

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO.110 OF 2023

REV. DR. BOLMAX FIDELIS

PEREIRA,

Son of Caetano N. Pereira

Aged 47 years, Indian National,

Catholic Priest, R/o. H.No.188,

Pimpolcotto Quepem, Goa.

Presently posted as the Parish

Priest of St. Francis Xavier

Church, Chicalim, Goa.

... PETITIONER

Versus

1. STATE OF GOA,

Through the Public Prosecutor,

High Court of Bombay at Goa,

Porvorim – Goa.

2. THE POLICE INSPECTOR,

Vasco-da-Gama Police Station,

Vasco-da-Gama, Goa.

3. SHRI KIRAN NAIK,

Resident of Mormugao,

South Goa, Goa.

... RESPONDENTS

Mr Vivian Braganza with Mr Richard Almeida, Advocates for the Petitioner.

Mr P. Faldessai, Additional Public Prosecutor for Respondent Nos.1 and 2.

Mr Kiran Naik, Respondent No.3 in person.

CORAM:

M. S. SONAK &

VALMIKI MENEZES, JJ.

Reserved on:

15th JANUARY 2024

Pronounced on: 12th APRIL 2024

JUDGMENT :

1. Heard learned Counsel for the parties.
2. Rule. The rule is made returnable immediately with the consent of and at the request of the learned Counsel for the parties.
3. The petitioner invokes the jurisdiction of this Court under Article 227 of the Constitution and Section 482 of CrPC and urges quashing of FIR No.52/2023 registered on 04.08.2023 at the Vasco Police Station, alleging commission of offences under Section 295-A and 504 of IPC.
4. The petitioner is a Catholic Priest who, at the time of the institution of this petition, was the Parish Priest of St. Francis Xavier Church at Chicalim, Goa. The petitioner has pleaded that he holds a PhD in Botany and teaches at St. Joseph College at Cortalim. The petitioner has pleaded that he is a musician and a part of a Gospel Band comprising Catholic Priests.
5. The petitioner has pleaded that in the course of his duties as a Parish Priest at St. Francis Xavier Church at Chicalim, Goa, he presides over 'mass and gives sermons'. He has pleaded that since the onset of the COVID-19 pandemic, such mass and sermons have been regularly broadcast on the YouTube channel "SFX Chicalim" for the benefit of parishioners and subscribers of the said channel.

6. The petitioner has pleaded that on 03.08.2023, the petitioner was made aware that the short clip of his recorded sermon broadcast on 30.07.2023 was circulated on social media by some miscreants alleging that some portions of this sermon were maligning Shri Chhatrapati Shivaji Maharaj. The petitioner has pleaded that accordingly, he immediately issued a clarification to the media, expressing regrets about his words being taken out of context and ascertaining that he had no intention to hurt anyone's sentiments. The petitioner has pleaded that on 04.08.2023, he learnt through social media about a complaint being filed against him. Accordingly, the petitioner immediately issued clarification and apology, broadcast live on various media platforms.

7. Based on the transcripts of this sermon, the impugned FIR was registered on 04.08.2023 under Crime No.52/2023 by the Vasco Police Station, alleging the commission of crimes under Sections 295-A and 504 of the IPC by the Petitioner. The petitioner applied for and was granted anticipatory bail by the Sessions Court.

8. The petitioner has eventually instituted this petition by contending that the contents of the complaint/FIR, even if taken at their face value, disclose no offence under Sections 295-A and 504 of the IPC. Accordingly, the petitioner has contended that the registration of this FIR and any attempt at investigations based thereon would constitute an abuse of the legal process.

9. Mr Vivian Braganza, the learned Counsel for the petitioner, submitted that the FIR discloses no commission of any offences under

Section 295-A and 504 of IPC. He submitted that there is nothing in the complaint or the sermon on which the complaint is based to suggest that the petitioner was involved in any deliberate and malicious act intended to outrage the religious feelings of any class of citizens of India by insulting religion or religious beliefs. Further, he submitted that there is nothing in the complaint/FIR to attract the ingredients of Section 504 of IPC. He submitted that the Petitioner's alleged utterances were protected under Article 19(1)(a) of the Constitution. He relied on several decisions, including the decision of this Court in *Sandeep Arjun Kudale V/s. State of Maharashtra through Public Prosecutor*¹ and *Sudheer Rikhari V/s. State of Goa And Ors.* (WPCR No.71/2020 decided on 09.04.2021). Based on all this, Mr Braganza submitted that the impugned FIR ought to be quashed.

10. Mr Faldessai learned Additional Public Prosecutor, submitted that the ingredients of Sections 295-A and 504 were fulfilled, and, therefore, there was no infirmity in the registration of the impugned FIR. He submitted that the veracity of the allegations cannot be tested at this stage. He submitted that the investigations were going on and there was sufficient material justifying the registration of the FIR. Accordingly, he submitted that this petition ought to be dismissed.

11. The third respondent, Mr Kiran Naik, appeared in person. He referred to his reply filed on 08.01.2024. He also placed on record a complaint dated 03.08.2023 signed by several people. Based on all this,

¹ 2023 SCC OnLine Bom 519

he submitted that Sections 295-A and 504 ingredients were made out. He further submitted that to him and his followers, Shri Chhatrapati Shivaji Maharaj was an inspiring figure whose life and teaching served as a guiding light in his spiritual journey and, therefore, Shivaji Maharaj holds the place of God. The third respondent also placed photographs of his Pooja room with an idol of Chhatrapati Shivaji Maharaj on record. He submitted that the Petitioner, by publicly stating that Shri Chhatrapati Shivaji Maharaj was not God but only a national Hero, had insulted the third respondent's religion. For all these reasons, Mr Kiran Naik submitted that this petition ought to be dismissed.

12. The rival contentions now fall for our determination.

13. The impugned FIR dated 04.08.2023 alleges the following:

“12. First Information contents (Brief Facts)

On DTPO mentioned above, the above accused person deliberately posted video of his Sermon, on the social media platform i.e. SFX Channel with intent to outrage religious feeling by making remark on Chatrapati Shivaji Maharaj which insulted/provoked the religious sentiments of people of Hindu religion and followers of Chatrapati Shivaji Maharaj. Hence offence U/s. 295A, 504 I.P.C.”

14. The impugned FIR is based on a transcript of the sermon delivered by the petitioner on 30.07.2023. The transcript in Konkani was orally delivered and transcribed on pages 74A to 74Q of the paper book. No dispute is raised by any of the respondents about the authenticity or correctness of this transcript. Similarly, the transcript is

translated into English and recorded on pages 74S to 74GG of the paper book. Again, there is no dispute about the authenticity or correctness of such a translation.

15. Since the impugned FIR is based upon the sermon, the English translation of the transcript is transcribed below for the convenience of reference:

“TRANSLATION OF THE SERMON (ENGLISH)”

Beloved Brothers & Sisters,

1. When the oppression of the early Christians first started in Rome, the Roman officials and administration closely observed who were the Christians influencing others through their words and actions, and moved to arrest them. The oppression of Christians it is said, resulted in much suffering and in many of them being martyred. One Roman official who apprehended a Christian, demanded that he deny Christ, failing which he would be beheaded and killed. In this way, they attempted to create a sense of fear amongst Christians and killed many of them. In this situation, one of the Christians, standing tall and firm, courageously replied "you can separate my head from my body but you will never be able to cut my heart and separate me from Jesus Christ."

2. Brothers & Sisters, to speak and actually live out such words calls for immense strength, unshakeable faith and courage. From the situation in those times, let us focus on earlier times during the era of prophet Jeremias, when the people of Israel, were beset with different kinds of problems and troubles during the existing political situation. The other kingdoms were joining together to occupy Israel as an allied force was needed to fulfil the goal.

3. In such an environment, Israel was carved into two. Unfortunately, the people were not willing to unite and stay together but preferred to form alliances with unbelievers. We see the same situation replicated amongst our political parties which are forming alliances. with whom are they forming alliances? When parties have a similar ideology, their allying together can perhaps be understood. But today it is apparent that ideology does not matter - it is only the objective of gaining power and the chair that matter. In pursuit of these objectives, the ideology is relegated to the bin. This was the same situation in those times. It was a warning to the people of Israel. If you do not change your lives, you will have to face bad times. What in their lives needed to be changed? In that society, there were all kinds of sins being committed. On one hand, they turned away from God. They worshipped different kinds of gods. And they accepted the belief that all gods were one. Today, amongst us, there are some people, a few Christians among them who say that "All gods are one. Any god can be approached, but we are Christians". This is what is said by some people amongst us. When through such persons the belief spread into the minds of others, then sins increased. The belief adopted was that the sins that were committed were not to be considered as sins.

4. Today amongst us perhaps, such an environment has been born and sins are no longer considered as sins. That is the reason we do not go for confession. The sins have become a way of life. What is the point of going for confession? After confessing today, the same sin is committed tomorrow. So what is the use of confession? This is the excuse used to avoid confession. And the same sins are being committed.

5. Brothers & sisters, in such situations, when troubles came upon a society, God did not forsake the society. He

sends a prophet like Jeremias. And we know the story of Jeremias. He was called by God when he was very young. Jeremias called to God "I am a child. I cannot speak. Why are you sending me?" Then God replied "You will not be speaking. But I will be speaking my words through you. Because of this, do not be afraid". And Jeremias' my brothers and sisters, accepted this vocation. Gathering the people together, he began to openly preach God's message. But this was not accepted by many people. A number of them ridiculed him, many hurt his feelings, some even tried to assault him. There was danger on every side. In today's reading, we hear that the people refused to accept God's message as propagated by Jeremias and continued with their old life style. In addition, when he spoke the truth, they even attempted to assault him. He was very troubled and hurt by the attitude of the people. On the one hand however, if the people did not accept God's message and change their mindset, he knew they would have to go into exile. Knowing this, Jeremias stepped forward aware that he ran the risk of being killed. Yet he persisted with the task assigned to him and kept giving out the message. While doing this however, he gave expression to the sadness in his heart. And in the book of Jeremias, we find his lamentations five times - not once, but five times. He called to God in his despondency asking "why is my life like this? Why are the people not listening? Why are my troubles increasing?" This is what we hear in today's reading - suffering on all sides, let's catch him, torture him and then he will lose strength and fail. Brothers & Sisters, Prophet Jeremias, was called when he was very young and was very old when he died. That's why his prophetic ministry is very lengthy. When he was delivering his messages he was greatly troubled by the behavior of the people hence his lamentations.

6. Today's theme is "If you acknowledge me before the people, I will acknowledge you before God. Do not be

afraid to say that you are my followers" These are the words that Jesus has spoken to us in today's reading. In the first reading that we have heard, the warnings and nudges given by God were not heard by the people. They continued to remain in their sins. Because of this, God sent them into exile. Before and even after the exile in Babylon, Jeremias continued giving messages of hope and encouragement to the people. When they went into exile he said "God is with you, God is merciful, God is protecting you, God is taking care of you". These are the words prophet Jeremias spoke to the people.

7. Brothers and Sisters, in today's second reading we hear St. Paul's letter to the Romans reminding them that because of the sins of one person – namely Adam, mankind had to bear the burden of punishment. The sufferings and troubles of this punishment are evident all around us. Jesus Christ came to wipe out all the wrongdoings, to redeem us from our sins and sufferings and lead us to his Father. And to fulfil this mission, he gave up his life on the cross.

8. Brothers and Sisters, this was for us. Those who believe will be blessed. Those who refuse to accept and listen, they will automatically receive nothing. Jesus came to save all the people in the world. That is why Jesus's word in today's gospel is "Fear not". What is our position today? Has the persecution started? Can we see it? Has it started? Are Christians being afflicted? Is there a movement against Christians? In Manipur, 250 churches of both communities have been burnt and destroyed. The riots between both the communities, resulted in a whole lot of damage. Who suffered most were the Christians. That is why the Christians of Manipur knelt on the roads and prayed to God asking for His mercy. We too need to pray for them and to feel their pain, because today Christianity is being attacked in an organized manner. And if after

seeing, we still remain blind, we will also experience bad days. Just as the warning was given to the people of Israel, God is cautioning us too. If we do not change our lives, and decide to continue to be engulfed in sin, and feel that the few sins we commit are not sins, - if I mention the list of sins, it will prolong the time. But we know. Different kinds of sins have entered our lives and we are indifferent - we do not consider them sins, our eyes and ears are closed. Sin does not mean only what an individual does.

9. Today our society is collectively committing social sins. Whatever bad is happening does not seem to bother us. We are silent. Whatever wrongdoings are occurring in society, we are often complicit because it is of benefit to us. In the reading of today, just as what happened to the people of Israel, who were united, then divided into two and instead of remaining together and protecting the community, made alliances with others for their own profit and I looked out only for their own interests, they fell into deep difficulties.

10. Brothers and sisters, today this is our situation. Hence there is need for caution and for us to be on our guard. If we refuse to pay heed to this, we will also have our turn to cry on bended knees on the roads. Already it is being said "What happened in Manipur, will happen in Goa next". Why is this being said? Not without reason. What is happening in Goa these days is that our government in a way, without any qualms has turned Hindutva vadi. Our Christian MLAs are also a part of this government but remain studiously silent. They cannot speak or see. If questioned, their immediate answer is "I don't know, I was not in Goa, I was out, I was busy with my family". They are not interested. They do not see, nor do they hear.

11. Brothers and sisters, in this context, where is our faith? What is to happen will take place. Where there is

persecution, trouble and suffering will have to be undergone. People will be imprisoned, some will have cases filed against them - we too who express our views could be targeted. But in this situation, where do we stand? What will happen to us, will we be decimated? Some have already started saying "now we are finished. There is nothing left". Such situations have also taken place many times from the beginning of Christianity. Many have tried to shake the faith of the people. "I am with you till the end of the world" said Jesus. Do we believe in his words? When Jesus says such words, it is for a reason. But no one will be able to shake the faith whether it is Shiv Sainik, or Shivaji's bhakts. These days we can see what is happening in Calangute. Things are started in one way but end up somehow with Christians being targeted. The Sarpanch there is Christian. **There are a few people for whom Shivaji has become God. Shivaji is not God. Shivaji is a hero - national hero yes. We need to honour and respect him. He has done a lot of good. He fought to save his people, to protect all the people. For doing this we need to respect him. He is a hero but not God. But today, the Hindutva vadis have come forward to make him god. In the past, I have said "Hindu khatre mein hai" today again I am repeating - Hindu khatre mein hai, because our Hindu brothers and sisters can they not see anything? We need to start speaking to our neighbours. We sometimes say "they will be upset or they may do something bad to us. We keep silent. We need to initiate dialogues with our Hindu brothers and sisters and seek their opinion. "Is Shivaji your God or a national Hero" ?' If he is a national hero, then he has to be regarded as a national hero and not God. And in this context what do they have to say? We need to dialogue, to discuss. Because everyone is silent today, an atmosphere of fear prevails.**

12. Brothers and sisters, if we remain suppressed, we will never be able to raise our heads. Faith will not end. Christian faith will not end. It will always remain. But will you and I remain in the faith? What is this based on? If you are afraid, then you are finished. You stay back and remain silent because of fear. But like those early Christians who said – Cut my neck.? Cut my body and separate my head? But you will never succeed in separating my heart from my God. You will not succeed in frightening us by doing these things. You will not be able to stop us from proclaiming our faith - this is what must be communicated to them. If we do not speak, they will not listen. And when they hear, they will not understand. And if after hearing, they still do not understand, then leave it to God.

13. Brothers and sisters today let us ask for grace. What do I mean? We do not have to make big speeches. Not everyone is equipped to give sermons or talks but we have to show that we are followers of Jesus through our way of life, in our homes, our society. There is no option. If we do not do that then we cannot call ourselves Christians because Jesus said “If in this world you are afraid or ashamed to acknowledge that you are my follower then before our Heavenly Father I too will be ashamed, of you.”

14. So today, at this celebration brothers and sisters, we will pray for this grace to live out our faith, to save one another and to clear our minds. And let us pray for those, especially our Hindu brothers and sisters (I feel happy to call them my Hindu brothers and sisters) who have fallen into this trap to be rescued. They need to be enlightened. We need to be the salt of the earth and the light of the world for them, to make them understand and take a stand. Let us pray for this grace. In this sacrifice, Jesus comes on this altar, when the bread and wine is changed. By receiving Him, let us become like Jesus.

16. The impugned FIR alleges the commission of offences under Sections 295-A and 504 of IPC. Accordingly, it would be appropriate to transcribe the said provisions, again for convenience of reference:

“295-A. Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs – Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of [citizens of India], [by words, either spoken or written, or by signs or by visible representations or otherwise], insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to [three years], or with fine or with both.

504. Intentional insult with intent to provoke breach of the peace – Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

17. In *Ramji Lal Modi V/s. State of U.P.*, the Constitutional validity of Section 295-A of the IPC was challenged on the ground that it contravened the right to free speech guaranteed by Article 19(1)(a) of the Constitution, and the restriction imposed by this provision was not a reasonable restriction protected under Article 19(2) of the Constitution. The Hon’ble Supreme Court rejected the challenge by explaining that Section 295-A of IPC does not penalise any and every

act of insult to or attempt to insult the religion or the religious beliefs of a class of citizens, but it penalises only those acts of insults to or those varieties of attempts to insult the religion or the religious beliefs of a class of citizens, which are perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class. Insults to religion offered unwittingly or carelessly or without any deliberate or malicious intention to outrage the religious feelings of that class do not come within the section. It only punishes the aggravated form of insult to religion when it is perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class.

18. In other words, in order for Section 295-A of IPC to pass the muster of Article 19(1)(a) of the Constitution, it must be construed as penalising only those acts of insults to or those varieties of attempts to insult the religion or the religious beliefs of a class of citizens, which are perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class. The Court clarified that insults to religion offered unwittingly or carelessly or without any deliberate or malicious intention to outrage the religious feelings of that class do not come within the ambit of Section 295-A of IPC. This Section only punishes the aggravated form of insult to religion when it is perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class.

19. In *Sudheer Rikhari* (supra), the Division Bench quashed prosecution under Section 295-A of IPC by holding that the matter

complained of has to be read as a whole. It was impermissible to rely on strongly worded or isolated passages for proving the charge nor should one take a sentence here and a sentence there and then connect them by a meticulous process of inferential reasoning. Further, relying upon *Manzar Sayeed Khan V/s. State of Maharashtra & Anr.*², the coordinate Bench held that the effect of words must be judged from the standards of reasonable, strong-minded, firm and courageous men and not those of weak and vacillating minds not of those who scent danger in every hostile point of view. Accordingly, the FIR under Section 295-A of the IPC was quashed for it disclosed no ingredients of the offence under Section 295 of the IPC.

20. In the present case, the alleged offending portions, according to Mr Faldessai and Mr Kiran Naik, are contained in paragraph 11 of the transcript quoted above. As held by a coordinate Bench in *Sudheer Rikhari* (supra) and the Hon'ble Supreme Court in *Manzar Sayeed Khan* (supra), the entire sermon or at least the entire paragraph 11 of the transcript has to be read as a whole. It is impermissible to rely on strongly worded or isolated passages to prove the charge. It is impermissible to take a sentence here and a sentence there and to connect them by a meticulous process of inferential reasoning.

21. In paragraph 11, the petitioner may have disagreed with the view held by many that Shri Chhatrapati Shivaji Maharaj was God. But the petitioner immediately followed this by stating that Shri Chhatrapati

² (2007) 5 SCC 1

Shivaji Maharaj was a National Hero entitled to honour and respect. This viewpoint may not be to the liking of the third respondent or, for that matter, people sharing the third respondent's viewpoint. However, there is nothing in paragraph 11 suggesting any insult or attempt to insult any religion or religious belief of either the third respondent or the class to which he belongs. Various dictionaries define "insult" as treating or speaking insolently or with contemptuous rudeness; something having the effect of an affront; to treat with insolence, indignity, or contempt. The Petitioner's utterances, particularly in the setting in which they were allegedly made or from the language used, cannot be construed as "insult" to attract the penal provisions in Section 295-A or 504 of IPC. Incidentally, Section 504 of IPC is a non-cognizable offence.

22. Besides, there is absolutely nothing to suggest any deliberate and malicious acts intended to outrage the religious feelings of the third respondent or any class of citizens of India. Even the impugned FIR does not allege so. From the tenor of the sermon, no case of incitement is also made out. Applying the test in *Ramji Lal Modi* (supra), *Manzar Sayeed Khan* (supra) and *Sudheer Rikhari* (supra), none of the ingredients of Section 295-A or 504 of IPC are attracted to the transcript in paragraph 11 on which the learned Additional Public Prosecutor and the third respondent rely.

23. In the alleged offending passage, the petitioner acknowledged that Shri Chhatrapati Shivaji Maharaj is a National Hero. He has

preached that all need to honour and respect Shri Chhatrapati Shivaji Maharaj, for he has done a lot of good. The petitioner added that Shri Chhatrapati Shivaji Maharaj fought to save his people and to protect all these people, and therefore, we need to respect him. All that the petitioner stated, and with which the third respondent disagreed, was that Shri Chhatrapati Shivaji Maharaj is not a God, though he is a National Hero. Many may not share the petitioner's viewpoint. Many others may consider the Petitioner's viewpoint unpopular or detestable. However, that by itself is insufficient to attract the ingredients of Section 295-A or 504 of the IPC. Expressing such a viewpoint, and that too respectably does not attract the provisions of Section either Section 295-A or Section 504 of the IPC, given the law that the alleged offending words must be judged from the standards of reasonable, strong-minded, firm and courageous men and not those of weak and vacillating minds, not of those who scent danger in every hostile point of view.

24. In *Justice (Retd.) Markandey Katju V/s. Lok Sabha*³, the Hon'ble Supreme Court, held that Article 19(1)(a) of the Constitution protects an unpopular and dissenting opinion. It is usually an unpopular and dissenting opinion that would need a cover or insulation. A popular or accepted opinion, naturally, would not require any protection. In any event, Article 19(1)(a) guarantees free speech and expression, makes no distinction, and imposes no caveats on whether such speech is popular or dissenting.

³ (2017) 2 SCC 384

25. In *Shreya Singhal V/s. Union of India*⁴, the Hon'ble Supreme Court held that the content of the phrase "*freedom of speech and expression*" can be analysed by referencing three concepts which are fundamental in understanding the reach of this most basic human right. The first is discussion, the second is advocacy, and the third is incitement. The Court held that mere discussion or even advocacy of a particular cause, however unpopular, is at the heart of Article 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in.

26. In the present case, nothing in the petitioner's sermon can be elevated to the level of "incitement". From the tenor of the sermon, it is clear that the Petitioner wishes to engage in a discussion. The petitioner expressed his viewpoint and that too in a respectable manner. The fact that many, including the third respondent, may disagree with or even detest the viewpoint expressed by the petitioner is not a ground to prosecute the petitioner by invoking Section 295-A or Section 504 of IPC. Both the penal provisions need to be construed within the bounds of Article 19(1)(a) and 19(2) of the Constitution. An interpretation that is too wide, covering every act of insult or attempt to insult without any deliberate or malicious intention of outraging the religious feelings of that class, might render the Constitutional protection under Article 19(1)(a) illusory. Here, not even a case of insult or attempt to insult is made out, much less any case of the deliberate

⁴ (2015) 5 SCC 1

and malicious intention of outraging the religious feelings or beliefs of any person or class of citizens. Accordingly, no case was made out to prosecute the petitioner under Section 295-A or 504 of IPC in the facts and circumstances of the present case.

27. Regarding the third respondent's contentions, it must be noted that there is nothing in the alleged offending paragraph or, for that matter, in the entire sermon that even remotely affects the third respondent's right or the right of any others to regard Shri Chhatrapati Shivaji Maharaj as a God and to pray to him. The third respondent's or other's such belief is equally protected by Article 19(1)(a) of the Constitution. But to say that the offending passage constitutes an insult or an attempt to insult the religion or religious belief of the third respondent or others or that the offending passage was a result of or with the deliberate and malicious intention of outraging the religious feelings of the third respondent or class of citizens of India who align with the views of the third respondent is rather difficult to accept.

28. In *Indibly Creative (P) Ltd. V/s. State of W.B.*⁵, the Hon'ble Supreme Court has held that commitment to free speech involves protecting unpalatable speech we do not want to hear. The Court noted a declaration attributed to Voltaire: "*I despise what you say but will defend to the death your right to say it*" and held that this encapsulates

⁵ (2020) 12 SCC 436

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. This principle is at the heart of democracy, a basic human right, and its protection is a mark of a civilised and tolerant society.

29. In the above context, reference is necessary to refer to the decision in *Anand Chintamani Dighe V/s. State of Maharashtra*⁶. In this case, the Government's ban on the play "*Mee Nathuram Godse Boltoy*" and the direction for the forfeiture of every copy of this book/play and its translations in the Gujarati language was challenged. D.Y. Chandrachud, J. (as His Lordship then was) overturned the ban and forfeiture by holding that the strength of our society and the stability of the constitutional structure lies in its ability to accommodate a diversity of viewpoints and cultures. The maturity of a society committed to a democratic way of life lies as much in its respect for those who conform as in its deference for those who do not. The Constitution preserves a healthy tradition of respect for the believer and the non-believer, the conservative as well as the liberal, those on the core as well as those on the periphery, the agnostic and heretic.

30. The Court held that 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

⁶ 2001 Cri LJ 2203

because they do not conform to the prevailing trend of thought. The Court held that diversity of viewpoints 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.

31. The Court further held that 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 criticised. 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 endeavour 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 a cloud of opacity and arbitrary State behaviour will imperil fundamental human freedoms.

32. In the specific context of Section 295-A of IPC, the Hon’ble Supreme Court in the case of *Amish Devgan V/s. Union of India*⁷ held that Section 295-A of IPC encapsulates all three elements; namely, it refers to the content-based element when it refers to words either spoken or written or by signs or visible representation or otherwise. However, it does not make a person guilty of the offence based on

⁷ (2021) 1 SCC 1

content alone. The first portion refers to deliberate and malicious intent on the part of the maker to outrage the religious feelings of any class of citizens of India. The last portion of Section 295A refers to the harm-based element, that is, insult or attempt to insult religions or religious beliefs of that class.

33. The Hon’ble Supreme Court explained that Section 295-A uses the word “attempts” and Section 505(2) uses the words “create or promote”. The Court held that the chance of the event occurring should be real and not fanciful or remote. The ‘not improbable’ standard is too weak and cannot be applied as it would infringe upon and fall foul of reasonable restriction and the test of proportionality. The Court also referred to *Shreya Singhal* (supra) and a catena of judgments of the Constitution Benches distinguishing between advocacy, discussion and incitement and that only the latter, i.e. the incitement, is punishable, whereas the former two would fall within the domain of freedom to express and convey one’s thoughts and ideas.

34. The Court held that ‘Incitement’ is a restricted term under the American Speech Law which we have adopted. The Court referred to *Brandenburg V/s. Ohio*⁸ and held that incitement must be imminent or almost inevitable. The Court noted that there has been some criticism that the test is too strong. Nevertheless, the Court held that it conveys that the standard has to be strict. Instigation must necessarily and specifically be suggestive of the consequences. Sufficient certainty

⁸ 1969 SCC OnLine US SC 144

to incite the consequences must be capable of being spelt out to be incitement.

35. Similarly, the Court held that the expression ‘Promote’ does not imply merely describing and narrating a fact or giving an opinion criticising another person's point of view or actions – it requires that the speaker actively incite the audience to cause public disorder. This active incitement can be gauged by the content of the speech, the context and surrounding circumstances, and the intent of the speaker. However, in case the speaker does not actively incite the dissent into public disorder and is merely pointing out why a certain person or group is behaving in a particular manner, what are their demands and their point of view, or when the speaker interviews such person or group, it would be a passive delivery of facts and opinions which may not amount to promotion.

36. Applying the above tests to the facts of the present case, it is difficult to hold that the alleged offending portion of the petitioner's sermons fulfils the ingredients of either Section 295-A of IPC or 504 of IPC. The key ingredients are completely missing; therefore, a case is made for quashing the impugned FIR.

37. In the specific context of Shri Chhatrapati Shivaji Maharaj, a reference to the decision of the Hon'ble Supreme Court in *Manzar Sayeed Khan* (supra) would be appropriate. Therein, an FIR was filed against Professor James W. Laine, the author of the book titled ‘*Shivaji: Hindu King in Islamic India*’ under Sections 153, 153A and 34 of IPC. While quashing the FIR and directing that the State shall not proceed

against Professor James W. Laine, the Hon'ble Supreme Court held that the intention to cause disorder or incite the people to violence is the sine qua non of the offence under Section 153A of IPC and the prosecution has to prove prima facie the existence of mens rea on the part of the accused. Though this was a decision in the context of section 153A of IPC, the observation is that the intention has to be judged primarily by the language of the book and the circumstances in which the book was written and published. The matter complained of within the ambit of Section 153A must be read as a whole. One cannot rely on strongly worded and isolated passages to prove the charge, nor can one take a sentence here and there and connect them by a meticulous process of inferential reasoning relevant to the case at hand. (See the observations of Vivian Bose, J. in *Bhagvati Charan Shukla V/s. Provincial Government*⁹).

38. Similarly, in *State of Maharashtra and Ors. V/s. Sangharaj Damodar Rupawate and Ors.*¹⁰, the issue concerned the ban on Professor James W. Laine's book, *Shivaji—Hindu King in Islamic India*. The Bombay High Court overturned this ban, and the Hon'ble Supreme Court dismissed the State's appeal, questioning the judgment of the Bombay High Court. The Court held that the impugned notification banning the book had not even specified the communities between which the book had caused or was likely to cause enmity. Therefore, it cannot be found out from the notification as to which

⁹ AIR 1947 Nagpur 1

¹⁰ (2010) 7 SCC 398

communities got outraged by the publication of the book or if it caused hatred and animosity between particular communities or groups. The Court held that the statement in the impugned 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 test laid down in several decisions of the Hon'ble Supreme Court on the subject. Accordingly, the State's appeal against the Bombay High Court's decision overturning the ban was dismissed.

39. There is an apocryphal tale associated with Shri Chhatrapati Shivaji Maharaj¹¹: Once, a stone thrown by an old woman at a tree to fetch mangoes accidentally hit Shri Chhatrapati Shivaji Maharaj, injuring him. After the old woman was apprehended and produced before Shri Chhatrapati Shivaji Maharaj, he immediately ordered her release and rewarded her with wealth that would support her for the rest of her life. The Great King reasoned as follows:

"If a tree which is not a highly elevated living entity can be so tolerant and merciful to give sweet mangoes even when hit by anyone, being a king, should I not be more merciful and tolerant than the tree?"

40. Thus, for all the above reasons, we quash the impugned FIR No.52/2023 registered on 04.08.2023 at Vasco Police Station against

¹¹ <https://www.businessinsider.in/thelife/personalities/article/chhatrapati-shivaji-maharaj-quotes-with-meaning/articleshow/74200875.cms>,
<https://www.indiatoday.in/information/story/remembering-the-inspiring-quotes-by-maratha-king-chhatrapati-shivaji-1647642-2020-02-18>

the petitioner. The rule is made absolute in the above terms. There shall be no order for costs.

VALMIKI MENEZES, J.

M. S. SONAK, J.

NITI KISHOR HALDANKAR Digitally signed by NITI KISHOR HALDANKAR
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