

INDIBILITY CREATIVE PVT LTD & ORS.

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v.

GOVT OF WEST BENGAL & ORS.

(Writ Petition (Civil) No. 306 of 2019)

APRIL 11, 2019

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**[DR DHANANJAYA Y. CHANDRACHUD AND
HEMANT GUPTA, JJ.]**

Constitution of India – Arts. 19, 32 – Petitioners produced Bengali film titled Bhoishyoter Bhoot, a social and political satire about ghosts – Second petitioner-Director of the film received letter on 11 Feb. 19, four days prior to its scheduled release on 15 Feb. 19, from the Joint Commissioner of Police (Intelligence), Special Branch to arrange prior screening of the film by 12 Feb. 19, stating that inputs were received “that the contents of the film may hurt public sentiments which may lead to political law and order issues” – Responded by second petitioner – First petitioner-Company, co-producer of the film, proceeded with the release of the film on 15 Feb. 19 – However, within a day of its release an overwhelming majority of the exhibitors abruptly took the film off their screens – Tickets were refunded to the viewers – Held: Police are not, in a free society, the self-appointed guardians of public morality – Uniformed authority of their force is subject to the rule of law – Joint Commissioner was not unmindful of the fact that the film had been slated for release within a few days of his communication in theatres across the city of Kolkata and the State of West Bengal – If there was any doubt over the entitlement of the producers to have the film exhibited, it was laid to rest when the producers immediately informed him of the film being CBFC (Central Board of Film Certification) certified – Statutory authority to certify a film for public exhibition is vested in the CBFC under the provisions of the 1952 Act – State Act (s.6, 1954 Act) and the Central Act (s.13, 1952 Act) provide the conditions in which the State government, or as the case may be, the central government (or a local authority) may suspend the exhibition of a film, where it is likely to cause a breach of the peace – Any order issued under the terms of these statutory provisions is subject to statutory control as well as to the

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- A *supervisory jurisdiction of the High Courts u/Art. 226 or, as the case may be, the original jurisdiction of this Court u/Art.32 – Producer of a film certified by the CBFC needs to embark upon meticulous arrangements including contracts for the exhibition of the film – Wielding of extra constitutional authority is destructive of legitimate expectations – Letter addressed by INOX to the producer specifically mentions that they were directed by the authorities to discontinue the screening in the ‘interest of the guests’ – This was clear abuse of public power – West Bengal police overreached their statutory powers – Several interim directions were issued to the State of West Bengal, the Principal Secretary, Home and the Director General of Police vide Supreme Court’s orders dtd. 15 March 19 and 25 March 19 – Confirmed – State restrained from taking recourse to any form of extra constitutional means to prevent the lawful screening of the film and to ensure that the properties of the theatre owners who exhibit the film are duly protected as are the viewers against attempts on their safety – As a consequence of the pulling off of the film from the theatres, the petitioners have suffered violation of their fundamental right to free speech and expression and of their right to pursue a lawful business – A remedy in public law for the grant of remedial compensation is required in the present case – Respondents to pay to the petitioners Rs 20 lakhs as compensation – Petitioners also entitled to the costs of the proceedings quantified at Rs 1 lakh – Cinematograph Act 1952 – ss.4, 5, 5A, 5B, 13 – West Bengal Cinemas (Regulation) Act 1954 – s.6 – Public Law – Grant of remedial compensation.*

- F *Constitution of India – Art. 19(1)(a) – Right to freedom of speech and expression – Exercise of – Duty of the State – Discussed.*

- G **The petitioners produced a Bengali film titled *Bhobishyoter Bhoot*, a social and political satire about ghosts. Second petitioner-Director of the film received letter on 11 Feb.19, four days prior to its scheduled release on 15 Feb. 19, from the Joint Commissioner of Police (Intelligence), Special Branch to arrange prior screening of the film by 12 Feb. 19, stating that inputs were received “that the contents of the film may hurt public sentiments which may lead to political law and order issues”. Second petitioner responded by stating that these “inputs” had already been addressed by the Central Board of Film Certification (CBFC)**
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before it issued clearance for the release of the film. Film released on 15 Feb. 19. However, within a day of its release an overwhelming majority of the exhibitors abruptly took the film off their screens. The tickets were being refunded to the viewers without any reason being offered by the exhibitors. Hence, the present petition.

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Allowing the writ petition, the Court

HELD: 1.1 The police are not in a free society the self-appointed guardians of public morality. The uniformed authority of their force is subject to the rule of law. They cannot arrogate to themselves the authority to be willing allies in the suppression of dissent and obstruction of speech and expression. The Joint Commissioner was not unmindful of the fact that the film had been slated for release within a few days of his communication in theatres across the city of Kolkata and the State. If there was any doubt whatever over the entitlement of the producers to have the film exhibited, it was laid to rest when the producers immediately informed him of the film being CBFC certified. The statutory authority to certify a film for public exhibition is vested in the CBFC under the provisions of the Cinematograph Act 1952. Sections 4, 5, 5A and 5B provided a statutory code for the examination and certification of films for public exhibition. Sub-section (1) of Section 5B provides for the grounds on which a film may not be certified for public exhibition. An order refusing to grant certification is subject to the remedies stipulated in the Act. The State Act (Section 6 of the West Bengal Cinemas (Regulation) Act 1954) and the Central Act (Section 13 of the Cinematograph Act 1952) provide the conditions in which the state government, or as the case may be, the central government (or a local authority) may suspend the exhibition of a film, where it is likely to cause a breach of the peace. Any order which is issued under the terms of these statutory provisions is subject to statutory control as well as to the supervisory jurisdiction of the High Courts under Article 226 or, as the case may be, the original jurisdiction of this Court under Article 32. These statutes are to be interpreted in the rule of law framework. An excess or abuse of statutory power is amenable to constitutional guarantees which protect the citizen against arbitrary State action. The danger

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- A which this case exemplifies is the peril of subjecting the freedom of speech and expression of the citizen to actions which are not contemplated by the statute and lie beyond the lawful exercise of public power. All exercises of authority in pursuance of enabling statutory provisions are amenable to statutory remedies and are subject to judicial oversight under a regime of constitutional remedies. The exercise of statutory authority is not uncontrolled in a regime based on the rule of law. But what do citizens who have a legitimate right to exhibit a film confront when they are told that a film which is duly certified and slated for release is unceremoniously pulled off the exhibiting theatres without the authority of law? Such attempts are insidious and pose a grave danger to personal liberty and to free speech and expression. They are insidious because they are not backed by the authority of law. They pose grave dangers to free speech because the citizen is left in the lurch without being informed of the causes or the basis of the action. This has the immediate effect of silencing speech and the expression of opinion. Contemporary events reveal that there is a growing intolerance: intolerance which is unaccepting of the rights of others in society to freely espouse their views and to portray them in print, in the theatre or in the celluloid media. Organised groups and interests pose a serious danger to the existence of the right to free speech and expression. If the right of the play-wright, artist, musician or actor were to be subjected to popular notions of what is or is not acceptable, the right itself and its guarantee under the Constitution would be rendered illusory. The true purpose of art, as manifest in its myriad forms, is to question and provoke. Art in an elemental sense reflects a human urge to question the assumptions on which societal values may be founded. In questioning prevailing social values and popular cultures, every art form seeks to espouse a vision. Underlying the vision of the artist is a desire to find a new meaning for existence. The artist, in an effort to do so, is entitled to the fullest liberty and freedom to critique and criticize. Satire and irony are willing allies of the quest to entertain while at the same time to lead to self-reflection. Art is as much for the mainstream as it is for the margins. The Constitution protects the ability of every individual citizen to believe as much as to communicate, to conceptualize as much as to share. Public power
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must be conscious of the fact that ours is a democracy simply because the Constitution recognizes the inalienable freedoms of every citizen. Power has been entrusted to the State by the people under a written Constitution. The State holds it in trust and its exercise is accountable to the people. The State does not entrust freedoms to the people: the freedoms which the Constitution recognizes are inseparable from our existence as human beings. Freedom is the defining feature of human existence. Freedoms are not subject to power. Public power is assigned by the people to government. Ours is a controlled Constitution, a Constitution which recognizes the fullest element of liberty and freedom and of the answerability of power to freedom. The views of the writer of a play, the metre of a poet or the sketches of a cartoonist may not be palatable to those who are criticized. Those who disagree have a simple expedient : of not watching a film, not turning the pages of the book or not hearing what is not music to their ears. The Constitution does not permit those in authority who disagree to crush the freedom of others to believe, think and express. The ability to communicate 'ideas' is a legitimate area of human endeavor and is not controlled by the acceptability of the views to those to whom they are addressed. When the ability to portray art in any form is subject to extra constitutional authority, there is a grave danger that fundamental human freedoms will be imperiled by a cloud of opacity and arbitrary State behaviour. A producer of a film which has been certified by the CBFC needs to embark upon meticulous arrangements including contracts for the exhibition of the film. The wielding of extra constitutional authority is destructive of legitimate expectations. Under the constitutional scheme, restrictions can only be imposed by or under a law which is made by the State. The State of West Bengal informed the Court that it had not taken recourse to its statutory powers either under State or Union legislation. The apprehension of the petitioners that this was an action which followed on the letter dated 11 February 2019 of the Joint Commissioner of Police is not unfounded. The letter addressed by INOX to the producer specifically mentions that they were directed by the authorities to discontinue the screening in the 'interest of the guests'. This was a clear abuse of public power. The police are entrusted with enforcing law. In the present case, the West Bengal police have

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- A overreached their statutory powers and became instruments in a concerted attempt to silence speech, suborn views critical of prevailing cultures and threaten law abiding citizens into submission. [Paras 16, 17][708-C-E; 709-A-C; 710-A-H; 711-A-H; 712-A]
- B 1.2 The freedoms which are guaranteed by Article 19 are universal. Article 19(1) stipulates that all citizens shall have the freedoms which it recognises. Political freedoms impose a restraining influence on the State by carving out an area in which the State shall not interfere. Hence, these freedoms are perceived to impose obligations of restraint on the State. But, apart from
- C imposing ‘negative’ restraints on the State these freedoms impose a positive mandate as well. In its capacity as a public authority enforcing the rule of law, the State must ensure that conditions in which these freedoms flourish are maintained. In the space reserved for the free exercise of speech and expression, the State
- D cannot look askance when organized interests threaten the existence of freedom. The State is duty bound to ensure the prevalence of conditions in which of those freedoms can be exercised. The instruments of the State must be utilized to effectuate the exercise of freedom. When organized interests threaten the properties of theatre owners or the viewing audience with reprisals, it is the plain duty of the State to ensure that speech is not silenced by the fear of the mob. In the present case, there has been an unconstitutional attempt to invade the fundamental rights of the producers, the actors and the audience. Worse still, by making an example out of them, there has been an attempt to
- E silence criticism and critique. Others who embark upon a similar venture would be subject to the chilling effect of ‘similar misadventures’. This cannot be countenanced in a free society. Freedom is not a supplicant to power. By the orders of this Court dated 15 March 2019 and 25 March 2019 several directions were issued to the State of West Bengal, the Principal Secretary, Home and the Director General of Police. The directions issued are maintained and confirmed. A Mandamus is issued restraining the
- G State from taking recourse to any form of extra constitutional means to prevent the lawful screening of the feature film *Bhobishyoter Bhoot*. The State shall specifically ensure that the
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properties of the theatre owners who exhibit the film are duly
protected as are the viewers against attempts on their safety.
[Paras 18, 19][712-A-H]

1.3 As a consequence of the pulling off of the film from the
theatres where it was screened on 16 February 2019, the
petitioners have suffered a violation of their fundamental right to
free speech and expression and of their right to pursue a lawful
business. This has been occasioned by the acts of commission
and, in any event, of omission on the part of the State in failing to
affirm, fulfill and respect the fundamental freedoms of the
petitioners. A remedy in public law for the grant of remedial
compensation is required in the present case. The respondents
are directed to pay to the petitioners compensation quantified at
Rs 20 lakhs within a period of one month from the date of the
present judgment. The petitioners shall be entitled to the costs
of the proceedings quantified at Rs 1 lakh, to be paid over within
one month. [Paras 20, 21][713-A-C]

Romesh Thapar v. State of Madras AIR 1950 SC
124 : [1950] SCR 594 – followed.

Prakash Jha Productions v. Union of India (2011) 8
SCC 372 ; *Manohar Lal Sharma v. Sanjay Leela*
Bhansali (2018) 1 SCC 770 : [2017] SCR 111 ;
Via Com Media Pvt Ltd v Union of India (2018) 1 SCC
761 ; *LIC v. Manubhai Shah* (1992) 3 SCC 637 : [1992]
3 SCR 595 ; *Gajanan Visheshwar Birjur v. Union of*
India (1994) 5 SCC 550 : [1994] 1 Suppl. SCR 466 ;
S. Rangarajan v. P. Jagjivan Ram (1989) 2 SCC 574 :
[1989] 2 SCR 204 ; *D.C. Saxena v. Hon'ble The Chief*
Justice of India (1996) 5 SCC 216 : [1996] 3 Suppl.
SCR 677 ; *KM Shankarappa v. Union of India* (2001)
1 SCC 582 : [2000] 5 Suppl. SCR 117 ; *Director*
General, Directorate General of Doordarshan v. Anand
Patwardhan (2006) 8 SCC 433 : [2006] 5 Suppl.
SCR 403 ; *Prakash Jha Productions v. Union of India*
(2011) 8 SCC 372 ; *Viacom 18 Media Pvt Ltd. v. Union*
of India (2018) 1 SCC 671 – relied on.

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- A *Anand Chintamani Dighe v. State of Maharashtra* **2001 Cri LJ 2203** ; *F.A. Picture International v. Central Board of Film Certification, Mumbai* **AIR 2005 Bom 145** ; *Vishesh Verma v. State of Bihar* **(2008) 56 (2) BLJR 1773** ; *Maqbool Fida Hussain v. Rajkumar Pandey* **2008 Cri LJ 4107** ; *S. Tamilselvan v. State of Tamil Nadu* **2016 SCC OnLine Mad 5960** – referred to.
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Case Law Reference

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|---|--------------------------------|--------------------|----------------|
| | (2011) 8 SCC 372 | relied on | Para 7 |
| | [2017] SCR 111 | relied on | Para 7 |
| C | (2018) 1 SCC 761 | relied on | Para 7 |
| | [1950] SCR 594 | followed | Para 14 |
| | [1992] 3 SCR 595 | relied on | Para 14 |
| D | [1994] 1 Suppl. SCR 466 | relied on | Para 14 |
| | [1989] 2 SCR 204 | relied on | Para 14 |
| | [1996] 3 Suppl. SCR 677 | relied on | Para 14 |
| | [2000] 5 Suppl. SCR 117 | relied on | Para 14 |
| E | [2006] 5 Suppl. SCR 403 | relied on | Para 14 |
| | 2001 Cri LJ 2203 | referred to | Para 14 |
| | AIR 2005 Bom 145 | referred to | Para 14 |
| | (2008) 56 (2) BLJR 1773 | referred to | Para 14 |
| F | 2008 Cri LJ 4107 | referred to | Para 14 |
| | (2011) 8 SCC 372 | relied on | Para 14 |
| | (2018) 1 SCC 761 | relied on | Para 14 |

- G CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) Np. 306 of 2019.

(Under Article 32 of the Constitution of India)

Mr. Sanjay Parikh, Sr. Adv., Ms. Rukhsana Choudhury, Narayan Krishan, Ms. Sanjana Srikumar, Ritwik Parikh, Gaurav Jain, Advs. for the Petitioners.

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Dr. Abishek Manu Singhvi, Sr. Adv., Suhaan Mukerji, Ms. Astha Sharma, Amit Verma, Abhishek Manchanda, Ms. Kajal Dalal, Amit Bhandari (for M/S. Plr Chambers And Co.), Advs. for the Respondents. A

The Judgment of the Court was delivered by

DR. DHANANJAYA Y CHANDRACHUD, J.

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1. Motivated by a mission to support meaningful Bengali cinema, the petitioners produced a film titled *Bhobishyoter Bhoot*. Their grievance, while invoking the jurisdiction of this Court under Article 32 of the Constitution is that the State of West Bengal, its Department of Home and the Kolkata Police have caused an “utterly unlawful obstruction of the public exhibition of their Bengali feature film”. Simply put, their grievance is summarized in the extract which we reproduce from the first paragraph of the petition: C

“The State of West Bengal is misusing police power and acting as a ‘super-censor’ sitting atop the CBFC and is violating the Petitioners’ fundamental rights guaranteed under Articles 14,19(1)(a), 19(1)(g) and 21 of the Indian Constitution through the Kolkata Police which is under the Department of Home.” D

2. The first petitioner is a company which was established in 2017. The second and third petitioners are its directors. They have co-produced the film. The second petitioner has earlier produced *Meghnadbodh Rohoshyo*, a Bengali feature film which was selected in the Indian Panorama section of the 48th International Film Festival of India at Goa in 2017. *Bhobishyoter Bhoot*, translated to mean “future ghosts” has been shortlisted in 2018 for the ARFF International – Barcelona Jury Award. E

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3. *Bhobishyoter Bhoot* is a social and political satire about ghosts who wish to make themselves relevant in the future by rescuing the marginalized and the obsolete. The film mourns the living dead. It laments the replacement of the outmoded cabaret with “item numbers”. In the same vein the film bemoans the decline of typists and horologists of yesteryears with present day digital alternatives. The film dwells on the pristine values of journalism, film making and politics, which contemporary society sees as compromised. Bengal has a rich culture of stories about ghosts that are said to be “friendly and fun”. One of the characters conceived by the director in an earlier film is stated to be a household name today among Bengalis. Anik Datta, the director of the G

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- A film, is a protagonist of meaningful cinema. His films leave the viewer to reflect upon social and political issues. Known for films packed with wit, punch and humour, Datta produced *Bhooter Bhobishyot* (the future of ghosts), a comedy which popularized the use of ghosts as a visual art form in Bengali cinema. The film depicted the machinations of a rapacious real estate developer to convert a dilapidated old home into a mall. The film adopted the agency of ghosts as protectors of the haunted house against builders. Datta's second film '*Ashcharjyo Prodeep*' has dealt with the erosion of middle class values by the culture of consumerism. His third film '*Meghnadbodh Rohoshyo*' is described as a political thriller which interweaves a theme involving Bengal of the 1970s with its modern existence.

4. *Bhobishyoter Bhoot* has a UA certification for public exhibition, issued by the Central Board of Film Certification¹ on 19 November 2018. Prior to its national launch, the film was slated for release in Kolkata and some districts of West Bengal on 15 February 2019. For nearly three weeks prior to its release, the film was promoted on electronic, print and social media to evince interest among its prospective viewers. On 11 February 2019, four days prior to its scheduled release, the second petitioner is stated to have received a call from a number which was displayed as 9830720982 on his cell phone. According to the petitioners, the caller identified himself as Dilip Bandopadhyay of the State Intelligence Unit of the Kolkata Police. The caller stated that his office had received some information regarding the film, which he was forwarding shortly. Soon enough, the second petitioner received a letter from the State Intelligence Unit calling upon him to arrange a prior screening of the film for senior officials of the intelligence unit of Kolkata police by 12 February 2019. The letter stated that inputs were received "that the contents of the film may hurt public sentiments which may lead to political law and order issues". The second petitioner responded on 12 February 2019, stating that these "inputs" had already been addressed by the CBFC before it issued a clearance for the release of the film. The second petitioner stated that the decisions of this Court hold that it is not open to any other authority or public office to interfere in such matters as this would violate the rule of law. The second petitioner categorically informed Shri Dilip Bandopadhyay, the Joint Commissioner of Police (Intelligence), Special Branch, Kolkata that his office does not have the

¹'CBFC'

jurisdiction to seek ‘advance’ private screening prior to the release for a “few senior officials” on a “priority basis” as sought. No further communication was received from the Kolkata police. A

5. The first petitioner proceeded with the release of the film on 15 February 2019. The first show was at 11.00 am. Another show was at 5.50 pm for the press, cast and crew. According to the petitioners, the film was running to packed houses by Saturday, 16 February 2019. The grievance is that within a day of its release in Kolkata and a few districts of West Bengal an overwhelming majority of the exhibitors abruptly took the film off their screens on 16 February 2019 without a communication from the producers. Tickets were being refunded to the viewers without any reason being offered by the exhibitors. The petitioners have averred that there was not even a single reported incident predating concerns of law and order. When the director, together with some members of the cast and crew, visited the exhibitor at Inox South City to inquire why tickets were being refunded to viewers, the exhibitor cited unnamed “higher authorities” who they said had instructed them to take the film off the screens. Several exhibitors claimed that Station House Officers from the local police station had called or visited them and informed them in no uncertain terms to cease screening the film with immediate effect, failing which they would have to face the risk of damage to their cinema halls. B C D E

6. By the time that this Court was moved in the exercise of its original jurisdiction, the film had been taken off the screens which fall under the jurisdiction of the Kolkata police. Of forty eight exhibitors and sixty screens, only two in upcountry districts of West Bengal continued to exhibit the film. The unceremonious pulling out of the film received a considerable degree of press coverage in the print media. Among the articles were those in the daily editions of: (i) Ananda Bazar Patrika dated 17.02.2019; (ii) The Telegraph dated 17.02.2019; (iii) Pratidin dated 17.02.2019; (iv) The Times of India dated 17.02.2019; and (v) Aaj Kaal dated 17.02.2019. On 16 February 2019, the petitioners addressed a communication to the exhibitors and to Eastern India Motion Pictures Association which represents the producers, directors, exhibitors, film laboratories and studio owners. E-mails were addressed to the large exhibitors – Inox movies, PVR cinemas and Cinepolis seeking explanation for the abrupt withdrawal of the film. No response was received. The F G

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A petitioners also addressed a communication on 19 February 2019 to the Police Commissioner, Kolkata seeking a clarification on whether the police had instructed exhibitors to refrain from screening the film. The petitioners sought an assurance that their fears were misplaced. These efforts were met with silence. In sum and substance, the apprehension of the petitioners is that there has been an unlawful interference with the public exhibition of the film by an organized and concerted effort on the part of the authorities of the State including the Intelligence Unit of the police in West Bengal. The petitioners have brought focus upon the consternation expressed by doyens of theatre, literature and films in West Bengal. These protests from a cross section of personalities have been described in the petition:

“Several eminent personalities have strongly condemned the removal of the Film from the halls of Kolkata. They include Soumitra Chatterjee renowned poet, theatre and veteran film actor in Pather Panchali and several other Bengali films, winner of the Dadasaheb Phalke award, Aparna Sen, actor, screenwriter, filmmaker and director of well known films including 36 Chowringee Lane, Budhadeb Dasgupta, renowned poet and contemporary Bengali film-maker, Director, Bibhash Chakraborty well known Bengali theatre personality. Several actors of contemporary Bengali cinema have staged protests and demonstrations in Kolkata and they include Sabhyasachi Chakraborty (of Feluda fame), Koushik Sen, Soheg Sen, Chandan Sen, Deboleena Datta, Chandrayee Ghosh, Barun Chanda and several others including the director of the film, Anik Datta, the co-script writer Utsav Mukherji. There have been several meetings and talks to decry the obstruction posed to the freedom of speech and expression of cinema artists, directors and producers. There have been open letters addressed to the State despite which there has been no response.”

In this backdrop, recourse to the jurisdiction of this Court has been taken to protect the fundamental right to free speech and expression of the petitioners and the audience, besides the rights to personal liberty and to the protection of business.

7. The basis on which the jurisdiction has been invoked is that:

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- (i) The film having received certification for public exhibition by CBFC, the obstruction caused by the state of West Bengal through its Home Department and the Kolkata police amounts to a subversion of the rule of law; A
- (ii) These acts of obstruction to the public exhibition of the film amount to a defiance of the law declared by this Court according to which a film which has been cleared by the CBFC cannot be subject to censorship by the state nor can the state raise issues of law and order to restrain its exhibition; B
- (iii) The attempt by the functionaries of the state to interfere with the exhibition of the film is destructive of the freedom of speech and expression; C
- (iv) CBFC as an expert body is entrusted with the statutory power under the Cinematograph Act to determine whether a film should be certified for public viewing and constitutes the sole repository of that power; and D
- (v) The extra constitutional method which has been adopted by the state and its agencies is destructive of the fundamental rights of the petitioners, besides being contrary to the legal principles enunciated in the decisions of this Court in **Prakash Jha Productions v Union of India**², **Manohar Lal Sharma v Sanjay Leela Bhansali**³ and **Via Com 18 Media Pvt Ltd v Union of India**⁴, among others. The petitioners invoke the Mandamus of the Court to (i) restrain the first, second and third respondents from obstructing the unhindered exhibition of the film; (ii) abide by the certificate issued by the CBFC; (iii) provide police protection to those involved in the exhibition of the film and the audience at the theatres; and (iv) uphold the rule of law and preserve law and order for unhindered exhibition and viewing of the film. E
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8. When the petition came up for hearing before this Court on 15 March 2019, notice and interim directions were issued directing the Chief Secretary and the Principal Secretary of the Department of Home in the Government of West Bengal to ensure that no obstruction or restraint G

²(2011) 8 SCC 372

³(2018) 1 SCC 770

⁴(2018) 1 SCC 761

A of any kind whatsoever is imposed on the film being screened in the theatres. The interim direction was in the following terms:

B “We specifically direct the Chief Secretary and the Principal Secretary, Department of Home, Government of West Bengal to ensure that no obstruction or restraint of any kind whatsoever is imposed on the viewing of the film or on the film being screened in theatres.

C We direct the Chief Secretary, the Principal Secretary, Department of Home and the Director General of Police, State of West Bengal to ensure that adequate arrangements for security are made to facilitate the screening of the film and to ensure that the viewers and the audience are not endangered and there is no danger to the property of the theatres where the film is being or will be screened.”

D The justification for the above interim directions was set out in the interim order:

E “Repeatedly, in decisions of this court, it has been held that once a film has been duly certified by CBFC, it is not open to any authority either of the State Government or otherwise to issue formal or informal directions preventing the producer from having the film screened. Such actions of the State directly impinge upon the fundamental right to the freedom of speech and expression guaranteed under Article 19(1) of the Constitution of India.”

F 9. When the petition came up on 25 March 2019, Dr Abhishek Manu Singhvi, learned senior counsel appearing on behalf of the respondents informed the Court that in pursuance of the earlier directions, the Additional Director General and Inspector General of Police (Law and Order), West Bengal, addressed letters dated 19 March 2019 to (i) District Superintendents of Police; (ii) Commissioners of Police (including of Kolkata); (iii) Range Deputy Inspectors General of Police; (iv) Zonal Inspectors General of Police; and (v) the Additional Director General of Police, South Bengal, forwarding a copy of the order of this Court for “information and necessary compliance”. A similar communication dated 18 March 2019 was addressed by the Principal Secretary, Department of Home, Government of West Bengal to the Commissioner of Police, Kolkata for compliance with the order of this Court. A statement was also made before this Court on behalf of the respondents that neither

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has the film been banned by the Government of West Bengal nor has recourse been taken to the powers contained in Section 6 of the West Bengal Cinemas (Regulation) Act 1954 or Section 13 of the Cinematograph Act 1952. Dr Singhvi filed a chart indicating that the film was presently running in ten theatres. Mr Sanjay Parikh, learned counsel appearing on behalf of the petitioners submitted that the chart indicated that all the theatres where the film was being screened were situated outside Kolkata. Taking note of the grievance that following the communication addressed on 11 February 2019 by the Joint Commissioner of Police (Intelligence) of the Special Branch, the theatres where the film was being exhibited were compelled to stop screening the film, this Court observed:

“We are of the view that the Joint Commissioner of Police acted beyond the scope of his legitimate authority in directing the producer to arrange for a private screening of the film for a few senior officials, apprehending that the screening of the film may lead to “political law and order issues”.

The State of West Bengal is duty bound, once the film has been certified by the Central Board of Film Certification (“CBFC”) to take necessary measures to protect the fundamental right to free speech and expression of the producer and the director and, for that matter, of the viewers to see the film unrestrained by extra constitutional restraints.”

Accordingly, this Court issued directions to the (i) Joint Commissioner of Police to forthwith withdraw the communication that was addressed by him to the producer of the film on 11 February 2019; and (ii) Principal Secretary, Department of Home and Director General of Police, West Bengal to immediately issue communications to all the theatres where the film was being originally screened intimating them that there is no ban on the screening of the film and that the state shall in compliance with the order passed by this Court on 15 March 2019, take necessary steps for protecting the properties of the theatre owners and the safety of the members of the public who wish to view the film. This Court called for affidavits of compliance from the Principal Secretary, Department of Home, Government of West Bengal and the Director General of Police noting that “we will hold them accountable to ensure compliance with the above direction”.

A 10. In pursuance of the directions which were issued on 25 March
2019, the Director and Inspector General of Police, State of West Bengal
has filed an affidavit stating that he had issued letters to all exhibitors
and theatre owners where the film was being originally screened on 27
B screening of the film and the State government shall take necessary
steps for protecting the theatres exhibiting the film and for ensuring the
safety of the members of the public who wish to view the film. The
communications have been addressed to fifty-one establishments. The
Principal Secretary, Home has also filed a compliance affidavit enclosing
C a copy of the communication addressed to all theatres where the film
was being originally screened. On 25 March 2019, the Joint Commissioner
of Police (Intelligence), Kolkata has withdrawn the letter addressed to
the producer of the film on 11 February 2019.

11. Now it is in this background, that the grievance which has
been addressed in the proceedings before this Court has to be assessed.

D 12. From the narration of facts, it has become evident that
Bhobishyoter Bhoot was released in theatres in West Bengal, both
within and outside Kolkata on 15 February 2019. The release of the film
was preceded a few days earlier by a letter on 11 February 2019 of the
Joint Commissioner of Police (Intelligence) in the Special Branch to the
E producer seeking “a private screening of the movie for a few senior
officials at this end at the earliest”. This was because, as he described,
the inputs his office had received “that the contents of the film may hurt
public sentiments which may lead to political law and order issues”.
The film was pulled down by a majority of the theatres and out of forty
F eight exhibitors, only two continued to display the film. This Court has
been informed by the State of West Bengal that it has not taken recourse
to its powers either under the West Bengal Cinemas (Regulation) Act
1954 or the Cinematograph Act 1952. Yet, barring a couple of exceptions,
all the theatre owners and exhibitors pulled the film off the radar. One
of them, INOX Leisure Ltd eventually addressed a communication on 4
G March 2019 to the producer stating that they were “directed by the
authorities to discontinue screening” of the film “keeping in mind the
interest of the guests”. In this backdrop, the legitimate grievance before
the Court is that absent a recourse to the exercise of statutory power,
the state and its agencies have resorted to extra constitutional means to
abrogate the fundamental rights of the producer, director and the viewers.

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13. Commitment to free speech involves protecting speech that is palatable as well as speech that we do not want to hear. A declaration attributed to Voltaire: “I despise what you say but will defend to the death your right to say it” encapsulates the essence of the protection of free speech. Protection of the freedom of speech is founded on the belief that speech is worth defending even when certain individuals may not agree with or even despise what is being spoken.⁵ This principle is at the heart of democracy, a basic human right, and its protection is a mark of a civilized and tolerant society.”⁶

The reasons to defend free speech are both moral and instrumental. Moral arguments for the defense of free speech range from a conception of what it is to be a person, to the idea that curtailments of speech and expression are an infringement of an individual’s autonomy or dignity—either as a speaker or a listener, or both.⁷ These arguments are based on the intrinsic value of free speech for human beings rather than the measurable consequences that might flow from preserving it.⁸ The instrumental argument on the other hand is based on the notion that preserving free speech produces tangible benefits, whether in terms of increased personal happiness, a flourishing society, or even economic benefits.”⁹

John Stuart Mill, one of the most influential philosophers and intellectuals of the nineteenth century, presented one of the first and perhaps what is still the most famous liberal defense of free speech.¹⁰ His classical book *On liberty* continues to dominate philosophical debate about free speech:

“Mill defends the view that extensive freedom of speech is a precondition not just for individual happiness, but for a flourishing society. Without free expression, humankind may be robbed of ideas that would otherwise have contributed to its development. Preserving freedom of speech maximizes the chance of truth emerging from its collision with error and half-truth. It also

⁵Nigel Warburton, *Free Speech: A Very Short Introduction* (Oxford University Press 2009), at Page 27

⁶Id.

⁷*Supra* note 6, at Page 59

⁸Id

⁹Id, at Page 57.

¹⁰Freedom of Speech, Stanford Encyclopaedia of Philosophy, available at <https://plato.stanford.edu/entries/freedom-speech/#HarPriFreSpe>

- A reinvigorates the beliefs of those who would otherwise be at risk of holding views as dead dogma.”¹¹

- This powerful defense of freedom of speech however is also accompanied by a limitation on free expression, commonly referred to as the “harm principle”, which states that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”¹² While the application of the liberal principles developed by Mill extends to several spheres, the sphere of free speech and expression was regarded to be particularly important to him due to its connection with truth and development.¹³ He emphasises the value of free speech in the following words:

- D “Were an opinion a personal possession of no value except to the owner, if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is that it is robbing the human race—those who dissent from the opinion still more than those who hold it.”¹⁴

- E Ronald Dworkin argued that a government without extensive freedom of speech would lack legitimacy and should therefore not be called “democratic”:

- F “Free speech is a condition of legitimate government. Laws and policies are not legitimate unless they have been adopted through a democratic process, and a process is not democratic if government has prevented anyone from expressing his convictions about what those laws and policies should be.”¹⁵

- Dworkin conceptualizes democracy not just as a formalised structure for decision-making but as a constitutional concept that allows the participation of all individuals, including minorities with potentially

G ¹¹*Supra* note 6, at Page 68

¹²Freedom of Speech, Stanford Encyclopaedia of Philosophy, available at <https://plato.stanford.edu/entries/freedom-speech/#HarPriFreSpe>

¹³*Supra* note 6, at Page 73.

¹⁴*Supra* note 6, at Page 89.

H ¹⁵Ronald Dworkin, “The Right to Ridicule”, New York Review of Books, 23 March 2006.

unconventional views.¹⁶ This notion of democracy is inconsistent with the idea of the state which restricts access to public debate, as such restrictions would fetter the understanding of democracy as a continuous process that can be shaped by all in society.¹⁷

A

Satire is a literary genre where “topical issues” are “held up to scorn by means of ridicule or irony.”¹⁸ It is one of the most effective art forms revealing the absurdities, hypocrisies and contradictions in so much of life. It has the unique ability to quickly and clearly make a point and facilitate understanding in ways that other forms of communication and expression often do not. However, we cannot ignore that like all forms of speech and expression, satirical expression maybe restricted in accordance with the restrictions envisaged under Article 19(2) of the Constitution. For example, when satire targets society’s marginalized, it can have the power to confirm and strengthen people’s prejudices against the group in question, which only marginalizes and disenfranchises them more.

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On 9 April 1980, James Baldwin engaged in a conversation with Chinua Achebe (Conversations with James Baldwin edited by Fred Stanley and Louis H Pratt). Achebe posits that art has an abiding connect with society:

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“Art has a social purpose [and] art belongs to the people. It’s not something that is hanging out there that has no connection with the needs of man. And art is unashamedly, unembarrassingly, if there is such a word, social. It is political; it is economic. The total life of man is reflected in his art.”¹⁹

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Albert Camus in his essays titled “Resistance, Rebellion and Death” makes a profound statement of the connect between art and freedom:

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¹⁶Eric Barendt, *Freedom of Speech*, (2nd Edition, OUP, 2005) at pgs 18-19 as cited in Aoife O’Reilly, *In Defence of Offence: Freedom of Expression, Offensive Speech, and the Approach of the European Court of Human Rights*, 19 *Trinity C.L. Rev.* 234 (2016) .

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¹⁷Id.

¹⁸Madhavi Goradia Divan, *Facets of Media Law* (Eastern Book Company 2013) at Page 154.

¹⁹Conversations with James Baldwin, University Press of Mississippi, 30 January 1989, (Fred L. Standley and Louis H. Pratt Eds).

H

A “Art, by virtue of that free essence I have tried to define, unites
 whereas tyranny separates. It is not surprising, therefore, that art
 should be the enemy marked out by every form of oppression. It
 is not surprising that artists and intellectuals should have been the
 first victims of modern tyrannies... Tyrants know there is in the
 B work of art an emancipatory force, which is mysterious only to
 those who do not revere it. Every great work makes the human
 face more admirable and richer, and this is its whole secret. And
 thousands of concentration camps and barred cells are not enough
 to hide this staggering testimony of dignity. This is why it is not
 true that culture can be, even temporarily, suspended in order to
 C make way for a new culture... There is no culture without
 legacy... Whatever the works of the future may be, they will
 bear the same secret, made up of courage and freedom, nourished
 by the daring of thousands of artists of all times and all nations.”²⁰

D Simone De Beauvoir tells us how every artist, situated in the
 present uses her connect with reality to transcend social existence:

E “In order for the artist to have a world to express he must first be
 situated in this world, oppressed or oppressing, resigned or
 rebellious, a man among men. But at the heart of his existence he
 finds the exigence which is common to all men; he must first will
 freedom within himself and universally; he must try to conquer it:
 in the light of this project situations are graded and reasons for
 acting are made manifest.”²¹

F 14. A catena of decisions of this Court have emphasised the value
 of freedom of speech and expression in our democracy. In one of the
 first constitutional cases concerning the freedom of speech and
 expression, **Romesh Thapar v. State of Madras**,²² it was observed:

G “Thus, very narrow and stringent limits have been set to permissible
 legislative abridgment of the right of free speech and expression
 and this was doubtless due to the realisation that freedom of speech
 and of the press lay at the foundation of all democratic
 organizations, for, without free political discussion, no public

²⁰Albert Camus and Justin O’Brien, *Resistance, Rebellion, and Death*, Random House, New York (1960).

²¹Simone De Beauvoir, *The Ethics of Ambiguity*, Bernard Frechtman (Translator).

²²AIR 1950 SC 124

education, so essential for the proper functioning of the processes of popular Government, is possible.” A

In **LIC v. Manubhai Shah** ²³ a two-judge Bench of this Court adjudicated upon two appeals which raised a common question of law concerning censorship of content by state-controlled entities. The first appeal related to an academic publication criticizing Life Insurance Corporation of India’s (“LIC”) schemes. While the reply to the paper had been published in the magazine run by the LIC, the rejoinder by the author was not published. The second appeal arose from Doordarshan’s refusal to broadcast a documentary film based on the Bhopal Gas Tragedy. The Court set aside the decision of both these state-controlled entities, noting that there is a higher burden on publications run by public funds to reject content only on valid grounds. Justice A M Ahmadi (as the learned Chief Justice then was) held thus: B C

“8... Every citizen of this free country, therefore, has the right to air his or her views through the printing and/or the electronic media subject of course to permissible restrictions imposed under Article 19(2) of the Constitution. The print media, the radio and the tiny screen play the role of public educators, so vital to the growth of a healthy democracy. Freedom to air one’s views is the lifeline of any democratic institution and any attempt to stifle, suffocate or gag this right would sound a death-knell to democracy and would help usher in autocracy or dictatorship. It cannot be gainsaid that modern communication mediums advance public interest by informing the public of the events and developments that have taken place and thereby educating the voters, a role considered significant for the vibrant functioning of a democracy. Therefore, in any set-up, more so in a democratic set-up like ours, dissemination of news and views for popular consumption is a must and any attempt to deny the same must be frowned upon unless it falls within the mischief of Article 19(2) of the Constitution...” D E F

In **Gajanan Visheshwar Birjur v. Union of India**,²⁴ the petitioner challenged the confiscation of books containing the writings of Mao Zedong which were imported from China under the provisions of the G

²³(1992) 3 SCC 637

²⁴(1994) 5 SCC 550

A Customs Act. The Court noted that the show-cause notices as well as the final orders did not contain any specifications to indicate as to why the confiscation was warranted under the notification. Speaking for a two-judge Bench of this Court, Justice Jeevan Reddy opined:

B “10. ...we must express our unhappiness with attempts at thought control in a democratic society like ours. Human history is witness to the fact that all evolution and all progress is because of power of thought and that every attempt at thought control is doomed to failure. An idea can never be killed. Suppression can never be a successful permanent policy. Any surface serenity it creates is a false one. It will erupt one day. Our Constitution permits a free trade, if we can use the expression, in ideas and ideologies. It guarantees freedom of thought and expression — the only limitation being a law in terms of clause (2) of Article 19 of the Constitution. Thought control is alien to our constitutional scheme...”

D In **S. Rangarajan v. P. Jagjivan Ram**,²⁵ a Division Bench of the Madras High Court had revoked the U-Certificate (“suitable for all ages”) granted to a Tamil film *Ore Oru Gramathile* dealing with the issue of reservation. Justice Jagannatha Shetty on behalf of a three-judge Bench of this Court, emphasised upon the positive duty of the state to protect the freedom of speech and expression thus:

E “We want to put the anguished question, what good is the protection of freedom of expression if the State does not take care to protect it? If the film is unobjectionable and cannot constitutionally be restricted under Article 19(2), freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence. That would tantamount to negation of the rule of law and a surrender to blackmail and intimidation. It is the duty of the State to protect the freedom of expression since it is a liberty guaranteed against the State. The State cannot plead its inability to handle the hostile audience problem. It is its obligatory duty to prevent it and protect the freedom of expression.”

G The Court also considered that the film had been already been approved by two Revising Committees:

“In this case, two Revising Committees have approved the film. The members thereof come from different walks of life with

H ²⁵(1989) 2 SCC 574

variegated experiences. They represent the cross-section of the community. They have judged the film in the light of the objectives of the Act and the guidelines provided for the purpose. We do not think that there is anything wrong or contrary to the Constitution in approving the film for public exhibition.” A

The Court concluded that the freedom of speech and expression could be restricted only under the limited circumstances in Article 19(2): B

“Freedom of expression which is legitimate and constitutionally protected, cannot be held to ransom, by an intolerant group of people. The fundamental freedom under Article 19(1)(a) can be reasonably restricted only for the purposes mentioned in Articles 19(2) and the restriction must be justified on the anvil of necessity and not the quicksand of convenience or expediency. Open criticism of Government policies and operations is not a ground for restricting expression. We must practice tolerance to the views of others. Intolerance is as much dangerous to democracy as to the person himself.” C D

In D.C. Saxena v. Hon’ble The Chief Justice of India²⁶, Justice K Ramaswamy, who delivered the opinion of the Court, opined thus:

“30. Equally, debate on public issues would be uninhibited, robust and wide open. It may well include vehement, sarcastic and sometimes unpleasant sharp criticism of government and public officials. Absence of restraint in this area encourages a well-informed and politically sophisticated electoral debate to conform the Government in tune with the constitutional mandates to return a political party to power. Prohibition of freedom of speech and expression on public issues prevents and stifles the debate on social, political and economic questions which in the long term endangers the stability of the community and maximises the source and breeds for more likely revolution.” E F

In **KM Shankarappa v. Union of India**,²⁷ the vires of Section 6(1) of the Cinematograph Act, 1952 was challenged. The section enabled the Central Government to pass any order it may deem fit in relation to G

²⁶(1996) 5 SCC 216

²⁷(2001) 1 SCC 582

A any film which was pending before or decided by the Board or the Appellate Tribunal constituted under the Act, giving the Central Government the power to review or revise the decisions of the Board or the Tribunal. The Court rejected the argument that it was necessary for the Central Government to retain such a power due to “public resentment” towards certain films leading to law and order situations, after the film had been cleared by the Board or Tribunal. A two-judge Bench of this Court held:

C “We fail to understand the apprehension expressed by the learned counsel that there may be a law and order situation. Once an expert body has considered the impact of the film on the public and has cleared the film, it is no excuse to say that there may be a law and order situation. It is for the State Government concerned to see that law and order is maintained. In any democratic society there are bound to be divergent views. Merely because a small section of the society has a different view, from that as taken by the Tribunal, and choose to express their views by unlawful means would be no ground for the executive to review or revise a decision of the Tribunal. In such a case, the clear duty of the Government is to ensure that law and order is maintained by taking appropriate actions against persons who choose to breach the law.”

E In **Director General, Directorate General of Doordarshan v. Anand Patwardhan**,²⁸ a documentary film against communal violence was rejected for telecast on Doordarshan. Part I was of the film had been granted ‘U’ certificate and Part II was given ‘A’ certificate by the Censor Board. Speaking for a two-judge Bench of this Court, Justice A R Lakshmanan held:

F “44. In our opinion, the respondent has a right to convey his perception on the oppression of women, flawed understanding of manhood and evils of communal violence through the documentary film produced by him...The freedom of expression, which is legitimate and constitutionally protected, cannot be held to ransom on a mere fall of a hat. The film in its entirety has a serious message to convey and is relevant in the present context. Doordarshan being a State controlled agency funded by public funds could not have denied access to screen the respondent’s documentary except on specified valid grounds.”

H ²⁸(2006) 8 SCC 433

It was further held:

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“45. The refusal of the appellants to telecast the film in the current case in the face of unanimous recommendations by their own committees set up in accordance with the direction of this Court is an issue to be addressed apart. The High Court of Bombay has not substituted its discretion for that of the authorities. On the contrary, the High Court has ruled that when the decision-making process has itself resulted in the recommendations to telecast, it is not open to Doordarshan to find other means just to circumvent this recommendation...”

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In **Anand Chintamani Dighe v. State of Maharashtra**²⁹, the Government of Maharashtra had issued a notification declaring that every copy of the play titled “Mee Nathuram Godse Boltoy” and its translations in Gujarati or any other language would stand forfeited to the Government. In an order of the Bombay High Court granting a stay on the notification, one of us (DY Chandrachud, J.) opined thus:

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“6..the strength of our society and the stability of the constitutional structure lies in its ability to accommodate a diversity of view points and cultures. The maturity of a society committed to a democratic way of life lies as much as in its respect for those who conform as in its deference for those who do not.

D

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The Constitution preserves a healthy tradition of respect for the believer and the nonbeliever, the conservative as well as the liberal, those on the core as well as those on the periphery; the agnostic and heretic. The process of thought control is alien to a set of democratic values. It would indeed be a dangerous trend in society if the fundamental rights of those who espouse views which run contrary to the views held by the majority are to be trampled upon because they do not conform to the prevailing trend of thought.”

F

The Court held:

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“15...the Constitution protects the creative expression of those engaged in human endeavour in the areas of fine art and culture. Article 19(1)(a) is, however, not the only article to which the protection of literary activities can be traced...Coupled with this

²⁹2001 Cri LJ 2203

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A is the right of the wider society and the community to know, to receive information and be informed. The right to information, or the right to know is an intrinsic facet of the right to life under Article 21 of the Constitution. An informed citizenry must have the means to receive news and information, and apart from this, to receive thoughts, perceptions and ideas. Those perceptions and viewpoints may not be in conformity with widely held social, economic and political beliefs. A diversity of viewpoint promotes an ability on the part of the society to exercise a right of choice, a right to decide and the right to form perceptions which lie at the core of the functioning of a democratic system...”

C In **F.A. Picture International v. Central Board of Film Certification, Mumbai**,³⁰ the petitioner was denied certification by the Central Board of Film Certification to exhibit a film on the grounds that the film was “full of gory visuals of violence and gruesome killings” and that “certain characters have definite resemblance with the real life personalities”. A Division Bench of the Bombay High Court quashed the orders of the Central Board of Film Certification (CBFC) as well as the appellate authority. One of us (D Y Chandrachud, J.) observed:

E “12...Films which deal with controversial issues necessarily have to portray what is controversial. A film which is set in the backdrop of communal violence cannot be expected to eschew a portrayal of violence... The director has available to him all the tools of trade. Satire, humor and the ability to shock each one out of the mundane levels of existence is what embellishes art forms. The Constitution protects the right of the artist to portray social reality in all its forms. Some of that portrayal may take the form of questioning values and mores that are prevalent in society. The power of literature lies in the ability of the writer to criticise commonly held beliefs and ordinary human foibles. Equally, a writer, producer and director of a film have the discretion to depict the horrors of social reality...”

G The Court further noted:

“The certifying authority and the Tribunal were palpably in error in rejecting the film on the ground that it had characters which bear a resemblance to real life personalities. The constitutional

H ³⁰AIR 2005 Bom 145

protection under Article 19(1)(a) that a filmmaker enjoys is not conditioned on the premise that he must depict something which is not true to life. The choice is entirely his. **Those who hold important positions must have shoulders which are broad enough to accept with grace a critique of themselves. Critical appraisal is the cornerstone of democracy and the power of the film as a medium of expression lies in its ability to contribute to that appraisal.**

(Emphasis supplied)

In **Vishesh Verma v. State of Bihar**,³¹ a Single Judge of the Patna High Court quashed criminal proceedings instituted against persons involved in the production of a television serial. It was alleged that the characters in the serial bore a resemblance to the family of a former Chief Minister of Bihar and the serial was an attempt to defame them. Justice Navaniti Prasad Singh held thus:

“9...a creative artist is free to project the picture of society or the political system or the person in politics in the manner he perceives. They can make pungent political satire of political leaders or system subject of course to decency, morality and Public Order. Legitimate creation by a creative artist cannot be gagged or suppressed on the ground of intolerance of a section of super sensitive people not used to hearing descent. This is the essence of democracy and we profess to live in a democratic country. People and more so, Courts (including Judicial Magistrates) should realize this.”

In **Maqbool Fida Hussain versus Rajkumar Pandey**,³² (“Maqbool Fida Hussain”), the Petitioner was charged with obscenity and hurting religious sentiments for his painting which depicted India as a nude woman with her hair flowing in the form of Himalayas. Justice Sanjay Kishan Kaul (as he then was) upheld the artistic freedom of the painter, noting thus:

“...Pluralism is the soul of democracy. The right to dissent is the hallmark of a democracy. In real democracy the dissenter must feel at home and ought not to be nervously looking over his shoulder fearing captivity or bodily harm or economic and social sanctions for his unconventional or critical views. There should

³¹(2008) 56 (2) BLJR 1773

³²2008 Cri LJ 4107

A be freedom for the thought we hate. Freedom of speech has no meaning if there is no freedom after speech. The reality of democracy is to be measured by the extent of freedom and accommodation it extends.”

B In **Prakash Jha Productions v. Union of India**,³³ the UP Government sought to ban the screening of the film ‘Aarakshan’ dealing with the issue of reservation, after it had been certified U/A by the Censor Board constituted under the Cinematograph Act. Notwithstanding the certificate issued by the Board, the UP Government issued an order under Section 6(1) of the Uttar Pradesh Cinemas (Regulation) Act, 1955 suspending exhibition of the film on the ground that it was likely to cause a breach of peace. Following the ruling in **K.M. Shankarappa v. Union of India** (supra), a two-judge Bench of this Court held:

D “23. It is for the State to maintain law and order situation in the State and, therefore, the State shall maintain it effectively and potentially. Once the Board has cleared the film for public viewing, screening of the same cannot be prohibited in the manner as sought to be done by the State in the present case. As held in **K.M. Shankarappa** (Supra) it is the responsibility of the State Government to maintain law and order.”

E In **S. Tamilselvan versus State of Tamil Nadu**,³⁴ a Tamil novel was alleged to narrate conventions that were ‘non-existent and defamatory’ to the residents of a certain area. A Writ Petition was filed before the Madras High Court, alleging that state officials had succumbed to the demands of extra-judicial elements and forced the author to withdraw unsold copies of the book and tender an unconditional apology. Speaking for a Division Bench of the Madras High Court, Justice Sanjay Kishan Kaul (as he then was) referred to the decision in **Maqbool Fida Hussain** (supra) and noted that there was a “requirement of positive measures of protection to be taken”. Taking into account the situation in the case at hand, the Court held thus:

G “180... In such simmering circumstances, it was the bounden duty of the State Government to ensure that the law and order situation does not go out of hand, but that ought not be achieved by placating anyone who seeks to take the law and order in his own hand at

³³(2011) 8 SCC 372

H ³⁴2016 SCC OnLine Mad 5960

the cost of the person who has peacefully expressed his/her view...and the authorities really were not neutral in the episode, but were possibly more concerned with the law and order scenario, as opposed to the freedom of expression of a single individual. A

181... We may also say that the State and the police authorities would not be the best ones to judge such literary and cultural issues, which are best left to the wisdom of the specialists in the field and thereafter, if need be, the Courts.” B

In **Viacom 18 Media Pvt Ltd. Versus Union of India**,³⁵ a three-judge Bench of this Court granted a stay on notifications and orders issued by some states banning the exhibition of the film ‘Padmavat’ and restrained other States from issuing similar orders and notifications, after the Central Board of Film Certification had granted certification. One of us (Justice Dipak Misra) (as the learned Chief Justice then was) held thus: C

“15... Once the parliamentary legislation confers the responsibility and the power on a statutory Board and the Board grants certification, non-exhibition of the film by the States would be contrary to the statutory provisions and infringe the fundamental right of the petitioners.” D

The Bench elucidated on the obligation of State authorities to maintain law and order when the film is being exhibited: E

“20. Keeping in view the fact situation, we have no hesitation in stating by way of repetition and without any fear of contradiction that it is the duty of the State to sustain the law and order situation whenever the film is exhibited, which would also include providing police protection to the persons who are involved in the film/in the exhibition of the film and the audience watching the film, whenever sought for or necessary.” F

15. An academic article expresses the problem with film censorship in India in the following words: G

“Film censorship in India exemplified the distinction and the tension between citizen and population that is a characteristic feature of contemporary democracy...though the discourse of democracy is predicated on the figure of the citizen and its corollaries of

³⁵(2018) 1 SCC 671

A autonomy, equal rights, and self-representation, the modernizing agendas of post-colonial nation-states like India presume populations which are the objects of government policy rather than as citizens...³⁶

B The approach of the authorities in the present case treats citizens as “subjects” denying them the capacity for autonomy and self-determination, by vesting in the government wide authority to decide the forms of expression that these “subjects” can access and be “trusted with having exposure to.”³⁷

C 16. The police are not in a free society the self-appointed guardians of public morality. The uniformed authority of their force is subject to the rule of law. They cannot arrogate to themselves the authority to be willing allies in the suppression of dissent and obstruction of speech and expression. The Joint Commissioner was not unmindful of the fact that the film had been slated for release within a few days of his communication in theatres across the city of Kolkata and the State. If there was any doubt whatever over the entitlement of the producers to have the film exhibited, it was laid to rest when the producers immediately informed him of the film being CBFC certified. The statutory authority to certify a film for public exhibition is vested in the CBFC under the provisions of the Cinematograph Act 1952. Sections 4, 5, 5A and 5B provided a statutory code for the examination and certification of films for public exhibition. Sub-section (1) of Section 5B³⁸ provides for the grounds on which a film may not be certified for public exhibition. An order refusing to grant certification is subject to the remedies stipulated

F ³⁶Ganti T.2009, ‘ The Limits of Decency and the Decency of Limits’, as cited in Gautam Bhatia, *Offend, Shock or Disturb: Free Speech under the Indian Constitution* (Oxford University Press 2016), at Page 180

³⁷Gautam Bhatia, *Offend, Shock or Disturb: Free Speech under the Indian Constitution* (Oxford University Press 2016), at Page 183

³⁸5B Principles for guidance in certifying films –

G (1) A film shall not be certified for public exhibition if, in the opinion of the authority competent to grant the certificate, the film or any part of it is against the interests of 1 (the sovereignty and integrity of India) the security of the State, friendly relations with foreign States, public order, decency or morality, or involves defamation of contempt of court or is likely to incite the commission of any offence.

H (2) Subject to the provisions contained in sub-section (1), the Central Government may issue such directions as it may think fit setting out the principles which shall guide the authority competent to grant certificates under this Act in sanctioning films for public exhibition.

in the Act. The State Act (Section 6³⁹ of the West Bengal Cinemas (Regulation) Act 1954) and the Central Act (Section 13⁴⁰ of the Cinematograph Act 1952) provide the conditions in which the state government, or as the case may be, the central government (or a local authority) may suspend the exhibition of a film, where it is likely to cause a breach of the peace. Any order which is issued under the terms of these statutory provisions is subject to statutory control as well as to the supervisory jurisdiction of the High Courts under Article 226 or, as the case may be, the original jurisdiction of this Court under Article 32. These statutes are to be interpreted in the rule of law framework. An excess

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³⁹Section 6 : Power of State Government or District Magistrate to suspend exhibition of films in certain cases

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(1) The State Government in respect of the whole of West Bengal or any part thereof, and a District Magistrate in respect of the area within his jurisdiction, may, if it or he is of

(2) Where an order under sub-section (1) has been issued by a District Magistrate, a copy thereof, together with a statement of the reasons therefor, shall forthwith be forwarded by the District Magistrate to the Commissioner of the Division comprising the district under the jurisdiction of the District Magistrate and such Commissioner may either confirm or discharge the order :

D

Provided that before confirming any such order, such Commissioner shall give to persons prevented from exhibiting the film, an opportunity of showing cause against such order.

(3) An order made under this section shall remain in force for a period of two months from the date thereof, but the State Government may, in the case of an order made by itself, and the Commissioner may, in the case of an order made by a District Magistrate and confirmed by him, if it or he is of opinion that the order should continue in force, direct that the period of suspension or prohibition shall be extended by such further period or periods as it or he thinks fit.

E

⁴⁰Section 13 : Power of Central Government or local authority to suspend exhibition of films in certain cases. 13.(1) The Lieutenant-Governor or, as the case may be, the Chief Commissioner, in respect of the [whole or any part of a Union territory] and the district magistrate in respect of the district within his jurisdiction, may, if he is of opinion that any film which is being publicly exhibited is likely to cause a breach of the peace, by order, suspend the exhibition of the film and during such suspension the film shall be deemed to be an uncertified film in the state, part or district, as the case may be.

F

(2) Where an order under sub-section (1) has been issued by the Chief Commissioner or a district magistrate, as the case may be, a copy thereof, together with a statement of reasons therefore, shall forthwith be forwarded by the person making the same to the Central Government, and the Central Government may either confirm or discharge the order.

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An order made under this section shall remain in force for a period of two months from the date thereof, but the Central Government may, if it is of opinion that the order should continue in force, direct that the period of suspension shall be extended by such further period as it thinks fit.

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- A or abuse of statutory power is amenable to constitutional guarantees which protect the citizen against arbitrary state action. The danger which this case exemplifies is the peril of subjecting the freedom of speech and expression of the citizen to actions which are not contemplated by the statute and lie beyond the lawful exercise of public power. All exercises of authority in pursuance of enabling statutory provisions are amenable to statutory remedies and are subject to judicial oversight under a regime of constitutional remedies. The exercise of statutory authority is not uncontrolled in a regime based on the rule of law. But what do citizens who have a legitimate right to exhibit a film confront when they are told that a film which is duly certified and slated for release is unceremoniously
- B pulled off the exhibiting theatres without the authority of law? Such attempts are insidious and pose a grave danger to personal liberty and to free speech and expression. They are insidious because they are not backed by the authority of law. They pose grave dangers to free speech because the citizen is left in the lurch without being informed of the causes or the basis of the action. This has the immediate effect of
- C silencing speech and the expression of opinion. Contemporary events reveal that there is a growing intolerance: intolerance which is unaccepting of the rights of others in society to freely espouse their views and to portray them in print, in the theatre or in the celluloid media. Organised groups and interests pose a serious danger to the existence of the right to free speech and expression. If the right of the play-wright, artist, musician or actor were to be subjected to popular notions of what is or is not acceptable, the right itself and its guarantee under the Constitution would be rendered illusory. The true purpose of art, as manifest in its myriad forms, is to question and provoke. Art in an elemental sense reflects a human urge to question the assumptions on which societal values may be founded. In questioning prevailing social values and popular
- D cultures, every art form seeks to espouse a vision. Underlying the vision of the artist is a desire to find a new meaning for existence. The artist, in an effort to do so, is entitled to the fullest liberty and freedom to critique and criticize. Satire and irony are willing allies of the quest to entertain while at the same time to lead to self-reflection. We find in the foibles of others an image of our own lives. Our experiences provide meaning to our existence. Art is as much for the mainstream as it is for the margins. The Constitution protects the ability of every individual citizen to believe as much as to communicate, to conceptualize as much as to share. Public power must be conscious of the fact that ours is a
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democracy simply because the Constitution recognizes the inalienable freedoms of every citizen. Power has been entrusted to the state by the people under a written Constitution. The state holds it in trust and its exercise is accountable to the people. The state does not entrust freedoms to the people: the freedoms which the Constitution recognizes are inseparable from our existence as human beings. Freedom is the defining feature of human existence. Freedoms are not subject to power. Public power is assigned by the people to government. Ours is a controlled Constitution, a Constitution which recognizes the fullest element of liberty and freedom and of the answerability of power to freedom. The views of the writer of a play, the metre of a poet or the sketches of a cartoonist may not be palatable to those who are criticized. Those who disagree have a simple expedient : of not watching a film, not turning the pages of the book or not hearing what is not music to their ears. The Constitution does not permit those in authority who disagree to crush the freedom of others to believe, think and express. The ability to communicate ‘ideas’ is a legitimate area of human endeavor and is not controlled by the acceptability of the views to those to whom they are addressed. When the ability to portray art in any form is subject to extra constitutional authority, there is a grave danger that fundamental human freedoms will be imperiled by a cloud of opacity and arbitrary state behaviour.

17. As this case indicates, a producer of a film which has been certified by the CBFC needs to embark upon meticulous arrangements including contracts for the exhibition of the film. The wielding of extra constitutional authority is destructive of legitimate expectations. Under the constitutional scheme, restrictions can only be imposed by or under a law which is made by the State. The State of West Bengal has informed the Court that it had not taken recourse to its statutory powers either under state or union legislation. If that be so, there has to be some explanation forthcoming before the Court why the film was simultaneously removed from the theatres, at one stroke, shortly after release. The apprehension of the petitioners that this was an action which followed on the letter dated 11 February 2019 of the Joint Commissioner of Police is not unfounded. The letter addressed by INOX to the producer specifically mentions that they were directed by the authorities to discontinue the screening in the ‘interest of the guests’. We have no manner of doubt that this was a clear abuse of public power. The police are entrusted with enforcing law. In the present case, the West Bengal police have overreached their statutory powers and have become

- A instruments in a concerted attempt to silence speech, suborn views critical of prevailing cultures and threaten law abiding citizens into submission.

18. The freedoms which are guaranteed by Article 19 are universal. Article 19(1) stipulates that all citizens shall have the freedoms which it recognises. Political freedoms impose a restraining influence on the state by carving out an area in which the state shall not interfere. Hence, these freedoms are perceived to impose obligations of restraint on the state. But, apart from imposing ‘negative’ restraints on the state these freedoms impose a positive mandate as well. In its capacity as a public authority enforcing the rule of law, the state must ensure that conditions in which these freedoms flourish are maintained. In the space reserved for the free exercise of speech and expression, the state cannot look askance when organized interests threaten the existence of freedom. The state is duty bound to ensure the prevalence of conditions in which of those freedoms can be exercised. The instruments of the state must be utilized to effectuate the exercise of freedom. When organized interests threaten the properties of theatre owners or the viewing audience with reprisals, it is the plain duty of the state to ensure that speech is not silenced by the fear of the mob. Unless we were to read a positive obligation on the state to create and maintain conditions in which the freedoms guaranteed by the Constitution can be exercised, there is a real danger that art and literature would become victims of intolerance. In the present case, we are of the view that there has been an unconstitutional attempt to invade the fundamental rights of the producers, the actors and the audience. Worse still, by making an example out of them, there has been an attempt to silence criticism and critique. Others who embark upon a similar venture would be subject to the chilling effect of ‘similar misadventures’. This cannot be countenanced in a free society. Freedom is not a supplicant to power.

19. This leads us to the issue of relief. By the orders of this Court dated 15 March 2019 and 25 March 2019 several directions were issued to the state of West Bengal, the Principal Secretary, Home and the Director General of Police. We maintain and confirm the directions which have been issued. We issue a Mandamus restraining the state from taking recourse to any form of extra constitutional means to prevent the lawful screening of the feature film *Bhobishyoter Bhoot*. The state shall specifically ensure that the properties of the theatre owners who exhibit the film are duly protected as are the viewers against attempts on their safety.

20. As a consequence of the pulling off of the film from the theatres where it was screened on 16 February 2019, the petitioners have suffered a violation of their fundamental right to free speech and expression and of their right to pursue a lawful business. This has been occasioned by the acts of commission and, in any event, of omission on the part of the state in failing to affirm, fulfill and respect the fundamental freedoms of the petitioners. We are clearly of the view that a remedy in public law for the grant of remedial compensation is required in the present case. We order and direct the respondents to pay to the petitioners compensation which we quantify at Rs 20 lakhs within a period of one month from the date of the present judgment.

21. The Writ Petition is allowed in the above terms. The petitioners shall be entitled to the costs of the proceedings quantified at Rs 1 lakh, to be paid over within one month.

Divya Pandey

Writ petition allowed.