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**HIGH COURT OF MADHYA PRADESH**  
**M.Cr.C. No.18186/2021**

(Gaurishankar Garg & another Vs. The State of M.P.)

(1)

**Gwalior, dated : 24/8/2021**

Shri Vivek Khedkar, Advocate for the petitioners.

Shri Manish Nayak, Panel Lawyer for the respondent/State.

Heard finally with the consent of both the parties.

Case diary perused.

This petition invoking inherent powers of this Court under section 482 of the Cr.P.C. has been filed seeking quashment of FIR registered as Crime No. 352/2017 at Police Station Sabalgarh, District Morena alleging offence punishable under section 2 of the Prevention of Insults to National Honour Act, 1971 (for brevity "1971 Act").

2. Prosecution story, in short, is that on 17/8/2017 a complaint was lodged by Sweety Rajawat, Sub Inspector, P.S. Sabalgarh, District Morena to the effect that on 16/8/2017, she found that in the compound of Balaji ITI College, Gurudwara Road, Sabalgarh, the national flag continued to remain hoisted till 8.30 PM and, as such, intentional insult to National Flag was being caused. The incident of insult to National Flag was witnessed by Rajkumar Bansal, Ajit and Bhawar Singh and photographs were also taken. Accordingly, the offence under section 2 of the Act was registered.

3. Learned counsel for the petitioners submits that even if the allegations contained in the FIR are treated to be true, then too they do not constitute any offence as alleged. In support of his contentions,

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learned counsel has placed reliance on decisions of the Apex Court in the cases of **State of Haryana and others Vs. Bhajanlal and others, 1992 Supp (1) SCC 335, Union of India Vs. Naveen Jindal and another, (2004) 2 SCC 510, Ganesh Lal Bathri Vs. State of M.P., (2003) 2 JLJ 296, Amgonda Vithoba Pandhare Vs. Union of India: LAWS (BOM), (2012) 1 138, Umesh Kishanrao Chopde Vs. State of Maharashtra and Anr., 2012 Cr.L.J. 3142** and the Single Bench decision of this Court rendered at Indore Bench in **M.Cr.C. No.5230/2012 (Dr. Vikram Dutta Vs. State of M.P. and Anr.) decided on 25.01.2018.**

4. The relevant provisions of Sec.2 of 1971 Act read thus:-

“2. Insult 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 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 re- presentation 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.

Section 2 attracts punishment of imprisonment for a term of

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three years or with fine or both when a person is found in public place within public view burning mutilating, defacing, defiling, disfiguring, destroying, trampling upon or bringing or otherwise bringing into contempt by words spoken or written or by act begin the Indian National Flag. Allegation against petitioners is of leaving National Flag at hoisted position at about 8.30 PM i.e. between sunset and sunrise. This act of petitioners does not squarely fall within Sec.2 of 1971 Act. Thus, the act of leaving the National Flag in hoisted position even after sunset may be an act of advertent or inadvertent forgetfulness and subject matter of misconduct but not contemptuous unless it is shown that hoisting and flying the National Flag between sunset and sunrise is expressly prescribed as an offence in specific terms.

5. The fundamental rule of interpretation of penal provision requires that every penal provision is to be interpreted strictly. If an act does not fall within the four corners of the offence described by the statute, then the said act cannot suffer rigors of penal provision.

In this regard, the decision of The Apex Court in **R. Kalyani Vs. Janak C. Mehta and Ors., (2009) 1 SCC 516**, is noteworthy:-

“37. Maxwell in The Interpretation of Statutes (12th Edn) says: "The strict construction of penal statutes seems to manifest itself in four ways: in the requirement of express language for the creation of an offence; in interpreting strictly words setting out the elements of an offence; in requiring the fulfillment to the letter of statutory conditions precedent to the infliction of punishment; and in insisting on the strict observance of technical provisions concerning criminal procedure and jurisdiction."

38. In Craies and Statute Law (7th Edn. At p. 529) it is

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said that penal statutes must be construed strictly. At page 530 of the said treatise, referring to U.S. v. Wiltberger, [(1820) 2 Wheat (US) 76], it is observed, thus :

"The distinction between a strict construction and a more free one has, no doubt, in modern times almost disappeared, and the question now is, what is the true construction of the statute? I should say that in a criminal statute you must be quite sure that the offence charged is within the letter of the law. This rule is said to be founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the Legislature, and not in the judicial department, for it is the Legislature, not the Court, which is to define a crime and ordain its punishment."

39. In Tuck & Sons v. Priester, [(1887)] 19 QBD 629] which is followed in London and County Commercial Properties Investments v. Attn Gen., [(1953) 1 WLR 312], it is stated:

"We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation, which will avoid the penalty in any particular case, we must adopt that construction. Unless penalties are imposed in clear terms they are not enforceable. Also where various interpretations of a section are admissible it is a strong reason against adopting a particular interpretation if it shall appear that the result would be unreasonable or oppressive."

From the above, it is evident that the act of leaving the National Flag at hoisted position between sunset and sunrise does not satisfy the ingredients which constitute the offence punishable u/S.2 of 1971 Act.

6. Learned counsel for respondents has attempted to seek assistance from the Indian Flag Code, 2002 (for brevity, "Flag Code"), in particular, Clause of Sec.2(2.2)(xi) of Flag Code. He submits that in particular Clause under the said Flag Code allowing National Flag to remain hoisted between sunset and sunrise is prohibited. As such it is urged that if provision of Sec.2 of 1971 Act

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is read in conjunction with the said clause of Flag Code, then petitioners have prima facie committed the offence punishable u/S.2 of 1971 Act.

7. The relevant clause of the Indian Flag Code, 2002 is reproduced below for ready reference and convenience:-

“2(2.2)(xi)- Where the Flag is displayed in open, it should, as far as possible, be flown from sunrise to sunset, irrespective of weather conditions.”

8. It is not in dispute that the said Flag Code is not “law” as defined in Article 13 of Constitution of India and is a mere compendium of executive instructions as held by the Apex Court in **Union of India Vs. Naveen Jindal and another, (2004) 2 SCC 510**, the relevant extract of which reads thus:-

“28. Before we proceed further, it is necessary to deal with the question, whether Flag Code is "law"? Flag Code concededly contains the executive instructions of the Central Government. It is stated that the Ministry of Home Affairs, which is competent to issue the instructions contained in the Flag Code and all matters relating thereto are one of the items of business allocated to the said Ministry by the President under the Government of India (Allocation of Business) Rules, 1961 framed in terms of Article 77 of the Constitution of India. 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."

29. 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

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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.”

9. As such since the Flag Code does not have any statutory force it cannot attract any offence. Besides, the Flag Code lays down that as far as possible National Flag should be flown between sunrise and sunset. Meaning thereby that it should not be flown between sunset and sunrise. Use of expression "as far as possible" in the said clause of Flag Code, which is a mere instruction, is sufficient for this Court to conclude that flying of National Flag between sunset and sunrise is not prohibited by law.

10. Consequently, present MCrC stands allowed and the FIR registered as Crime No. 352/2017 at Police Station Sabalgarh, District Morena alleging offence punishable under section 2 of the 1971 Act and all consequential proceedings stand quashed.

**(S.A.Dharmadhikari)**  
**Judge**

(and)