

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 15.03.2021	Delivered on 22.03.2021
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CORAM:

THE HONOURABLE **MR. JUSTICE N. ANAND VENKATESH**

Crl.OP No.15656 of 2020

and

Crl.MP.No.5974 of 2020

State Rep.by
The Inspector of Police,
B 12 Police Station,
Coimbatore.

..Petitioner

.Vs.

D.Senthilkumar
S/o.Dhakshana Moorthy,
Hindu Public Party's State News Connector,
98A, Sivaji Colony Bus Stop,
Vishnupriya Hospital Opposite,
Velandipalayam (P.O),
Coimbatore 641 025.

..Respondent

PRAYER : Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, to call for the records in C.M.P.No.6452/2015, pending on the file of the Judicial Magistrate V, Coimbatore culminating in the order dt.17.12.2017 and quash

the entire proceedings in C.M.P.No.6452/2015, pending on the file of the Judicial Magistrate V, Coimbatore culminating in the order dt.17.12.2017.

For Petitioner : Tr. Emilias
Additional Advocate General
Asst by:
Ms.P.Kritika Kamal
Government Advocate (crl.side)

For Respondent : Mr.D.Senthil Kumar
Party in Person

ORDER

The Flag Code of India opens with a declaration that the Indian National Flag represents the hopes and aspirations of the people of India, and it is a symbol of our national pride. The Respondent in this case, on coming to know about a function conducted at Coimbatore and the manner in which the Indian National Flag was portrayed in that function, felt that the participants have deliberately disrespected the National Flag,

which resulted in a criminal complaint, and the consequent orders passed therein which is the subject matter of challenge in the present Criminal Original Petition.

2.The crux of the complaint was that, on 25.12.2013, at a public function celebrating the Christmas festival, a cake measuring 6 ft. length and 5 ft. breadth, the icing on which carried a tri-colour Indian map outline with the *Ashoka Chakra* in the centre, was cut, distributed and consumed by the Special Guests and about 2500 participants including 1000 children who attended the celebration. According to the complainant, the said function was attended by the District Collector of Coimbatore, The Deputy Commissioner of Police, and various other religious leaders and members representing a number of Non-Governmental Organisations. The grievance of the complainant was that the representation of the Indian National Flag on the cake and the cutting of the same amounts to an offence under Section 2 of The Prevention of Insults to National Honour Act, 1971 (hereinafter referred to as "the Act").

3.The Respondent became aware of the Christmas function on 26.12.2013 after it was reported in all the newspapers. The Respondent strongly felt that the participants had insulted the National Flag, and hence, he gave a complaint to the B-12 Police Station, Coimbatore, on 30.12.2013. According to the Respondent, the police refused to entertain this complaint. Aggrieved by the same, the Respondent filed a petition under Section 156(3) of The Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C.") before the learned Judicial Magistrate- V, Coimbatore to direct the police to register an FIR and file a Final Report.

4.The learned Magistrate decided to deal with the petition as a complaint under Chapter XV, Cr.P.C., and the same is clear from the proceedings of the court dt. 19.03.2014. The learned Magistrate took cognisance of the complaint under Section 190(1)(a), Cr.P.C. and recorded the sworn statement of the Respondent on 02.11.2015. That apart, the learned Magistrate

also recorded the sworn statements of two more witnesses on 10.03.2016 and 02.04.2016, respectively.

5. The learned Magistrate thereafter exercised the jurisdiction under Section 156(3), Cr.P.C. and passed an order on 17.02.2017, directing the police to register an FIR against the concerned persons for an offence under Section 2 of the Act, to inquire the same and to file a Final Report.

6. The State has filed the Criminal Original Petition under Section 482, Cr.P.C. challenging the Order passed by the learned Magistrate on 17.02.2017. The Respondent has filed the Writ Petition to direct the police to comply with the orders passed by the learned Magistrate.

7. Mr. C. Emilius, learned Additional Advocate General (hereinafter referred to as "the AAG") appearing on behalf of the State made the following submissions:

- Even if the allegations made in the complaint are taken as it is, it does not make out an offence under Section 2 of the Act.
- The complaint was based only on paper reports, and the complainant did not have any personal knowledge about the function that was held on 25.12.2013.
- The complainant initially filed a petition under Section 156(3), Cr.P.C., and it was entertained by the court below even without a supporting affidavit and hence it is in violation of the mandate prescribed by the Hon'ble Supreme Court in ***Priyanka Srivatsava v. State of U.P.*** reported in ***2015 (6) SCC 287.***
- The court below, after having taken cognisance of the complaint and proceeding to deal with the same under Chapter XV, Cr.P.C. cannot resort to the powers under Section 156(3), Cr.P.C. To

substantiate his submissions, the learned AAG relied upon the judgement of the Hon'ble Supreme Court in ***Madhao v. State of Maharashtra*** reported in ***(2013) 5 SCC 615***. The learned AAG also relied upon the judgement of this Court in ***M. Hamsaveni v. R. Loganathan*** reported in ***(2019) 5 CTC 518***.

- The Collector of Coimbatore District and the Deputy Commissioner of Police are public servants who attended the function in that capacity, and hence the learned Magistrate should not have passed an order under Section 156(3), Cr.P.C. without sanction under Section 197, Cr.P.C. To substantiate this submission, the learned AAG relied upon the judgement of the Hon'ble Supreme Court in ***Anil Kumar v. Ayyappa*** reported in ***(2013) 10 SCC 705***.

8. The complainant appeared in person and made the following submissions:

- The function was not conducted for any communal harmony or for depicting national integration, and it was only a Christmas celebration.
- The tri-colour Indian flag should not have been depicted on the cake, and cutting such a cake will certainly result in insult to the National Flag.
- The complainant specifically placed reliance upon Explanation 2 to Section 2 of the Act and submitted that the cake in the form of the Indian map in tri-colour would come within the phrase "*made of any substance or represented on any substance*".
- The learned Magistrate has applied his mind and passed an order directing the police to register an FIR, and therefore, the police must register the FIR and investigate this case and save the honour of the National Flag.

9. This Court has carefully considered the submissions made on either side and the materials available on record.

10.This Court wants to deal with this case broadly under two heads:

a) Whether the procedure adopted by the learned Magistrate is in accordance with Cr.P.C. and the same is sustainable in law; and

b) Whether the complaint makes out an offence under Section 2 of the Act.

11.There is no serious dispute on the facts of the present case. Therefore, this Court will straight away focus on the issues that are taken up for consideration.

12.The learned Magistrate had initially taken a decision to deal with the Petition as a complaint. The same is clear from the proceedings of the Magistrate dt. 17.02.2017. The Magistrate, on going through the allegations made in the complaint, decided to take cognisance under Section 190(1)(a), Cr.P.C. Thereafter, the learned Magistrate proceeded to examine the complainant and

two witnesses on oath as per Section 200, Cr.P.C. Having resorted to this procedure, the learned Magistrate ought to have proceeded further and either rejected the complaint under Section 203, Cr.P.C. or issued process to the accused persons under Section 204, Cr.P.C. Instead, the learned Magistrate reverted back to Section 156(3), Cr.P.C. and directed the police to register an FIR, investigate and file a Final Report.

13.The procedure followed by the learned Magistrate is patently illegal. Power to direct investigation under Section 156(3), Cr.P.C. is done at the pre-cognisance stage. Therefore, once the Magistrate decides to take cognisance and embarks upon the procedure stipulated under Chapter XV, Cr.P.C., he cannot revert back to the pre-cognisance stage and pass orders under Section 156(3), Cr.P.C.

14.The learned Magistrate failed to take note of a fundamental flaw that was committed while exercising the jurisdiction. If an order is passed under Section 156(3), Cr.P.C.,

and it translates itself into an FIR, the investigation will ultimately result in a Final Report under Section 173(2), Cr.P.C. Once such a report is filed, the learned Magistrate has to take cognisance of the same under Section 190(1)(b), Cr.P.C. If that is allowed in the present case, the learned Magistrate will be taking cognisance of the same case for the second time. The first time the cognisance has already been taken under Section 190(1)(a), Cr.P.C. and the second time, the Magistrate will be taking cognisance after the Final Report under Section 190(1)(b), Cr.P.C. This will result in a complete violation of the procedure adumbrated under the Cr.P.C.

15.The judgments cited by the learned AAG will squarely apply to the facts of the present case, and the Order passed by the learned Magistrate under Section 156(3) of Cr.P.C. is liable to be interfered with by this Court on this ground alone. The first issue is answered accordingly.

16.Under normal circumstances, where a Court finds patent illegality in the procedure adopted by a subordinate court,

and the same is set aside on that ground, this Court will not venture into deciding the merits of the case. However, since the complainant has raised an issue on insult to the National Flag and some clarity is required to deal with similar situations that may arise in future, this Court proceeds to deal with the second issue also and render its findings on the same.

17. In the present case, the complainant does not have personal knowledge about the event that was conducted on 25.12.2013. The only source of information for the complainant was the newspaper reports relied upon by him. Even the witnesses examined by the learned Magistrate were persons who were accidentally present at the venue and that too after the cake was cut, and they had their share of the cake. It is, therefore, clear that the complaint did not emanate from a person who had witnessed the incident. This function was attended by the District Collector, Deputy Commissioner of Police and other notable dignitaries, and this function is said to have been conducted to propagate national integration and communal harmony.

Admittedly, in the event, there were 2500 participants, out of which 1000 were children. When such is the importance of the event, Courts should satisfy itself on the correctness or the nature of the information provided by the complainant. The Hon'ble Supreme Court, on more than one occasion, has held that the publication made in a newspaper or a journal or a magazine should not be taken as gospel truth, and the Court has to necessarily look for materials to corroborate the authenticity and credibility of the information published in the newspaper. Useful reference can be made to the judgement of the Hon'ble Supreme Court in ***Dr. B. Singh v. Union of India*** reported in ***2004 (3) SCC 36***.

18. This Court does not want to enter into the controversy on the issue of sanction raised by the learned AAG since this issue has already been referred to a larger bench by the Hon'ble Supreme Court in ***Manju Surana v. Sunil Arora*** reported in ***(2018) 5 SCC 557***. Even otherwise, this issue will become relevant only if this Court is convinced that the facts stated in the complaint make out an offence under Section 2 of the Act.

19. This Court will deal with the second issue that has been taken up for consideration under the following heads:

1. The historical significance of the National Flag of India and the Constituent Assembly Debates;
2. Constitution of India, 1950 and the Act;
3. Provisions of the Flag Code of India, 2002; and
4. Essential Ingredients to attract an offence under Section 2 of the Act; and
 - 4.1. Importance of *Mens Rea* in a case of this nature;
 - 4.2. Interpretation of Insult; and
 - 4.3. Interpretations rendered by various High Courts on the purport of Section 2 of the Act.
5. Compulsive Patriotism and its Fetishization.

The Historical Significance of The National Flag of India and The Constituent Assembly (Constituent Assembly of India Debates (Proceedings)-Volume IV, Tuesday, the 22nd July 1947, Resolution Re. National Flag)

20. In 1921, a student named **Pingali Venkayya** presented a flag design as a distinctive symbol representing its nationalist objectives and rallied the millions. With changes over the next few decades, the present Flag in its colours, design and proportion was adopted as the National Flag of India.

21. **Pandit Jawaharlal Nehru**, when moving the Resolution regarding the National Flag before the Constituent Assembly of India on 22nd July 1947, said:

This Resolution, Sir, is in simple language, in a slightly technical language, and there is no glow or warmth in the words that I have read. Yet I am sure that many in this House will feel that glow and warmth which I feel at the present moment for behind this Resolution and the Flag which I have the honour to present to this House for adoption lies history, the concentrated history of a short span in a nation's existence. Nevertheless, sometimes in a brief period we pass through the track of centuries. It is not so much the mere act of living that counts but what one does in this brief life that is ours; it is not so much the mere existence of a nation that counts but what that nation does during the various periods of its existence; and I do venture to claim that in the past quarter of a century or so India has lived and acted in a concentrated way and the emotions which have

filled the people of India represent not merely a brief spell of years but something infinitely more. They have gone down into history and tradition and have added themselves on to that vast history and tradition which is our heritage in this country. So, when I move this Resolution, I think of this concentrated history through which all of us have passed during the last quarter of a century. Memories crowd upon me. I remember the ups and downs of the great struggle for freedom of this great nation. I remember and many in this House will remember how we looked up to this Flag not only with pride and enthusiasm but with a tingling in our veins; also how; when we were sometimes down and out, then again the sight of this Flag gave us courage to go on. Then, many who are not present here today, many of our comrades who have passed, held on to this Flag, some amongst them even unto death and handed it over as they sank, to others to hold it aloft. So, in this simple form of words, there is much more than will be clear on the surface. There is the struggle of the people for freedom with all its ups and downs and trials and disasters and there is, finally today as I move this Resolution, a certain triumph about it--a measure of triumph in the conclusion of that struggle."

... Therefore, this Flag that I have the honour to present to you is not I hope and trust, a Flag of Empire, a Flag of Imperialism, a Flag of domination over anybody, but a Flag of freedom not only for ourselves, but a symbol of--freedom to all people who may see it. (Cheers). And wherever it may go--and I hope it will go far,--not only where Indians dwell as our ambassadors and ministers but across the far seas where

it may be carried by Indian ships, wherever it may go it will bring a message, I hope, of freedom to those people, a message of comradeship, a message that India wants to be friends with every country of the world and India wants to help any people who seek freedom. (Hear, hear). That I hope will be the message of this Flag everywhere."

22.Sir S. Radhakrishnan added, *"the Flag links up the past and the present. It is the legacy bequeathed to us by the architects of our liberty."*

23.Mr. Frank R. Anthony, in his speech, said that *"This Flag flies today as the Flag of the Nation, it should be the duty and privilege of every Indian not only to cherish and live under it but if necessary, to die for it."*

24.Dr. Joseph Alban D'Souza prayed, *"Vivat, Crescat, Floreat India"*, *"May India under the aegis of this Flag live, grow and flourish"*.

25.Mr. Chaudri Khaliquzzaman said, *“I know that a flag to look at, is simply a piece of cloth but a country’s flag symbolises its ideals and its aspirations, both moral and spiritual.”*

26.Pandit Govind Malaviya observed:

“As I have already stated, when a flag or any other thing is accepted by a nation as its ensign, it becomes the dearest object of the nation and assumes the most important and the highest place in the life and history of that nation. This, our Flag, has been the symbol of the hopes and dreams of our hundred million souls for the last 27 years. For the honour of this flag millions holding it dearer than their lives, suffered tremendously. Numberless people went to jails leaving their children starving. People had their heads and bones broken by the lathis of police and the military to keep it aloft. Unarmed young men and students of the country opened their chests before the bullets of the English military or police to protect the honour of his Flag. For generations it has been our Flag and the great feeling, emotion and enthusiasm we have in our hearts for this Flag is beyond human description.”

27.A symbol is a mark, sign, or word that indicates, signifies, or is understood as representing an idea, object, or relationship. A Country’s National Flag is a symbolic manifestation

intended as an inclusive, representative and integrated comity. The National Flag, therefore, conjures a rush of pride in the whole being of its citizens.

28.Rejecting what is symbolic of a Nation brings to mind the words of the character Philip Nolan in Edward Everett Hale's short story 'The Man without a Country', "*Remember, boy, that behind all these men... behind officers and government, and people even, there is the Country Herself, your Country, and that you belong to her as you belong to your own mother. Stand by her, boy, as you would stand by your mother...!*".

Constitution of India, 1950 and the Act

29.Article 19(1)(a) of the Constitution (hereinafter referred to as "the Constitution") guarantees all citizens, '*right to freedom of speech and expression.*' However, the right is not absolute and is subject to reasonable restrictions, and the law on the same is settled. Article 51-A (1) simultaneously lays down that citizens are duty-bound '*to abide by the Constitution and respect*

its ideals and institutions, the National Flag and the National Anthem.'

30.The earliest legislation on the subject of 'insults to national honour' in India was enacted by the State of Tamil Nadu in the year 1957. The Prevention of Insults to National Honour Act, 1957 (Tamil Nadu Act No. XIV of 1957) was enacted in the wake of the Anti-Hindi Agitation Movement in order to '*prevent certain offences against the Indian National Flag, pictures, effigies and statutes of the Father of the Nation, or the Constitution of India.'*

31.Section 4 of The Prevention of Insults to National Honour Act, 1957 made the '*burning etc., of Indian National Flag*' as an offence punishable with imprisonment for a term which may extend to 3 years or with fine or both. The explanation to the provision clarified that the term 'Indian National Flag' includes 'any pictorial representation thereof'.

32.This Act is, therefore, the precursor to The Prevention of Insults to National Honour Act, 1971 (Act No. 60 of 1971), legislated by the Parliament. The Introduction to the Act highlights that the need for a law on this subject was imperative in the wake of `incidents involving deliberate disrespect to the National Flag, the National Anthem and the Constitution and the need to `prevent the recurrence of such incidents.'

33.The Statement of Objects and Reasons of the Act is extracted hereunder so as to set clarity to the malice that the law set out to handle and eliminate:

“Cases involving deliberate disrespect to National Flag, the National Anthem and the Constitution have come to the notice in the recent past. Some of these incidents were discussed in both the Houses of Parliament and members expressed great anxiety about the disrespect shown to the national symbols. Government were urged to prevent the recurrence of such incidents. Disrespect to the National Flag and the Constitution or the National Anthem is not punishable under the existing law. Public acts of insults to these symbols of sovereignty and the integrity of the nation must be prevented. Hence the Bill. The scope of the law is restricted to overt acts of insult to and attack on, the national.

symbols by burning, trampling, defiling or mutilating in public. It is not intended to prohibit honest and bonafide criticism of the symbols, and express provisions to this effect have been made in the Bill.”

34. Under the scheme of the Act, Section 2 penalizes any act which insults the Indian National Flag and the Constitution of India with imprisonment, which may extend to 3 years or with fine, or with both. Explanation 1 exempts any comments or criticism that are made with a view to obtaining an amendment of the Constitution or alteration of the Flag. Explanation 2 to Section 2 elucidates as to what constitutes “Indian National Flag”. Explanation 3 expresses what “public place” occurring in Section 2 is. Explanation 4 analyses what disrespect to the Indian National Flag means and includes.

35.The provision is extracted hereunder:

2. Insults to Indian National Flag and Constitution of India.—Whoever in any public place or in any other place within public view burns, mutilates, defaces, defiles, disfigures, destroys, tramples upon or [otherwise shows disrespect to or brings] into contempt (whether by words,

either spoken or written, or by acts) the Indian National Flag or the Constitution of India or any part thereof, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

Explanation 1.—Comments expressing disapprobation or criticism of the Constitution or of the Indian National Flag or of any measures of the Government with a view to obtain an amendment of the Constitution of India or an alteration of the Indian National Flag by lawful means do not constitute an offence under this section.

Explanation 2.—The expression “Indian National Flag” includes any picture, painting, drawing or photograph, or other visible representation of the Indian National Flag, or of any part or parts thereof, made of any substance or represented on any substance.

Explanation 3.—The expression “public place” means any place intended for use by, or accessible to, the public and Includes any public conveyance.

[Explanation 4.—The disrespect to the Indian National Flag means and includes—

(a) a gross affront or indignity offered to the Indian National Flag; or

(b) dipping the Indian National Flag in salute to any person or thing; or

(c) flying the Indian National Flag at half-mast except on occasions on which the Indian National Flag is flown at half-mast on public buildings in accordance with the instructions

issued by the Government; or

(d) using the Indian National Flag as a drapery in any form whatsoever except in State funerals or armed forces or other para-military forces funerals; or

[(e) using the Indian National Flag,—

(i) as a portion of costume, uniform or accessory of any description which is worn below the waist of any person; or

(ii) by embroidering or printing it on cushions, handkerchiefs, napkins, undergarments or any dress material; or]

(f) putting any kind of inscription upon the Indian National Flag; or

(g) using the Indian National Flag as a receptacle for receiving, delivering or carrying anything except flower petals before the Indian National Flag is unfurled as part of celebrations on special occasions including the Republic Day or the Independence day; or

(h) using the Indian National Flag as covering for a statute or a monument or a speaker's desk or a speaker's platform; or

(i) allowing the Indian National Flag to touch the ground or the floor or trail in water intentionally; or

(j) draping the Indian National Flag over the hood, top and sides or back or on a vehicle, train, boat or an aircraft or any other similar object; or

(k) using the Indian National Flag as a covering for a building; or

(l) intentionally displaying the Indian National Flag with the "saffron" down.]

36.Subsequently, the Flag Code of India, 2002 (hereinafter referred to as "the Code") was brought into force as an attempt to bring together the provisions of the Emblems and Names (Prevention of Improper Use) Act, 1950 and the Act, and '*all such laws, conventions practices and instructions*' issued by the Government from time to time with respect to the display of the National Flag and the manner thereof.

37.Clause 2.1. of Section I of the Code provides that "There shall be no restriction on the display of the National Flag by members of the general public, private organisations, educational institutions etc., except to the extent provided in the Emblems and Names (Prevention of Improper Use) Act, 1950 and the Prevention of Insults to National Honour Act, 1971 and any other law enacted on the subject."

38.The Code, however, does not have the force of a statute and is not 'law' under Article 13(3)(1) of the Constitution as held by the Hon'ble Supreme Court in ***Union of India v. Naveen***

Jindal, reported in **2004 (2) SCC 510**. It contains a set of procedures and parameters to be followed while using the Flag.

39.A comprehensive reading of the provisions extracted herein above would show that the Act seeks to lay a reasonable restriction over the fundamental right to expression guaranteed by the Constitution under Article 19 by laying down the parameters that would circumscribe certain overt acts to be beyond such threshold, moving into the realm of causing deliberate insult to the National Flag, the Constitution and emblems thereof. It further provides for the proprieties to be observed while displaying the national Flag.

Provisions of the Flag Code of India, 2002

40. Unlike the 1971 Act, the Flag Code of India is not placed on the footing of a statute. Rather, the Flag Code is a set of Executive instructions as to proper use of the National Flag. In *Naveen Jindal* (cited *supra*), the Supreme Court took into account

three important dimensions in order to find out an answer to the question of whether the Flag Code is a Law under Art. 13(3)(a) namely:

1. Importance of National Flag,
2. Constituent Assembly Debates and
3. Rules existing in other countries.

The relevant portions of the judgment are extracted hereunder:

The question, however, is as to whether the said executive instruction is “law” within the meaning of Article 13 of the Constitution of India. Article 13(3)(a) of the Constitution of India reads thus :

“13. (3) (a) “Law” includes any Ordinance, order bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.”

A bare perusal of the said provision would clearly go to show that executive instructions would not fall within the aforementioned category. Such executive instructions may have the force of law for some other purposes; as for example those instructions which are issued as a supplement to the legislative power in terms of clause (1) of Article 77 of the Constitution of India. The necessity as regard determination of the said question has arisen as the Parliament has not chosen to enact a statute which would confer at least a

statutory right upon a citizen of India to fly a National Flag. An executive instruction issued by the appellant herein can any time be replaced by another set of executive instructions and thus deprive Indian citizens from flying National Flag. Furthermore, such a question will also arise in the event if it be held that right to fly the National Flag is a fundamental or a natural right within the meaning of Article 19 of the Constitution of India; as for the purpose of regulating the exercise of right of freedom guaranteed under Article 19(1)(a) to (e) and (g) a law must be made.

The court further held that,

(iv) Flag Code although is not a law within the meaning of Article 13(3)(a) of the Constitution of India for the purpose of clause (2) of Article 19 thereof, it would not restrictively regulate the free exercise of the right of flying the national Flag.

Essential Ingredients to attract an offence under Section 2 of the Act.

41. For any act to be termed as an offence under Section 2, *Actus Reus* and *Mens Rea* should be established. The *Actus Reus* being any of the actions in Section 2 and Explanation 4 and the *Mens Rea* being the intention to show disrespect or contempt. As to what constitutes an offence, the decisions of the Hon'ble Supreme Court and various High Courts are extracted hereunder.

42. The High Court of Bombay in ***Amgonda Vithoba Bandhare v. Union of India***, reported in **2012 (4) Mh.L.J 768** held that:

“7. Explanation 4 mentions various acts of dishonour in clauses (a) to (l). Perusal of the said section clearly reveals that one of the essential ingredients of the said offence is that disrespect, contempt of the Flag should be intentional. Similarly, Explanation 4 gives various instances of disrespect to the Indian National Flag. The offence of not lowering down the Flag after sunset does not fall either in the various instances which are mentioned in Explanation 4 or in Section 2 of the said Act. The averments in the complaint, therefore, even if they are accepted at its face value, does not constitute an offence within the meaning of Section 2 of the said Act.

8. So far as the Flag Code is concerned, the said Flag Code is not an Act nor is it issued under any of the statutory provisions of the said Act and, therefore, it is not a statutory law enacted by the competent legislature.

9. The Apex Court had occasion to consider whether the Flag Code has any statutory course and in the case of Union of India v/s Navin Jindal & anr., decided on 23.1.2004 in Civil Appeal No.453 of 2004, after going through various sections and parts of the Flag Code, the Apex Court came to the conclusion that the Flag Code contains executive instructions of the Central Government and, therefore, it is not a law within the meaning of Article 13(3)(a) of the

Constitution of India. In view of the ratio of the judgment of the Apex Court, therefore, it cannot be said that violation of the instructions which are given in the Flag Code would amount to an offence which is punishable under Section 2 of the said Act.”

43. Relying on **Amgonda** (cited *supra*), the Bombay High Court held the following in the case of **Dr. Varsha w/o Raj Salunke v. State of Maharashtra**, reported in **2018 SCC OnLine Bom 2805 : (2019) 1 AIR Bom R (Cri) (NOC 12) 5.**

“9. In “Amgonda” (Supra). It has been observed, ‘7. Explanation 4 mentions various acts of dishonour in clauses (a) to (l). Perusal of the said section clearly reveals that one of the essential ingredients of the said offence is that disrespect, contempt of the Flag should be intentional. Similarly, Explanation 4 gives various instances of disrespect to the Indian National Flag. The offence of not lowering down the Flag after sunset does not fall either in the various instances which are mentioned in Explanation 4 or in Section 2 of the said Act. The averments in the complaint, therefore, even if they are accepted at its face value, does not constitute an offence within the meaning of Section 2 of the said Act.’

8. So far as the Flag Code is concerned, the said Flag Code is not an Act nor is it issued under any of the statutory provisions of the said Act and, therefore, it is not a statutory law enacted by the competent legislature.

Therefore, when the facts of the case do not disclose commission of any offence and only non-observance of the Flag Code then such non-observance which is not a law within the meaning of Article 13(3)(a) of the Constitution of India, it cannot be said to be covered under Section 2 of the Prevention of Insults to National Honour Act 1971.”

Importance of Mens Rea in a case of this nature

44. From a perusal of the penalising provision and even the Statement of Objects and Reasons to the Act, what is deduced is that *Mens Rea*, i.e., to cause insult, show disrespect or to bring into contempt towards the National Flag or The Constitution is seen at a high threshold. The intention to commit such an act must be so malafide and apparent to attract an offence under Section 2 of the Act.

45. At this juncture, it is pertinent to take into account the judgement of the High Court of Madhya Pradesh in ***Ganesh Lal Bathru v. State of MP***, reported in ***2002 SCC OnLine MP 599***, where the Court interpreted “*otherwise beings into contempt*” as:

“6. From a perusal of the relevant provisions of the Act so also the Code and on a careful scrutiny of materials on record, it is clear that there is a dearth of materials to show an intention or mens rea to disrespect the national Flag and thereby to undermine the sovereignty of nation. The applicant was working as the Principal of a Government High School and being the incharge could hoist the Flag but since the complainant was authorised to do so, the applicant could not have played any mischief, unless there is a positive material to the contrary, in tying the Flag in reverse Order through a lower staff to show down the complainant....

... In addition to that, the inclusive clause of section 2 ‘or otherwise brings into contempt’ cannot be stretched that far as to include acts in question which are absolutely devoid of elements of mens rea or disrespect and thus fall outside the definition of contempt as given in Black’s Dictionary.”

46. In the case of ***Tamizhazhagan and Anr. v. The Revenue Divisional Officer*** reported in ***(1966) 2 MLJ 194***, this Court while dealing with the validity of Prevention of Insults to National Honour Act, 1957 and Section 5 of the said Act, summarised the meaning of patriotism, and the intention of the legislature behind the impugned statute, held as follows:

“18. Patriotism and loyalty to the Constitution are matters of feeling and conduct with the human spirit. They are capable of drawing out of man the highest of his noble qualities and supreme sacrifice. They belong to the category of feelings which, at any rate at the present stage of society and world order, man regards as of paramount importance. From such belief flows sentiments of great regard and veneration to objects which symbolise such feelings. The Constitution of India which the people of India have given themselves, symbolises the realisation of their cherished dreams after decades of unparalleled sacrifice, and it is but natural to expect any citizen of India to regard with veneration any document that embodies the Constitution. True, the Constitution can be amended and has been amended several times, but the Constitution is an organic instrument and carries within it the power to get itself amended. To the instrument as it stands he pays his deepest homage. It symbolises to him his hard-won sovereignty; it contains his charter of rights.

19. It is quite a common feature to be observed that people in this country, at least large sections, look with veneration upon any parchment, paper, palm leaf, or slate, which records any writing, as manifestations of Goddess Saraswathi. If, in such circumstances, the State should think it necessary to declare the wilful burning of any article embodying the Constitution or part of it, an offence, the State is only discharging its duty, and reflecting the sentiments of large sections of the Indian public, it is only making punishable an act which may otherwise go unpunished, though it might have offended the sentiments of large sections of the community, and deeply wounded their feelings. It will be a case of

mala in se, that is, an offence against nature or contrary to the moral sense of the community, and not a mere mala prohibita that is, an offence against laws which enjoin positive duties and forbid things which are not mala in se, to which is annexed a penalty for non-compliance.

20. Here we would like to quote the observations of the Supreme Court in Veerabadrhan Chettiar v. Ramaswami Naicker. The decision impliedly recognise the duty of the State to protect the sentiments and susceptibilities of its different groups of citizens. That was a case of religious susceptibilities. The question in that case was whether the breaking in public of an unconsecrated clay idol of God Ganesa held sacred by a large section of Hindus with the express intention of insulting the feelings, of the Hindu community would be an offence under Section 295, Indian Penal Code. The Indian Penal Code had used the words “any object held sacred by any class of persons.” Differing from this Court and holding that idols are only illustrative of those words and the objects destroyed need not be consecrated ones, Sinha, J., delivering the judgment of the Supreme Court, remarks at page 1035:

A sacred book like the Bible, or the Koran, or the Granth Saheb, is clearly within the ambit of these general words. If the Courts below were right in their interpretation of the crucial words in Section 295, the burning or otherwise destroying or defiling such sacred books will not come within the purview of the penal statute. In our opinion, placing such a restricted interpretation on the words, of such general import, is against all established canons of construction. Any object, however trivial or destitute of real value

in itself, if regarded as sacred by any class of persons, would come within the meaning of the penal section. Nor is it absolutely necessary that the object, in order to be held sacred, should have been actually worshipped. An object may be held sacred by a class of persons without being worshipped by them. It is clear, therefore, that the Courts below were rather cynical in so lightly brushing aside the religious susceptibilities of that class of persons to which the complainant claims to belong. The section has been intended to respect the religious susceptibilities of persons of different religious persuasions or creeds. Courts have got to be very circumspect in such matters, and to pay due-regard to the feelings and religious emotions of different classes of persons with different beliefs, irrespective of the consideration whether or not they share these beliefs or whether they are rational or otherwise, in the opinion of the Court.

35. Now, the impugned legislation penalises only wilfully burning of any copy or a copy of a part of the Constitution of India, and the word 'wilfully' is of considerable import in the context of its user. It is not every burning of a copy of the Constitution that is made an offence. 'Wilfully' there, is not just the equivalent of knowingly or intentionally. It is something more. It is burning the Constitution purposely, the purpose getting apparent from the two succeeding words 'desecrates' or 'insults' and as revealed by the Short Title to the Act and the Preamble. 'Wilfully', as we see it, denotes an evil intention and it is found in Stroud's Judicial Dictionary, 3rd Edition, Volume 4, at page 3305, that such is the common use of the word in the English language. 'Wilfully' in the context does not mean merely intentionally as opposed to

accidentally which meaning it sometimes has.

In The Queen v. Senior, wilfully' is stated to mean that "the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it". The paper embodying the Constitution must be burned as embodying the Constitution; there must be deliberation to burn a copy or part of the Constitution with the intention of desecrating or insulting. No doubt if the words 'wilfully burns' stand by themselves, it may take in an innocent burning of the paper containing the Constitution. But the words take their colour from the context. The enactment is not made in vacuo. The circumstances in which the Act came to be passed, the object and purpose of the Act as revealed in the Preamble and the other parts of the Act provide the key to the understanding of the language and place a limitation on the words 'wilfully burns'."

Interpretation of the term 'Insult'

47. In *Tamizhazhagan* (cited *supra*), this Court while interpreting the terms 'insult' and 'desecration', after delving into the principles of interpretation in construing general language used by the legislature in an enactment, held as extracted hereunder:

"36. In Craies on Statute Law, 6th Edition, at page 177, the principles of interpretation in such circumstances as gathered from the case-law are set out thus: From Cox v. Hakes (2), the following statement is extracted:

“It cannot, I think, be denied that, for the purpose of construing any enactment, it is right to look, not only at the provision immediately under construction, but at any others found in connection with it which may throw light upon it, and afford an indication that general words employed in it were not intended to be applied without some limitation. General words therefore must be understood as used with reference to the subject-matter in the mind of the Legislature and limited to it.”

We are on a penal statute and when interpretation of the statute becomes necessary, it should lean towards preserving the liberty of the subject. That the word ‘burns’ in S. 5 of the Act can only refer to burning with an intention of desecrating or insulting in the context of its user, will be apparent from the following illustration given in Maxwell on Interpretation of Statutes, 11th Edition, at page 324:

“On the same principle, an Act which prohibited the ‘taking or destroying’ of the a pawn or fish would not include a ‘taking’ of spawn to remove it to another bed, for the word ‘destroying’ with which ‘taking’ was associated, indicated that the taking which was prohibited was dishonest or mischievous.”

It is an established principle of interpretation of statute that if very general language is used in an enactment, which it is clear must have been intended to have some limitation put upon it, the Preamble may be used to indicate to what particular instances the enactment is intended to apply—see Craies on Statute Law, 6th Edition, at page 203. If need be, we would read the conjunction ‘or’ before ‘insults’ in S. 5 as ‘and’, that the section may read: “Whoever wilfully burns or desecrates and insults”. Vide Maxwell on Interpretation of Statutes, 11th Edition, at page 230 for an

illustration where an absurd consequence was avoided and the real intention of the Legislature which was beyond reasonable doubt was effected by reading 'or' as 'and'."

The court went on to note the meaning of the terms 'insult' and 'desecrate',

"37. In Frank and Wagnalls' New Standard Dictionary 'insult' is explained thus: "To treat with gross indignity, insolence or contempt, by word or act; officer an indignity or affront to;" 'Desecrate' is defined in the Dictionary as "divert from sacred to a common use; give up to sacrilege; profane, as to desecrate a shrine or holy vessels".

Further, it held,

"38. Learned Counsel contends that even if a person burns a copy of the Constitution in the fastness of his own house, he could be held guilty under the section, and the wide sweep of the enactment beyond the needs makes the Act unconstitutional. We do not construe the Act like that. The gist of the offence is insult and if insult is to be effective, it has to be conveyed. The law does not take note of uncommunicated or unexhibited ideas or thoughts or feelings. In the Law Lexicon of India, Ramanatha Iyer Edition, page 603,

'Insult' is explained as being 'active' like outrage. The language is 'whoever insults', not 'whoever thinks he insults': insult cannot be taken by a copy of the constitution: it will hurt the millions who pay

homage to the Constitution. The burning that is banned is not one intended for absorption of stone walls or for edification of stoic philosopher-spectators. It is a burning that one may expect would provoke and offend those hostile to the idea, while exciting the friendly and sympathetic to extremes of demonstration, with likelihood of violent clashes between the two.

59. On ultimate analysis the position resolves to this: whenever the question arises whether a particular offence involves moral delinquency, the particular case will have to be decided on its own facts, and the conclusion will have to be in accordance with the public morals of the time and the common sense of the community as ultimately judicially interpreted. Here again, the context and the purpose for which the character of the offence has to be determined will have a bearing on the matter. The question has to be approached not in an abstract fashion, but bearing in mind the implications of the particular offence, and the requirements and object of the statute for which the moral element has to be assessed.

Interpretations rendered by various High Courts on the purport of Section 2 of the Act

48. In the case of ***Sarvadnya D. Patil and Anr. v. State of Goa and Ors.***, reported in ***2001 SCC OnLine Bom 753***, the Bombay High Court held that there should be an **intentional overt act** in order to attract an offence under

Section 2 of the Act. The relevant portions of the judgement are extracted hereunder:

“5. It is doubtful whether omission to hoist the National Flag or hold the Flag Hoisting ceremony on the aforesaid days of national importance would fall within the ambit of “or otherwise brings into contempt”. The definition clearly indicates positive acts such as burning, mutilating, defacing, defiling, etc. In order to be liable for punishment under Section 2, it is necessary that the act complained of must be intentional. The omission to hold the flag hoisting ceremony cannot be said to be sui generis with the positive acts mentioned preceding the words “or otherwise”. Even otherwise, there is no statutory provision making it mandatory to hold the flag hoisting ceremony on 19th December, 2000 i.e. Goa Liberation Day and other days of national importance.”

49. In ***The Publisher, Sportstar Magazine, Chennai v. Girish Sharma***, reported in ***2000 SCC OnLine Mad 896***, this Court, while dealing with a case as to whether an opinion published in a magazine highlighting the importance of the national Flag in light of the Flag being displayed upside down at a sports tournament, held as follows:

“10. The reading of the above provision would make it clear that whoever in any public place brings into contempt the Indian National Flag shall be punished.

.....

12. The perusal of the above paragraphs would make it clear that the Indian Flag was placed upside down in the Tournament took place on 8.3.1997, in which Chess was played by V. Anand and Veselin Topalov and the said figure was published by the Publisher, the petitioner herein.

13. In paragraph 4 of the complaint, the complainant would state that the said figure of the Indian Flag which was placed upside down was published by the petitioner in his Magazine, thereby the Publisher caused dishonour and insult to the Indian Flag and Nation.

14. In short, it is the case of the complainant that the publication of the photograph displaying the event which took place in a foreign country where the Indian Flag was placed upside down while the Indian player and the foreign were playing, would amount to offence under the Act. Thus, it is clear that it is not the case of the complainant that the Indian Flag was placed by the Publisher in a wrong way or upside down.

15. On going through the article, which is the material on the basis of which complaint has been filed, it is clear that initially the Indian Flag was kept upside down, but the same was corrected by the Organisers within a few minutes. This is only an information disseminated through the press.

16. For placing Indian Flag upside down, it cannot be stated that the Publisher was in any way responsible. On the other hand, the mistake committed by the Organisers of the Tournament was clearly displayed and depicted through the photograph informing the reading public that the mistake committed by the Organisers in placing the Indian Flag in a wrong way at the beginning stage has been corrected by them even in the middle of the play.

17. Moreover, the writer of the article also would express his opinion that, “When Indian Flag was placed upside down, the Indian player Anand did not play well, but once this was corrected, the Indian player started to play well and won two games”. This opinion given by the writer of the article would indicate that the players can play well only when the National Flag is placed in the correct way. Therefore, the publication of the photograph and writing the article about it giving the above opinion would not amount to insult to the National Flag. On the other hand, it is the warning to the Organisers not to place the Indian Flag upside down.

18. It would also indicate that when the Indian players play in foreign countries, they have to verify whether the Indian Flag placed in the Chess Table is in a correct way and thereafter, they have to play and only then, play would be a fair play and they would also play well.

19. *The photograph and the opinion given in the article by the writer, in my view, is to impress upon the players as well as the Organisers of the Tournament that at least in the future, the Flags of the respective countries must be placed in a correct way and proper placement of the National Flag only would pave the way for the proper play. Therefore, this is only a comment by the press which indicates the importance of the honour to be given to the National Flag.*

20. *Under those circumstances, this publication of the photograph and the events which took place in the foreign country while the chess was played along with the opinion of the writer of the article, would not attract any ingredients of Section 2 of the Act.”*

50. In the case of ***Ajitinder Singh v. State of Punjab***, reported in ***2000 SCC OnLine P&H 52***, the court held the following.

“7. Flying the National Flag on the Government vehicles does not come within any of the categories mentioned in the aforesaid Section nor does it amount to insult to Indian National Flag. The learned Counsel for the petitioner is not able to draw my attention to any of the provisions of law or authority to show that flying the National Flag on the car used by Respondent No. 5 amounts to insult to the National Flag. A reading of Section 2 of the Prevention of Insults to National Honour Act, 1971 does not prohibit flying of the National Flag

on the bonnet of the car. Therefore, this contention of the learned Counsel for the petitioner is also rejected.”

51. In ***P.V. Joseph, v. State of Kerala***, reported in ***2016 SCC OnLine Ker 11466***, the Kerala High Court held that a prosecution would be unnecessary in a case where there was no intention on the mind of the accused person to dishonour the National Flag. The relevant portion of the judgement is extracted hereunder:

“4. Going by the decisions noted supra, it seems that the prosecution in this case is quite unnecessary. Apart from that, it seems that there was no intention on the part of the petitioners to dishonour the National Flag. True that it was an omission on their part in lowering the National Flag after the prescribed time. The prosecution seems to be quite unnecessary and therefore, the same can be quashed.”

52. In ***A.K. Viswanathan v. Angamali Municipality Represented by its Secretary***, reported in ***2019 SCC OnLine Ker 3978***, the Kerala High Court held:

“13. In other words, it is indirectly admitted in the complaint that the petitioners had no intention to insult or to show disrespect to the National Flag.

14.even assuming that the averment in Annexure-A1 complaint that the National Flag lowered down by the second accused was one hoisted on the morning of 17.08.2015 on the flag post, it cannot be found that he had any intention to insult or to show disrespect to the National Flag by lowering it down. Even as per the averment in the complaint, the petitioners had done so on a misunderstanding that the National Flag which was hoisted on the flag post on the Independence Day was thereafter not lowered down.”

53. In **Addanki Ranjith Ophir v. State of Andhra Pradesh**, reported in **2017 SCC OnLine Hyd 499**, the Andhra Pradesh High Court held:

“6. Printing of the photo of the Jesus Christ on the said book does not in any manner fall within the purview of Section 2 of the said Act.”

Compulsive Patriotism and it's Fetishization

54. The judgment of the Hon'ble Supreme Court of the United States in **Texas v. Johnson**, reported in **491 U.S. 397 (1989)**, in a case of flag desecration for burning the Flag, was rendered with 5-4 majority in favour of a citizen of America, by laying down that if the purpose of the Act is not attributable to the

sanctity and sovereignty of the nation, then such allegations would not amount to any kind of punishment. Justice Kennedy, in concurrence with the opinion of Justice Brennan's opinion, wrote this,

"51. Though symbols often are what we ourselves make of them, the Flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the costs to which those beliefs commit us. It is poignant but fundamental that the Flag protects those who hold it in contempt."

55. As it is, there is no doubt that nationalism in a democracy like India is very vital. But, hyper and surfeit adherence to it goes against the prosperity of our nation from all its past glory. The great jurist, late Mr. N.A. Palkhivala pointed out, *"we commenced with one priceless advantage, namely, 5000 years of civilisation behind us, a civilisation in the words of Ralph Waldo Emerson "reached the summit of human thoughts"*. A patriot is not one who only raises the Flag, symbolises his national pride and wear it on his sleeve, but also, a person who bats for

good governance. The symbolisation of national pride is not synonymous with patriotism, just like how cutting a cake is not unpatriotic. Rig Veda asks us to let noble thoughts come to us from every side, which reflects Indian ethos, i.e. tolerance. As Rabindranath Tagore once remarked, "*Patriotism cannot be our final spiritual shelter; my refuge is humanity. I will not buy glass for the price of diamonds, and I will never allow patriotism to triumph over humanity as long as I live.*"

56. Patriotism is not determined by a gross physical act. The intention behind the act will be the true test, and it is possible that sometimes the very act itself manifests the intention behind it. In the present case, even if the entire set of facts stated in the complaint are taken as it is, it must be seen as to what would have been the actual feeling with which the participants would have dispersed after the function was over. Will they be feeling great pride in belonging to this great nation, or would the pride of India have come down on the mere cutting of a cake during the celebration? Without any hesitation, this Court can hold

that the participants would have felt only the former and not the latter. For proper understanding, let us take a hypothetical case where there is widespread participation in an Independence Day or Republic Day celebration. During such celebrations, the participants are provided with a national flag to be worn by them. In reality, after the participants leave the venue on completion of the celebrations, they do not continue to possess this Flag forever, and it becomes part of any other waste paper. Will this mean that each of the participants has insulted the national Flag and should be proceeded against under Section 2 of the Act? The obvious answer is in the negative. If persons are allowed to give such broad meaning to the word 'insult', many will become very uncomfortable and hesitant to handle the national Flag. The National Flag is given during the function as a symbol of our national pride. Once such a feeling is created in the minds of the participants, the purpose for which the national Flag was given or used will be achieved.

57. The Flag Code does provide a mechanism to destroy flags in private, in a manner consistent with the dignity of the Flag, and as a responsible citizen, it should be followed in letter and spirit. Not all will be aware of this procedure, and therefore, that by itself will not make them susceptible to committing an offence under Section 2 of the Act. This Court ventured to give such an extreme illustration only to drive home the point that a wayfarer, for the mere sake of publicity, should not be allowed to expose people to criminal prosecution for some innocuous acts which by themselves cannot be construed to be an insult to make it an offence under Section 2 of the Act.

58. In view of the above discussion, this Court is of the considered view that the complaint given by the Respondent does not make out an offence under Section 2 of the Act, and the second issue is answered accordingly.

59. In the result, the Order passed by the Court below in CMP No. 6452 of 2015 dt. 17.02.2017 is hereby quashed, and

the Criminal Original Petition is allowed. In view of this Order, nothing survives in the Writ Petition filed by the complainant and the same is closed.

60. Before drawing the curtains, I will be failing in my duty if I do not acknowledge the assistance rendered by my interns in providing the research materials, without which I would not have been able to deliver a consummate judgement on this important issue. I, therefore, deem it fit to record the same in this judgement. Consequently, the connected miscellaneous petition is closed.

22.03.2021

Index: Yes
Internet: Yes
Speaking Order/Non Speaking order
KP
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To

The Public Prosecutor,
High Court, Madras.

N. ANAND VENKATESH, J.

KP

Pre-Delivery Order in
Crl.OP No.15656 of 2020

Delivered on: 22.03.2021

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