Government had set out its opinion that the books contained matters the publication of which was punishable under Sections 153-A and 295-A of the IPC but it did not state, as it should have, the grounds of that opinion. Striking down the order of forfeiture, the learned judge observed as under:

“(4) Two things appear clearly from the terms of this Section. The first thing is that an order under it can be made only when the Government forms a certain opinion. That opinion is that the document concerning which the order is proposed to be made, contains “any matter the publication of which is punishable under Section 124-A or Section 153-A or Section 295-A of the Penal Code.” Section 124-A deals with seditious matters, Section 153-A with matters promoting enmity between different classes of Indian citizens and Section 295-A with matters insulting the religion or religious beliefs of any class of such citizens. The other thing that appears from the Section is that the Government has to state the grounds of its opinion. The order made in this case, no doubt, stated that in the Government’s opinion the books contained matters the publication of which was punishable under Sections 153-A and 295-A of the Penal Code. It did not, however, state, as it should have, the grounds of that opinion. So it is not known which communities were alienated from each other or whose religious beliefs had been wounded according to the Government, nor why the Government thought that such alienation or offence to religion had been caused.”

Thus, the Court observed that in the notification it was not known which communities were alienated from each other or whose religious beliefs had been wounded and why the Government thought that such alienation or offence to religion had been caused. It was held that if the grounds of opinion are not stated, the order of forfeiture must be set aside, because then the Court cannot be satisfied that the grounds given by the Government justify the order. *Inter alia* observing that it is

the duty of the High Court to set aside an order of forfeiture if it is not satisfied that the grounds on which the Government formed its opinion could justify that opinion, the Court also noted that it is not the duty of the High Court to find for itself whether the book contained any such matter.

21.Significance of setting out the grounds of the opinion of the Government was again emphasised in *Narayan Dass Indurakhya Vs. State of Madhya Pradesh*⁹. It was observed that grounds must be distinguished from the opinion, as grounds of the opinion must mean the conclusion of facts on which the opinion is based. The Court said:

“6. There is a considerable body of statutory provisions which enable the State to curtail the liberty of the subject in the interest of the security of the State or forfeit books and documents when in the opinion of the Government, they promote class hatred, religious intolerance, disaffection against the State, etc. In all such cases, instances of some whereof are given below the State Government has to give the grounds of its opinion. Clearly the grounds must be distinguished from the opinion. Grounds of the opinion must mean the conclusion of facts on which the opinion is based. There can be no conclusion of fact which has no reference to or is not ex facie based on any fact.”

⁹ (1972) 3 SCC 676

It was also observed that mere repetition of an opinion or reproduction of the Section without giving any indication of the facts will not answer the requirement of a valid notification.

22.Section 99A of the 1898 Code again came up for consideration before a bench of three Judges of this Court in *The State of Uttar Pradesh Vs. Lalai Singh Yadav*¹⁰.

Emphasizing the importance of furnishing of grounds by the Government for its opinion, speaking for the bench, V.R. Krishna Iyer, J. observed as under:

“8. A drastic restriction on the right of a citizen when imposed by statute, calls for a strict construction, especially when quasi-penal consequences also ensue. The imperial authors of the Criminal Procedure Code have drawn up Section 99A with concern for the subject and cautionary mandates to government. The power can be exercised only in the manner and according to the procedure laid down by the law. Explicitly the section compels the government to look at the matter which calls for action to consider it as to the clear and present danger it constitutes in the shape of promoting feelings of enmity and hatred between different segments of citizens or as to its strong tendency or intendment to outrage the religious feelings of such segments (there are other proclivities also stated in the section with which we are not concerned for the present purpose) and, quite importantly, to state the grounds of its opinion. We are concerned with the last ingredient. When the section says that you must state the grounds it is no answer to

¹⁰ (1976) 4 SCC 213

say that they need not be stated because they are implied. You do not state a thing when you are expressively silent about it. To state 'is to declare or to set forth, especially in a precise, formal or authoritative manner; to say (something), especially in an emphatic way ; to assert' (Random House Dictionary). The conclusion is inescapable that a formal authoritative setting forth of the grounds is statutorily mandatory.....”

While reiterating that a formal authoritative setting forth of the grounds is statutorily mandatory and the Court cannot make a roving enquiry beyond the grounds set forth in the order and if the grounds are left out altogether then there is nothing available to the Court to examine and the notification must fail, the Court also observed that the grounds or reasons linking the primary facts with the forfeiter's opinion need not be stated at 'learned length'. In some cases, a laconic statement may be enough; in others a longer ratiocination may be proper. The order may be brief but it cannot be blank as to the grounds which form the basis of the opinion on which the Government relies. It was also observed that since an order of forfeiture constitutes a drastic restriction on the rights of a citizen, the relevant provisions of the Code have to be strictly construed.

23.At this juncture, it would be appropriate to refer to the decision of this Court, to which one of us (D.K. Jain, J.) was a party, in *Manzar Sayeed Khan Vs. State of Maharashtra & Another* (*supra*), which arose on account of registration of the FIR against the Author, Publisher and Printer, respondents No.4 to 6 in this appeal, on publication and distribution of the book “Shivaji – Hindu King in Islamic India”, the subject matter of the present case. Quashing the FIR against the author, this Court observed that the intention to cause disorder or incite people to violence is the *sine qua non* of the offence under Section 153-A of the IPC and the prosecution has to prove *prima facie* the existence of *mens rea* on the part of the accused. It was, *inter alia*, observed that the intention of the publication has to be judged primarily by the language of the book, the circumstances in which it was written and published; the matter complained of must be read as a whole and one cannot rely on strongly worded and isolated passages for proving the charge nor indeed can one take a sentence here and a sentence there and connect them by a meticulous process of inferential reasoning. Reliance was placed on the decision of

this Court in *Ramesh Vs. Union of India and others*¹¹, wherein the observations of Vivian Bose, J. (as he then was) in *Bhagwati Charan Shukla Vs. Provincial Government*¹², to the effect that “the effect of the words must be judged from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view” were approved.

24. Recently in *Baragur Ramachandrappa and Others Vs. State of Karnataka and Others* (supra), this Court again considered the scope of Section 95 of the Code. Approving the interpretation of Sections 95 and 96 of the Code given by a special bench of the Patna High Court in *Nand Kishore Singh & etc. Vs. State of Bihar and Another*¹³, wherein it was observed that it would be fallacious to mathematically equate the proceedings under Sections 95 and 96 of the Code with a trial under Section 295-A of the IPC with the accused in the dock, the Court went on to elucidate that Section 95 did not require that it should be “proved” to the satisfaction of the State Government that all requirements of the punishing Sections

¹¹ (1988) 1 SCC 668

¹² AIR 1947 Nag 1

¹³ AIR 1986 PATNA 98

including *mens rea* were fully established and all that Section 95(1) required was that the ingredients of the offence should “appear” to the Government to be present. While observing that Section 95 of the Code exemplifies the principle that freedom of speech and expression is not unfettered, this Court commended that freedom must be available to all and no person has a right to impinge on the feelings of others on the premise that his right to freedom of speech remains unrestricted and unfettered. It cannot be ignored that India is a country with vast disparities in language, culture and religion and unwarranted and malicious criticism or interference in the faith of others cannot be accepted.

25.It would thus, appear that no inflexible guidelines can be laid down to test the validity of a notification issued under Section 95 of the Code. Nonetheless the following legal aspects can be kept in mind while examining the validity of such a notification:

- (i) The statement of the grounds of its opinion by the State Government is mandatory and a total absence thereof would vitiate the declaration of

forfeiture. Therefore, the grounds of Government's opinion must be stated in the notification issued under Section 95 of the Code and while testing the validity of the notification the Court has to confine the inquiry to the grounds so disclosed;

- (ii) Grounds of opinion must mean conclusion of facts on which opinion is based. Grounds must necessarily be the import or the effect or the tendency of matters contained in the offending publication, either as a whole or in portions of it, as illustrated by passages which Government may choose. A mere repetition of an opinion or reproduction of the Section will not answer the requirement of a valid notification. However, at the same time, it is not necessary that the notification must bear a verbatim record of the forfeited material or give a detail gist thereof;
- (iii) The validity of the order of forfeiture would depend on the merits of the grounds. The High

Court would set aside the order of forfeiture if there are no grounds of opinion because if there are no grounds of opinion it cannot be satisfied that the grounds given by the Government justify the order. However, it is not the duty of the High Court to find for itself whether the book contained any such matter whatsoever;

- (iv) The State cannot extract stray sentences of portions of the book and come to a finding that the said book as a whole ought to be forfeited;
- (v) The intention of the author has to be gathered from the language, contents and import of the offending material. If the allegations made in the offending article are based on folklore, tradition or history something in extenuation could perhaps be said for the author;
- (vi) If the writing is calculated to promote feelings of enmity or hatred, it is no defence to a charge under Section 153-A of the IPC that the writing contains a truthful kind of past events or is

otherwise supported by good authority. Adherence to the strict path of history is not by itself a complete defence to a charge under Section 153-A of the IPC;

- (vii) Section 95(1) of the Code postulates that the ingredients of the offences stated in the notification should “appear” to the Government to be present. It does not require that it should be “proved” to the satisfaction of the Government that all requirements of punishing sections, including *mens rea*, were fully established;
- (viii) The onus to dislodge and rebut the *prima facie* opinion of the Government that the offending publication comes within the ambit of the relevant offence, including its requirement of intent is on the applicant and such intention has to be gathered from the language, contents and import thereof;
- (ix) The effect of the words used in the offending material must be judged from the standards of

reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view. The class of readers for whom the book is primarily meant would also be relevant for judging the probable consequences of the writing.

26. Having assessed the validity of notification dated 20th December 2006 on the touchstone of the afore-stated principles, we are of the opinion that in the present case, the conditions statutorily mandated for exercise of power under Section 95 of the Code are lacking and therefore, the action of the Government cannot be sustained.

27. It is plain from a bare reading of the notification that the Government's opinion, that the circulation of the said book, containing scurrilous and derogatory references to Shri Chhatrapati Shivaji Maharaj, has resulted in causing enmity between various communities and has led to acts of violence and disharmony and that any further circulation of the said book is likely to result in breach of peace and public

tranquillity, is based on the grounds set out in the preamble to the notification, viz., the author has made several derogatory references, specified in the Schedule appended to the notification, regarding Shri Chhatrapati Shivaji Maharaj, in particular about his parentage and the Bhosale family; the said derogatory references are prejudicial to the maintenance of harmony between different groups and has disturbed the public tranquillity, the publication and circulation of the book has not only already resulted in causing enmity between the persons who revere Shri Chhatrapati Shivaji Maharaj and other persons who may not so revere but is likely to continuously cause such enmity and that for publication of the book an FIR for offences under Sections 153 and 153-A read with Section 34 of the IPC has been registered against the author.

28. Thus, being one of the essential conditions for exercise of power under Section 95 of the Code, that the publication contains matter which is an offence under various provisions of the IPC, the opinion of the State Government is based on the factum of registration of an FIR against the author and others for offences punishable under Sections 153 and 153-A read with

Section 34 of the IPC. As stated above, vide order dated 5th April, 2007, in ***Manzar Sayeed Khan's*** case (*supra*), this Court while quashing the same FIR which was registered against Prof. James W. Laine and others and was referred to in the notification has held that the offending articles in the book do not constitute an offence under Section 153-A of the IPC. It is explicit that the entire edifice of the impugned notification being based on the registration of the said FIR, it gets knocked off by the decision of this Court. Furthermore, it is stated that “the Government of Maharashtra is of the opinion that the circulation of the said book containing scurrilous and derogatory references against Shri Chhatrapati Shivaji Maharaj has resulted in causing enmity between various communities and has led to acts of violence and disharmony and that any further circulation of the said book is likely to result in breach of peace and public tranquillity and in particular between those who revere Shri Chhatrapati Shivaji Maharaj and those who may not; and cause disturbances to public tranquillity and maintenance of harmony between such groups and as such the said book should be forfeited”. We are unable to persuade ourselves to agree with learned counsel for

the appellants that only the subjective satisfaction of the State Government was called for and the matter covered by the notification is sufficient and cannot be assailed. It is manifest that the notification does not identify the communities between which the book had caused or is likely to cause enmity. Therefore, it cannot be found out from the notification as to which communities got outraged by the publication of the book or it had caused hatred and animosity between particular communities or groups. We feel that the statement in the notification to the effect that the book is “likely to result in breach of peace and public tranquillity and in particular between those who revere Shri Chhatrapati Shivaji Maharaj and those who may not” is too vague a ground to satisfy the afore-enumerated tests. Moreover, the High Court has also noted that the learned Associate Advocate General was unable to produce or disclose any material or information to find out as to which were the groups based on religion, race, language or religion or caste or communities who do not revere Shri Chhatrapati Shivaji Maharaj. If that be so, no fault can be found with the finding of the High Court to the effect that there is nothing on record on the basis whereof the Government could

form the opinion that the book was likely to promote disharmony or feeling of enmity between various groups or likely to cause disturbance to public tranquillity and maintenance of harmony between various groups.

29.In view of the foregoing, we are in agreement with the High Court that the notification of forfeiture, dated 20th December 2006, does not fulfil the mandatory requirements of sub-section (1) of Section 95 of the Code and is, therefore, invalid. No ground is made out warranting our interference with the impugned judgment. The appeal is dismissed accordingly, leaving the parties to bear their own costs.

.....
J.
(D.K. JAIN)

.....J.
(H.L. DATTU)

NEW DELHI;
JULY 9, 2010