IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On: 01.2.2024	**Delivered on: 08.2.2024**

Coram :

THE HON'BLE MR. JUSTICE N. ANAND VENKATESH

Criminal Original Petition No.27142 of 2023
& Crl.M.P.Nos.18842 & 18844 of 2023

K.Annamalai ...Petitioner

Vs

V.Piyush ...Respondent

PETITION under Section 482 of the Criminal Procedure Code praying to call for the records relating to C.C.No.1360 of 2023 on the file of the learned Judicial Magistrate No.4, Salem and quash the same.

For Petitioner : Mr.C.V.Shyam Sundar
For Respondent : Mr.V.Suresh

ORDER

"No man ought to be at liberty to force, upon unwilling ears and eyes, sounds and sights which must cause irritation…. If I were a Judge in India, I should have

no scruple about punishing a Christian who should pollute a mosque."

Lord Macaulay

This is another case which serves as a reminder to those in positions of power and influence whose words and deeds have a wider reach and impact on the citizenry of this country.

2. The petitioner is the State President of the Bharatiya Janata Party (BJP) in Tamil Nadu. He is stated to have given an interview to a YouTube channel named 'Pesu Thamizha Pesu' on 22.10.2022, wherein he expressed his opinion regarding the ban on crackers during the Diwali festival. He is reported to have stated as under:

"சுப்ரீம் கோர்ட்ல போய் முதல் முதலா ரிட் பெட்டிஷன் போட்டது யாரு. எந்த NGO போட்டுச்சு. இந்த மாதிரி நீ பட்டாசு வெடிக்கறதுனால பொல்யூஷன் வந்துருச்சு. அதனால .....சுப்ரீம் கோர்ட்ல ∴பர்ஸ்ட் கெஸ் போட்ட NGO is it not a Christian Missionary NGOனு அவங்கள சொல்ல சொல்லுங்க. ஒரு NGO போய் சுப்ரீம் கோர்ட்ல இந்த பிரச்சனையை ஆரம்பிக்கிறான், பல ஆண்டுகளுக்கு முன். அதுலயும், குறிப்பாக ஒரு மிகப்பெரிய ஒரு..... அந்தப் பையன் இப்போ லண்டன்ல படிக்கிறான். அந்த பையன் பேர்ல தான் ∴பர்ஸ்ட் கேஸே

> ∴பைல் பண்றாங்க. எனக்கு பொல்யூஷன் வருது டெல்லியில் என்னால படிக்க முடியல. ஒரு NGO பேக் பண்ணுது. ஏன்? உங்களுக்கு இந்தியாவோட கலாச்சாரத்தை மொத்தமா அழிச்சிடனும். பட்டாசே வெடிக்க கூடாது. 2000 ஆண்டுகளாக பட்டாசு என்பது நமது கலாச்சாரத்தில் இருக்குது. அது எல்லாம் அழிச்சிரனும். சுப்ரீம் கோர்ட்ல அத வந்து காண்டரோஷியலா வந்து, இந்த NGO வந்து பெரிய பணம் செலவு பண்ணி, பெரிய பெரிய லாயர்ஸ்லாம் கொண்டு வந்து நடத்துறாங்க. அந்த கேஸ்.....இந்து கலாச்சாரத்தை அழிக்கிறுக்குனெ ஒரு குரூப்பு கிளம்பி இருக்கு டெல்லியில் இருந்து international funded NGO. அத முறியடிப்பதற்கு சுப்ரீம் கோர்ட்கு ஓடிட்டு இருக்கிறோம் நாமெல்லாம்."

3. The entire interview ran for nearly 44 minutes. The alleged controversial statement/opinion formed a portion of it and edited footage running to nearly six minutes was culled out and posted on the Twitter account of the petitioner's party in the State.

4. The respondent, who claims himself to be an environmentalist, had access to this Twitter post and felt that the post had the propensity of spreading hatred between two communities ie., between Christians and Hindus, and that it would also create divisions amongst religious groups. Therefore, he gave a

complaint on 23.10.2022 to the Director General of Police, the Home Secretary and the Commissioner of Police, Salem City immediately. However, the respondent was informed by the police through the communication dated 07.12.2022 that the YouTube interview did not attract any breach of public peace nor prima facie make out a case against the accused persons.

5. Thereafter, the respondent filed an application under Sections 156(3) and 200 of the Criminal Procedure Code (for short, the Code) on 15.12.2022 before the learned Judicial Magistrate No.4, Salem, who, after considering the allegations made in the application and also after perusing the entire records, which included the video clipping that was presented in a pen drive, *prima facie* found that offences have been made out against the petitioner under Sections 153A and 505(1)(b) of the Indian Penal Code (for brevity, the IPC). The Magistrate accordingly issued a process and proceeded to summon the petitioner by a detailed order dated 04.11.2023. The Magistrate also declined to issue process against the interviewer. Challenging the summoning order, this petition has been filed before this Court seeking to quash the proceedings pending in C.C.No.1360 of 2023 on the file of the Judicial Magistrate No.4, Salem.

6. Heard the learned counsel for the petitioner and the learned counsel appearing for the respondent.

7. The learned counsel for the petitioner submitted that the statements made by the petitioner cannot be construed as hate speech and that at best, it can only be taken as a cry in anguish. He further submitted that the so-called interview was given as early as 22.10.2022, that the complaint was taken on file nearly after 400 days, and that in the interregnum period, there was no adverse reaction to the statement/opinion made/expressed by the petitioner and that it never resulted in the disturbance of tranquillity prevailing in the society. He also submitted that apart from that, the police had inquired into the complaint and come to the conclusion that no case has been made out and in spite of it, the respondent, with an ulterior motive, is prosecuting the case.

8. The learned counsel for the petitioner further submitted that the so-called issue that is projected by the respondent has become a dead horse, and that it is pointless to whip that horse at this length of time and make the petitioner undergo the trial of a frivolous criminal complaint and that even if the allegations are taken

as such, no offences have been made out under Sections 153A and 505(1)(b) of the IPC.

9. In order to substantiate his submissions, the learned counsel for the petitioner relied upon the following judgments :

(i) of the Division Bench of the Calcutta High Court in the case of ***P.K. Chakravarti v. Emperor [reported in (1926) I.L.R. Vol. 54 Calcutta 59]****;*

(ii) a learned Single Judge of this Court in the case of ***Ameer Vs. State [Crl.O.P.No. 2845 of 2019 dated 25.4.2022];***

(iii) a learned Single Judge of the Karnataka High Court in the case of ***Sanjay Vs. State of Karnataka [Criminal Petition No.6415 of 2021 dated 09.6.2023];***

(iv) a learned Single Judge of the Jammu and Kashmir High Court in the case of ***Zakir Hussain Vs. U.T. of Ladakh [reported in 2021 SCC OnLine J&K 64];***

(v) a learned Single Judge of this Court in the case of ***E.V.K.S. Elangovan Vs. State [Crl.O.P.No.21792 of 2021 dated 08.4.2022];***

(vi) a learned Single Judge of this Court in the case of ***Fazil Vs. State [Crl.O.P. No.21123 of 2020 dated 05.7.2022];*** and

(vii) a learned Single Judge of this Court in the case of ***I.Periyasamy Vs. State [Crl. O.P.(MD) No.19455 of 2018 dated 08.4.2022].***

10. Per contra, the learned counsel appearing for the respondent submitted that the petitioner had deliberately posted the shortened version of the interview running for six minutes in the official twitter page only with a view to stoking anger and hatred amongst Hindu viewers and supporters of the BJP party. It was further submitted that the controversial interview was given with a clear intention to create divisions and a conflict between two communities. He also submitted that the petitioner is a mass social media influencer, who holds a higher position in the national political party, that he has several followers and that in view of the same, the interview that was given by the petitioner had a very wide reach and also attracted several adverse comments. According to him, the interview given by the petitioner must be seen from the angle of its content and context, in which, it was made and the persons, to whom, it was meant to have been addressed.

11. The learned counsel for the respondent further submitted that the impact would be even more when it falls from the mouth of the petitioner, who is a person of stature in the State of Tamil Nadu, that the facts of this case clearly satisfy the ingredients for the offences under Sections 153A(1)(a) and 153A(1)(b) of the IPC, that this is in view of the fact that the words spoken by the petitioner promote disharmony, feelings of enmity, hatred and ill-will between two religious groups and it has the propensity to disturb the public tranquillity and that for the very same reasons, a prima facie case has been made out under Section 505(1)(b) of the IPC.

12. The learned counsel for the respondent described the speech of the petitioner as a '***dog whistle',*** which conveyed a political message and was intended to be understood by the particular demographic group in a particular manner, which ultimately would turn the group against persons belonging to a minority religion. He also submitted that the Apex Court has now come down heavily on such hate speeches and in the case of ***Ashwini Kumar Upadhyay Vs. Union of India [W.P.(Civil) No.943 of 2021 dated 13.1.2023],*** while allowing the interlocutory applications for amendment, the Apex Court issued interim directions

directing that such hate speeches, which attract the offences under Sections 153A and 505 of the IPC, must be immediately acted upon by registering *suo motu* first information report and that the offender must be proceeded against.

13. According to the learned counsel appearing for the respondent, the police were expected to follow this direction, that since they closed the complaint, the respondent, as a responsible citizen, wanted to have a follow-up on this issue of prime importance in order to curb any such hate speeches, which will disturb the fabric of the nation, in future. He also submitted that since sanction must be obtained from the State Government, the respondent followed it up with the District Magistrate and District Collector concerned and in turn, the Government issued G.O.Ms.No.652, dated 18.10.2023 according sanction under Section 196 of the Code for prosecuting the petitioner for the offences under Sections 153A and 505 of the IPC, that further, the Court below applied its mind on the entire materials and had written a six page order while taking cognizance of the complaint and that there is absolutely no ground to interfere with the same. Hence, the learned counsel sought for dismissal of this quash petition.

14. In order to substantiate his submissions, the learned counsel for the respondent relied upon the following :

(i) judgment of the Supreme Court in the case of ***Babu Rao Patel Vs. State (Delhi Administration) [reported in 1980 (2) SCC 402];***

(ii) judgment of the Supreme Court in the case of ***Balwant Singh Vs. State of Punjab [reported in 1995 (3) SCC 214];***

(iii) judgment of the Supreme Court in the case of ***Bilal Ahamed Kaloo Vs. State of A.P. [reported in 1997 (7) SCC 431];***

(iv) judgment of the Supreme Court in the case of ***Patricia Mukhim Vs. State of Meghalaya [reported in 2021 (15) SCC 35];***

(v) judgment of the Supreme Court in the case of ***Pravasi Bhalai Sangathan Vs. Union of India [reported in 2014 (11) SCC 477];***

(vi) judgment of the Supreme Court in the case of ***Amish Devgan Vs. Union of India [reported in 2021 (1) SCC 1];***

(vii) judgment of the Supreme Court in the case of ***Kaushal Kishore Vs. State of Uttar Pradesh [reported in 2023 (4) SCC 1];***

(viii) order of the Supreme Court in the case of ***Ashwini Kumar Upadhyay Vs. Union of India [W.P. (Civil) No.943 of 2021 dated 13.1.2023];*** and

(ix) order rendered by me in the case of ***S.Ve.Shekher Vs. Al.Gopalsamy [Crl.O.P. (MD) No. 11494 of 2018 dated 14.7.2023].***

15. This Court has carefully considered the submissions of the learned counsel on either side and perused the materials available on record.

16. Before dealing with the issue involved in this case, it is first necessary to examine the import of the term ***"hate speech"***. The history of attempts to prevent the propagation of scurrilous statements about particular groups is of very ancient vintage. The earliest instance occurred in 1275, when the offence of "*De Scandalis Magnatum*" was created, prohibiting "*any false News or Tales, whereby discord, or occasion of discord or slander may grow between the King and his People, or the Great Men of the Realm*". The statute aimed to prevent false statements which, in a society dominated by extremely powerful landowners, could

threaten the security of the state. De Scandalis Magnatum was rarely employed and was abolished in England in 1887.

17. In the United States, the power of the State to repress hate speeches against certain communities has been routinely pitted against the protection granted to free speech under the First Amendment. In ***Cantwell v. State of Connecticut***, supra, 310 U.S. 296, the U.S. Supreme Court held that "*There are limits to the exercise of these liberties (of speech and of the press). The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the states appropriately may punish."* This decision was followed by Frankfurter, J in ***Beauharnais v. People State of Illinois*****, 1952 SCC OnLine US SC 56.**

18. In ***Queen v James Keegstra*** [1990] 3 SCR 697, the Canadian Supreme Court dealt with a very important case concerning the constitutional validity of a law outlawing hate speech against particular communities. James Keegstra, a high

school teacher, was charged with promoting hatred by communicating antisemitic statements in his class. Mr. Keegstra attributed various evil qualities to Jews calling them "treacherous", "subversive", "sadistic", "money-loving", "power hungry" and "child killers". The Supreme Court, by a majority, upheld the law. Chief Justice Dickson who delivered the judgment of the majority highlighted the rationale for outlawing hate speech as under:

> *"Essentially, there are two sorts of injury caused by hate propaganda. First, there is harm done to members of the target group. It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence. In the context of sexual harassment, for example, this Court has found that words can in themselves constitute harassment (Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252). In a similar manner, words and writings that wilfully promote hatred can constitute a serious attack on persons belonging to a racial or religious group, and in this regard the Cohen Committee noted that these persons are humiliated and degraded (p. 214).*
>
> *In my opinion, a response of humiliation and degradation from an individual targeted by hate propaganda is to be expected. A person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs (see I. Berlin, "Two Concepts of Liberty", in Four Essays on Liberty (1969),*

> *118, at p. 155). The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance. This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority. Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society."*

19. These observations would apply on all fours to a country like ours where the ideal of fraternity is constitutionally enshrined in the preamble of the Constitution.

20. The Canadian Supreme Court revisited the issue in ***Saskatchewan Human Rights Commission v William Whatcott***, [2013] 1 SCR 467, where the following three limb test was formulated to deal with hate speech cases:

> *" First, courts are directed to apply the hate speech prohibitions objectively. In my view, the reference in Taylor to "unusually strong and deep-felt*

emotions" (at p. 928) should not be interpreted as imposing a subjective test or limiting the analysis to the intensity with which the author of the expression feels the emotion. The question courts must ask is whether a reasonable person, aware of the context and circumstances surrounding the expression, would view it as exposing the protected group to hatred.

[57] *Second, the legislative term "hatred" or "hatred or contempt" is to be interpreted as being restricted to those extreme manifestations of the emotion described by the words "detestation" and "vilification". This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects.*

[58] *Third, tribunals must focus their analysis on the effect of the expression at issue. Is the expression likely to expose the targeted person or group to hatred by others? The repugnancy of the ideas being expressed is not, in itself, sufficient to justify restricting the expression. The prohibition of hate speech is not designed to censor ideas or to compel anyone to think "correctly". Similarly, it is irrelevant whether the author of the expression intended to incite hatred or discriminatory treatment or other harmful conduct towards the protected group. The key is to determine the likely effect of the expression on its audience, keeping in mind the legislative objectives to reduce or eliminate discrimination."*

21. Shortly thereafter, in ***Pravasi Bhalai Sangathan v. Union of India*****,** (2014) 11 SCC 477, the Supreme Court was petitioned under Article 32 of the Constitution seeking remedial measures to combat hate speeches which were being made in various parts of the country. The Court referred to the decision of the Canadian Supreme Court in ***Saskatchewan Human Rights Commission v William Whatcott***, [2013] 1 SCR 467, and laid down the following as falling within the net of "*hate speech*":

> *"Hate speech is an effort to marginalise individuals based on their membership in a group. Using expression that exposes the group to hatred, hate speech seeks to delegitimise group members in the eyes of the majority, reducing their social standing and acceptance within society. Hate speech, therefore, rises beyond causing distress to individual group members. It can have a societal impact. Hate speech lays the groundwork for later, broad attacks on vulnerable that can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide. Hate speech also impacts a protected group's ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy."*

22. The Supreme Court went on to observe that although there existed sufficient statutory mechanisms to curb hate speech, the problem lay in its enforcement. It observed:

> *"As referred to hereinabove, the statutory provisions and particularly the penal law provide sufficient remedy to curb the menace of "hate speeches". Thus, person aggrieved must resort to the remedy provided under a particular statute. The root of the problem is not the absence of laws but rather a lack of their effective execution. Therefore, the executive as well as civil society has to perform its role in enforcing the already existing legal regime. Effective regulation of "hate speeches" at all levels is required as the authors of such speeches can be booked under the existing penal law and all the law enforcing agencies must ensure that the existing law is not rendered a dead letter. Enforcement of the aforesaid provisions is required being in consonance with the proposition salus reipublicae suprema lex (safety of the State is the supreme law).*

23. While declining to issue general directives, the Supreme Court nonetheless thought it fit to refer the matter to the Law Commission of India for further study. In response, the Law Commission prepared its 267th Report recommending the insertion of 153-C (Prohibiting incitement to hatred) and

section 505-A (Causing fear, alarm, or provocation of violence in certain cases) in the Indian Penal Code to effectively deal with cases of hate speech.

24. In ***Amish Devgan v. Union of India*****, (2021) 1 SCC 1,** a journalist and news anchor approached the Supreme Court challenging the registration of FIR's against him for alleged hate speech. The Supreme Court explained the effect of inflammatory speeches made by those in power and authority. Paragraph 76 is directly relevant to the case on hand, and reads as follows:

> ***"****Persons of influence, keeping in view their reach, impact and authority they wield on general public or the specific class to which they belong, owe a duty and have to be more responsible. They are expected to know and perceive the meaning conveyed by the words spoken or written, including the possible meaning that is likely to be conveyed. With experience and knowledge, they are expected to have a higher level of communication skills. It is reasonable to hold that they would be careful in using the words that convey their intent. The reasonable man's test would always take into consideration the maker. In other words, the expression "reasonable man" would take into account the impact a particular person would have and accordingly apply the standard, just like we substitute the reasonable man's test to that of the reasonable professional when we apply the test of professional negligence."*

25. The Supreme Court took note of various authorities/materials available across the globe to understand the term 'hate speech'. In one portion of the said judgment, the Apex Court specifically took note of the essays written by Andrew F.Sellars and Alice E.Marwick and Ross Miller, who brought three important concepts of content, intent and harm that could be caused by such hate speech. These articles also emphasised upon the context and occasion of the speech and the stature and power of the speaker and also the target that is made upon the group, to which it is meant to have been addressed based on race, religion, gender, etc. These articles also laid emphasis upon the non-physical harm that can also be called 'silent harm', which results in a hate speech. The Court then drew a vital distinction between “free speech” and “hate speech” and observed thus:

> **“***The present case, it is stated, does not relate to “hate speech” causally connected with the harm of endangering security of the State, but with “hate speech” in the context of clauses (a) and (b) of sub-section (1) of Section 153-A, Section 295-A and sub-section (2) of Section 505 of the Penal Code. In this context, it is necessary to draw a distinction between “free speech” which includes the right to comment, favour or criticise government policies; and “hate speech” creating or spreading hatred against a targeted community or group. The former is primarily concerned with political, social and economic issues and policy matters, the latter would not primarily focus on the*

> *subject-matter but on the substance of the message which is to cause humiliation and alienation of the targeted group. The object of criminalising the latter type of speech is to protect the dignity (as explained above) and to ensure political and social equality between different identities and groups regardless of caste, creed, religion, sex, gender identity, sexual orientation, linguistic preference, etc."*

26. The dissenting judgment of Mrs Justice B.V Nagarathna, J in ***Kaushal Kishor v. State of U.P.*****, (2023) 4 SCC 1,** contains a succinct summary of the relevant principles governing the law on hate speech. The learned judge has observed thus:

> ***"****Traditionally, "hate speech" is the term used to describe speech that can potentially cause actual material harm through potential social, economic and political marginalisation of a community as declared by this Court in Pravasi Bhalai Sangathan [Pravasi Bhalai Sangathan v. Union of India, (2014) 11 SCC 477 : (2014) 3 SCC (Cri) 400]. However, in the present case, in my opinion, we are concerned with a more overarching area of derogatory, vitriolic and disparaging speech, which is actually not "hate speech" simpliciter as has been traditionally sought to be defined and understood. I am concerned with speech that may not be linked to systematic discrimination and eventual political marginalisation of a community, but which may nonetheless*

> *have insidious effects on the societal perception of human dignity, values of social cohesion, fraternity and equality cherished by "We the people" of India."*

27. The learned judge observed that hate speech strikes at each of the foundational values and that it violates the fraternity of citizens from diverse backgrounds, which is the *sine qua non* of a cohesive society based on plurality and multiculturalism, which is the fabric of the nation. The Hon'ble Judge also took note of the development of technology, which is being used as a medium of communication and as a result, it has a wider spectrum of impact across India. Therefore, it was emphasised that public functionaries, persons of influence and celebrities owe a duty to the citizenry at large to be more responsible and restrained in their speech.

28. The following observations made by Hon'ble Ms.Justice B.V. Nagarathna in the decision in the case of ***Kaushal Kishor*** are of great importance :

> *"251. Every citizen of India must consciously be restrained in speech, and exercise the right to freedom of speech and expression under Article 19(1)(a) only in the sense that it was intended by the framers of the Constitution, to be exercised.*

> *This is the true content of Article 19(1)(a) which does not vest with citizens unbridled liberty to utter statements which are vitriolic, derogatory, unwarranted, have no redeeming purpose and which, in no way amount to a communication of ideas. Article 19(1)(a) vests a multi-faceted right, which protects several species of speech and expression from interference by the State. However, it is a no brainer that the right to freedom speech and expression, in a human-rights based democracy does not protect statements made by a citizen, which strike at the dignity 2of a fellow citizen. Fraternity and equality which lie at the very base of our Constitutional culture and upon which the superstructure of rights are built, do not permit such rights to be employed in a manner so as to attack the rights of another."*

29. More recently, a two-judge bench of Mr. Justice K.M Joseph and Mrs. Justice B.V Nagarathna issued directions in W.P 943 of 2021, vide order dated 28.04.2023 directing, inter alia, as under:

> *"Respondent Nos. 9 to 36 shall ensure that immediately as and when any speech or any action takes place which attracts offences such as Sections 153A, 153B and 295A and 505 of the IPC etc., suo motu action will be taken to register cases even if no complaint is forthcoming and proceed against the offenders in accordance with law. Respondent Nos.9 to 36 will therefore issue direction(s) to their subordinates so that appropriate action in law will be taken at the earliest. We make*

> *it clear that any hesitation to act in accordance with this direction will be viewed as contempt of this Court and appropriate action will be taken against the erring officers"*

30. In this backdrop, we must now turn to examine the ingredients of Section 153-A and 505 of the Indian Penal Code, 1860. The evolution of the law as regards Section 153-A IPC has been traced in a judgment of mine in ***Mathew Samuel Vs. State rep.by Inspector of Police, Central Crime Branch [reported in 2019 (1) LW (Crl.) 21 J.S.].*** Hence, it may not be necessary to tread covered ground except to notice the following passages from the said decision:

> *"7. EVOLUTION OF SECTION 153-A OF THE IPC:*
>
> *(i) Section 153-A was inserted into the Code vide Section 5 of the Indian Penal Code Amendment Act (V of 1898).*
>
> *(ii) The original Section 153-A, as it stood prior to 1961, runs as under :*
>
> *'Whoever by words, either spoken or written, or by signs, or by visible representations, or otherwise, promotes or attempts to promote feelings of enmity or hatred between different classes of the citizens of India, shall be punished with imprisonment which may extend to two years, or with fine, or with both.*
>
> *Explanation.—It does not amount to an offence within the meaning of this Section to point out, without malicious intention and with an honest view to their removal, matters*

which are producing or have a tendency to produce, feelings of enmity or hatred between different classes of the citizens of India.'

(iii) In Abhiram Singh v. C.D.Commachen, (2017) 2 SCC 629 : 2017 SCC OnLine SC 9 at page 664, the Supreme Court noticed the legislative intent behind the 1961 amendment of Section 153-A and observed: 28. Interestingly, simultaneous with the introduction of the Bill to amend the Act, a Bill to amend Section 153-A of the Penal Code, 1860 (IPC) was moved by Shri Lal Bahadur Shastri. The Statement of Objects and Reasons for introducing the amendment notes that it was, inter alia, to check fissiparous, communal and separatist tendencies whether based on grounds of religion, caste, language or community or any other ground. The Statement of Objects and Reasons reads as follows:

STATEMENT OF OBJECTS AND REASONS

In order effectively to check fissiparous, communal and separatist tendencies whether based on grounds of religion, caste, language or community or any other ground, it is proposed to amend Section 153-A of the Indian Penal Code so as to make it a specific offence for anyone to promote or attempt to promote feelings of enmity or hatred between different religious, racial or language groups or castes or communities. The Bill also seeks to make it an offence for anyone to do any act which is prejudicial to the maintenance of harmony between different religious, racial or language groups or castes or communities and which is likely to disturb public tranquillity. Section 295-A of the Penal Code is being slightly widened and

the punishment for the offence under that section and under Section 505 of the Code is being increased from two to three years. New Delhi Lal Bahadur Shastri 5-8-1961.

(iv) The Law Commission of India, in its 42nd Report on the Indian Penal Code, observes as follows:

The amendment of 1961 made three changes in the original Section.

a. The term 'classes' was replaced by religious, racial or language groups or castes or communities.

b. Secondly, the scope of the Section was enlarged, by making it an offence also for anyone to do any act which is prejudicial to the maintenance of harmony between different religious, racial or language groups, or castes or communities and which is likely to disturb public tranquillity.

c. Thirdly, the Explanation was omitted. Bonafide writing or speech was no longer excepted from the purview of the Section.

(v) Post the 1961 amendment, the Section read as under

'153-A. Whoever—

(a) Promoting enmity between different groups on grounds of religion, race, language, etc. and doing acts prejudicial to maintenance of harmony—by words, either spoken or written, or by signs or by visible representations or otherwise, promotes, or attempts to promote, on grounds of religion, race, language, caste or community or any other ground whatsoever, feelings of enmity or hatred between different religious, racial or language groups or castes or communities, or

(b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial or language groups or castes or communities and which disturbs or is likely to disturb the public tranquillity,

shall be punished with imprisonment which may extend to three years, or with fine, or with both.'

(vi) In 1969, the Section was expanded further, and the statement of reasons for the amendment is as follows:

'Promoting enmity between different groups on grounds of religion, race, language, etc., is made an offence under Section 153 of the IPC. It is proposed to include therein promoting enmity between different groups on grounds, such as, place of birth, or residence as well. It is also proposed to widen the scope of the provision so as to make promotion of disharmony or feelings of ill-will an offence punishable thereunder. Clause (b) of the said Section provides for the punishment for doing acts prejudicial to the maintenance of harmony between different groups. That provision is also proposed to be widened so as to include acts prejudicial to the maintenance of harmony between different regional groups as well. It is also proposed to provide for enhanced punishment… ..for any such offence committed in a place of worship.'

(vii) Mens rea under Section 153-A

Discussing the requirement of mens rea under Section 153-A, the Law Commission, in its 42nd Report, points out

'Three possible views can now be put forth as to the requirement of mens rea under Section 153-A. First, intention is still the gist of the offence, and has to be proved by the

prosecution like any other fact, though it is open to the Court to infer it as is usually done in other cases. (Majority view before 1961). Secondly, intention is still the gist of the offence but there is a rebuttable presumption about it. By virtue of Section 81 of the Code, read with Section 106 of the Evidence Act, however, the accused can rebut the presumption (view expressed in Debates in Parliament in 1961). Thirdly, intention is not required and mere tendency to promote ill will, etc. is enough. (Allahabad view before 1961).'

(viii) The Law Commission concluded as under:

'Hence we would support the first view, and recommend that the word 'intentionally' should be inserted before the word 'promotes' in Section 153-A to make it clear that mens rea is essential and has to be proved as in any other case.'

(ix) Discussing the ingredients of the Section, a Full Bench of the Allahabad High Court in Maulana Azizul Haq Kausar Naqvi v. State, 1980 SCC OnLine All 77 : (1980) 17 ACC 152 : 1980 AWC 173 : AIR 1980 All 149 at page 162, opined as under :

'40. The essential ingredients of the aforesaid provision of law are:

(1) That the accused promoted or attempted to promote feelings of enmity and hatred between different religious, racial or language groups or caste or communities or that the accused has done an act which is prejudicial to the maintenance of harmony between such groups or caste or communities and which is likely to disturb public tranquillity.

(2) That he promoted or attempted to promote feelings of enmity or hatred by words or signs or visible representations or otherwise or had acted prejudicially to the maintenance of harmony which disturbs or is likely to disturb public tranquillity.'

'54. It is thus firmly established, both in India and in England, that criminality for the offence of blasphemous libel, or criminality under Section 153-A of the Indian Penal Code, does not attach to the things said or done but to the manner in which it is said or done. If the words spoken or written are couched in temperate, dignified, and mild language, and do not have the tendency to insult the feelings or the deepest religious convictions of any section of the people, penal consequences do not follow.'

(x) In Balwant Singh v. State of Punjab, (1995) 3 SCC 214 : 1995 SCC (Cri.) 432 at page 219, the Supreme Court endorsed the approach of the Law Commission and held that mens rea is essential to constitute an offence under Section 153-A. The Court said

'9. Insofar as the offence under Section 153-A IPC is concerned, it provides for punishment for promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever or brings about disharmony or feeling of hatred or ill-will between different religious, racial, linguistic or regional groups or castes or communities. In our opinion only where the written or spoken words have the tendency or intention of creating public disorder or disturbance of law and

order or affect public tranquillity, that the law needs to step in to prevent such an activity. The facts and circumstances of this case unmistakably show that there was no disturbance or semblance of disturbance of law and order or of public order or peace and tranquillity in the area from where the appellants were apprehended while raising slogans on account of the activities of the appellants. The intention to cause disorder or incite people to violence is the sine qua non of the offence under Section 153-A IPC and the prosecution has to prove the existence of mens rea in order to succeed. In this case, the prosecution has not been able to establish any mens rea on the part of the appellants, as envisaged by the provisions of Section 153-A IPC, by their raising casually the three slogans a couple of times. The offence under Section 153-A IPC is, therefore, not made out.'

(xi) In Bilal Ahmed Kaloo v. State of A.P., (1997) 7 SCC 431, the Supreme Court examined the commonality between Section 153-A and Section 505 of the IPC, and opined as under

'15. The common feature in both Sections being promotion of feeling of enmity, hatred or ill will "between different" religious or racial or linguistic or regional groups or castes and communities, it is necessary that at least two such groups or communities should be involved. Merely inciting the feeling of one community or group without any reference to any other community or group cannot attract either of the two Sections.

16. The result of the said discussion is that the appellant who has not done anything as against any religious,

racial or linguistic or regional group or community cannot be held guilty of either the offence under Section 153-A or under Section 505(2) of IPC.' (xii) In Manzar Sayeed Khan v. State of Maharashtra, (2007) 5 SCC 1 : (2007) 2 SCC (Cri.) 417, the Supreme Court reiterated

'The gist of the offence is the intention to promote feelings of enmity or hatred between different classes of people. The intention to cause disorder or incite the people to violence is the sine qua non of the offence under Section 153-A IPC and the prosecution has to prove prima facie the existence of mens rea on the part of the accused. 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 153-A must be read as a whole. One cannot rely on strongly worded and isolated passages for proving the charge nor indeed can one take a sentence here and a sentence there and connect them by a meticulous process of inferential reasoning.'

The Court also referred to its earlier decision in Ramesh v. Union of India [(1988) 1 SCC 668 : 1988 SCC (Cri.) 266 : AIR 1988 SC 775] wherein it was held that a TV serial Tamas did not depict communal tension and violence and the provisions of Section 153-A IPC would not apply to it. The Court approved the felicitous observations of Vivian Bose,J (as he then was) in Bhagwati Charan Shukla v. Provincial Government [AIR 1947 Nagpur 1] wherein the learned judge has held

'the effect of the words must be judged from the standards of reasonable, strong-minded, firm and courageous

men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view. ... It is the standard of ordinary reasonable man or as they say in English law 'the man on the top of a Clapham omnibus'.'

(xiii) In S.Khushboo v. Kanniammal, (2010) 5 SCC 600 : (2010) 2 SCC (Cri.) 1299 at page 612, the Supreme Court held

'23. Similarly, Section 509 IPC criminalises a 'word, gesture or act intended to insult the modesty of a woman' and in order to establish this offence it is necessary to show that the modesty of a particular woman or a readily identifiable group of women has been insulted by a spoken word, gesture or physical act. Clearly this offence cannot be made out when the complainants' grievance is with the publication of what the appellant had stated in a written form. Likewise, some of the complaints have mentioned offences such as those contemplated by Section 153-A IPC (promoting enmity between different groups, etc.) which have no application to the present case since the appellant was not speaking on behalf of one group and the content of her statement was not directed against any particular group either.'

(xiv) Subal Kumar Dey v. State of Tripura, 2007 SCC OnLine Gau 104 : (2009) 1 Gau LR 265 : 2007 Cri. LJ 1195 : (2008) 1 CCR 338 at page 265, the accused was being prosecuted under the following circumstances

1. The petitioner Subal Kumar Dey is the Editor and Publisher of the Bengali daily named "Syandam Patrika" printed, published and circulated from Agartala. One Yudhisthir Ray lodged a complaint on 8.5.1997 in Chebri police station

under Khowai sub-division against Mr.Dey that his newspaper published a news item on 25.2.1997 that some explosives had been recovered from the house of a person named Ganga Charan Debbarma who was the relative of the then Chief Minister, which was false and fabricated. According to the informant the said news item was published with a view to malign the democratically elected Chief Minister and to incite disharmony between the tribal and the Bengali communities. The written complaint was registered as Kalyanpur P.S. Case No.46 of 1997 under Sections 501, 505(i)(b)(c), 153, 153(A) and 120B of the Indian Penal Code. The investigation following the said FIR found prima facie evidence resulting to submission of a charge sheet against Mr.Dey, the petition herein. On the prayer of the petitioner the case was transferred from the court of Judicial Magistrate, Khowai to the court of Chief Judicial Magistrate, Agartala. On 30.6.2000 Mr.Dey submitted a prayer for his discharge on the ground that the criminal proceeding against him was not maintainable in law as no personnel injury was attributed to the informant. The prayer for discharge was dealt with by the learned Chief Judicial Magistrate in his order dated 7.8.2001. While rejecting the prayer the trial court observed that the charge sheet was filed against the accused petitioner under Sections 153A, 505(b)(c) of the Indian Penal Code in support of which sufficient materials exist on record. It was further observed that both the provisions being analogous, the alleged offence had to be understood after ascertaining whether the news item was published and circulated to excite commotion and create communal disharmony and whether such

news was false and fabricated. The learned court felt that at the stage of taking cognizance on the basis of the police report it was not possible to come to a definite finding whether the accused had published the news item without deliberate and malicious intention. At such a stage the court would just consider if there was ground for presuming that the accused had committed an offence. According to the learned trial court at the stage of cognizance there is no scope to record a conclusion that the materials on record are not likely to lead to conviction at the end of the trial. After taking a view that it will be premature to say that there is no sufficient materials against the accused, the petition for discharge came to be rejected. Aggrieved, the accused petitioner by means of this revision petition under Sections 397 and 482 of the Criminal Procedure Code called in question the correctness and validity of the said order dated 17.8.2001 of the learned Chief Judicial Magistrate with a prayer for setting aside the said order and discharge the accused from the said proceeding.

8. The legal position set out above, when applied for scrutiny of the allegation made in the FIR and the charge sheet, it would unmistakably show that the allegation that the news item in question maligned the Chief Minister and prompted disharmony between tribals and Bengalies is not borne by any iota of evidence. There is no direct or indirect hint about two communities fighting each other and the statement that Ganga Charan Debbarma is related to the then Chief Minister Dasharath Deb (who is no more) is found correct from the statement of Ganga Charan Debbarma himself. Neither

Dasharath Deb or any of his legal heirs nor Ganga Charan Debbarma made any allegation that they were maligned by the said news item or what was narrated had the ingredients of causing disharmony between the tribals and the Bengalies. No statement from any para military force who allegedly recovered carbine has been recorded to establish that no recovery of carbine from the house of Ganga Charan Debbarma was at all made. Even if the statement about the recovery of Carbine from the house of Ganga Charan Debbarma is found to be not correct, it cannot be said that such wrong statement caused or was likely to cause disharmony between two communities. Thus, before registering a case on the basis of the allegation made by Yudhistir Ray, the contents of the news item should have been carefully gone into by the investigating officer to satisfy himself whether ingredients constituting offences under Sections 153A and 505 of the Indian Penal Code were prima facie present. Freedom of expression which includes freedom of press being one of the cardinal principles of a democratic polity would be the casualty if such unfounded allegation is quickly taken cognizance of without carefully examining the contents. In my considered view this is a fit case in which this court should step in to prevent the abuse of the process of court. It needs no emphasis to observe that the court below while making the impugned order failed to comprehend that the news item in question had nothing to incite or promote disharmony between two groups of people.

The High Court held that in the absence of any material to show that the act complained of had excited disaffection and

disharmony between two groups, a prosecution under Section 153-A IPC, on the ground that the act complained of had maligned the Chief Minister, was patently misconceived.

(xv) In Abhiram Singh v. C.D.Commachen, (2017) 2 SCC 629 : 2017 SCC OnLine SC 9 at page 676, the majority judgment in the Constitution Bench was of the view that Section 123(3) of the Representation of the People Act, 1951 must be construed in the light of the amendments made in Section 153-A of the Code. This is because Section 123 of the RP Act, 1951 and Section 153-A of the IPC were, a "package deal" to Parliament making any appeal to communal, fissiparous and separatist tendencies, an electoral offence leading to voiding an election and a possible disqualification of the candidate from contesting an election or voting in an election for a period. An aggravated form of any such tendency could also invite action under the criminal law of the land. The Court then concluded

50.1. The provisions of Clause (3) of Section 123 of the Representation of the People Act, 1951 are required to be read and appreciated in the context of simultaneous and contemporaneous amendments inserting Clause (3-A) in Section 123 of the Act and inserting Section 153-A in the Penal Code, 1860.

(xvi) The word 'community' in the context of Section 123(3) of the RP Act, 1951 (which deploys the same phraseology as Section 153-A IPC) came up for interpretation before a Division Bench of the High Court of Rajasthan in Khilumal Topandas v. Arjundas Tulsidas, 1959 SCC OnLine Raj 29 : AIR 1959 Raj 280 at page 283, and Court held as under

'15. The Parliament went a step further by providing in Section 123(3) of the Act that a systematic appeal on grounds of caste, race, community or religion was a corrupt practice as a candidate elected on such basis must be deemed to be not a true representative of the people as a whole. In Section 123(3), the word 'community' has been inserted which has not been used anywhere in the Constitution. The dictionary meaning of the word 'community' is very wide. It may even mean the body of men having common interest. Such interest may be social, economic or political.

16. It is evident that the word 'community' cannot be construed in its wider sense when it is used in Section 123(3). In India a community is often organised on the basis of caste or religion. We speak of the Khatri community or the Agarawal community on the basis of caste. We speak of the Hindu community or the Muslim community on the basis of religion. Of course our history is so old that we have obliterated all kinds of racial prejudices, but a community may be organised on the basis of racial distinctions. When a community is organised on the basis of caste, race or religion, it is evident that such an organisation does come within Section 123(3). At the same time we have communities organised not on the basis of caste, race or religion but on social, economic or political basis.

17. Thus we may have an organisation of the mercantile community based on economical considerations aiming at the development of trade. We have also political bodies organised on different ideologies. The word 'community' used in Section 123(3) has only to be confined to such an organisation which in

effect divides the citizens of the country into groups sometimes opposed to one another. It is only when the organisation of the community is such as aims to divide the citizens of the country and releases forces antagonistic to the unity of the country that it comes within the purview of Section 123(3). Communities organised for the purpose of cementing the citizens for the purpose of social, economic and political pro-grass of the country, do not come under Section 123(3).

18. The words which are used immediately before and after the word community in that Sub-Section are 'caste, race and religion.' The word 'community' must be construed by reference to the words 'caste, race and religion'. 'It is a legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with them'. Robertson v. Day (1879) 5 AC 63 at p. 69. This is merely an application of the rule of noscitur a socits. In Wharton's Law Lexicon n14th Edition at page 697 this rule is referred as follows:

'Where there is a string of words in an Act of Parliament and the meaning of one of them is doubtful, that meaning is given to it which it shares with the other words'.

(xvii) In the light of the judgment in Commachen, this interpretation of Section 123(3) of the RP Act, 1951 will also, perforce, apply to interpret Section 153-A of the Code. The expression 'any other ground whatsoever' occurring in Section 153-A IPC cannot receive a liberal construction since the provision, being penal in nature, must receive a strict construction. Explaining the construction of penal statutes the

Supreme Court in R. Kalyani v. Janak C. Mehta, (2009) 1 SCC 516 : (2009) 1 SCC (Cri.) 567 at page 529 held as under

38. In Craies Statute Law (7th Edn. at p. 529) it is said that penal statutes must be construed strictly. At p.530 of the said treatise, referring to U.S. v. Wiltberger [5 L Ed 37 : 18 US (5 Wheat.) 76 (1820)] 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 (CA)] , which is followed in London and Country Commercial Properties Investments Ltd. v. Attorney General [(1953) 1 WLR 312 : (1953) 1 All ER 436], 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.'

40. Blackburn,J. in Willis v. Thorp [(1875) LR 10 QB 383] observed:

'When the legislature imposes a penalty, the words imposing it must be clear and distinct.'

(xviii) Thus viewed, the expression 'any other ground whatsoever' must be interpreted to mean a ground that is analogous to the grounds that precede it. There is no difficulty in applying the principle of ejusdem generis to understand the meaning of the aforesaid expression. This is on account of the fact that the first limb of Section 153-A makes a pointed reference to two sets of grounds viz, 'grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever'. The first category of grounds is 'religion, race, place of birth, residence, language, caste or community'. Each of these grounds constitute what the Supreme Court collectively calls immutable characteristics i.e.,traits which each human being is powerless to change. In Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 360 (1978) the US Supreme Court speaking through Brennan,J defined an immutable characteristic in the following terms

('[R]ace, like gender and illegitimacy, is an immutable characteristic which its possessors are powerless to escape or set aside.'

In Commachen's case, the Hon'ble Supreme Court, while construing the provisions of Section 123-A RPA, Act observes

> *'118. These, among other provisions of the Constitution demonstrate that there is no wall of separation between the State on the one hand and religion, caste, language, race or community on the other.*
>
> *The Constitution is not oblivious to the history of discrimination against and the deprivation inflicted upon large segments of the population based on religion, caste and language. Religion, caste and language are as much a symbol of social discrimination imposed on large segments of our society on the basis of immutable characteristics as they are of a social mobilisation to answer centuries of injustice. They are part of the central theme of the Constitution to produce a just social order. Electoral politics in a democratic polity is about mobilisation. Social mobilisation is an integral element of the search for authority and legitimacy. Hence, it would be far-fetched to assume that in legislating to adopt Section 123(3), Parliament intended to obliterate or outlaw references to religion, caste, race, community or language in the hurly burly of the great festival of democracy'."*

31. A man addressing a gathering of say 100 people and a man addressing through social media to the entire world are two different scenarios altogether. The test that is applied for the former cannot be test for the latter. When the law was enacted, the law makers were exposed only to the former scenario and they would have never dreamt that the latter scenario will come into being at some time in

future. Hence, the courts must step in to take note of the changed scenario and interpret the provisions of law. That is how the march of law takes place.

32. The interpretation of Sections 153A and 505 of the IPC continued to hold the field from a traditional approach wherein the Court, apart from looking at the intent of the maker of a comment, was also *prima facie* looking at a palpable consequence like violence, disturbance to law and order, disturbance to public order, etc. This line of thinking has to necessarily change after the advent of technology and more particularly after social media has started taking over our lives.

33. In ***Pravasi Bhalai Sangathan v. Union of India*****,** (2014) 11 SCC 477 the Supreme Court observed that even the psychological impact that will be caused in the mind of the recipient of the message can be the basis for deciding hate speech. Hate speech can lay the ground work, which, at a later point of time, can lead to discrimination, ostracism, violence and in the most extreme cases, genocide. History has taught us what happened to the Jews during the Second

World War, which initially started as a hate speech by Hitler and ultimately ended as a genocide.

34. In the considered opinion of this Court, psychological impact on an individual or a group can also be brought within the meaning of definition of the term 'hate speech'. This is an important facet in our understanding of what constitutes hate speech, as also to understand the scope of Section 153A of the IPC. The decision in ***Pravasi Bhalai Sangathan,*** supra, moved from the traditional approach, which expected a gross physical act to a modern approach with a psychological impact. At the same time, the distinction between free speech and hate speech remains relevant.

35. The distinction between the two came to the fore in ***Patricia Mukhim v. State of Meghalaya, (2021) 15 SCC 35.*** This was a case where one Patricia Mukhim, who is an important social worker in Meghalaya, requested that the non tribal population of Meghalaya also requires more protection. This message that was sent by her through the facebook incited communal tension. The Supreme Court held that the statement made by Patricia Mukhim in the facebook post did

not have any intent to promote any class/community hatred and that the State of Meghalaya was requested to take care of the interest of the non-tribals also in the State. This post was held to be falling within the scope of free speech, which cannot be stifled by registering criminal cases apart from holding that it could be branded as a hate speech. This tendency to misuse a face book post or statement made as a hate speech cannot be ruled out and therefore, the courts must be very careful before coming to a conclusion as to whether the speech made is a free speech or a hate speech.

COMMUNALISM : A CHALLENGE TO SECULARISM

36. The term 'secularism' came to fore not by adding the word 'secular' in the Preamble. It only made explicit and implicit ideals in the Constitution. Many religions originated from India itself and many religions came to India through trade and cultural exchange. This continuous process of creation and development of cultural traditions engendered a thriving pluralistic society in India. Owing to this healthy cohesion, people of India have co-existed peacefully. During the colonial period, imperialistic forces maximised dominance by dividing people and exploiting resources. Communalism is one legacy of this history of divisive

politics. It was constructed by the colonial rulers to manage their day-to-day affairs by dividing the society on the lines of religion, ethnicity and language. Communalism in India is used as the ideology, which attempts to construct separate identities based on culture, religion, caste and community. It can be used for any religion, majority or minority if that particular community is used to divide the society based on their belief system. Communalism is used to incite strife, and violence and create tension between the communities.

37. Religion is so entrenched in the Indian society that it has become pervasive and unfortunately, many believe in the superiority of their own belief system. In this kind of environment, where decisions are taken not on the basis of rationality or scientific temper, but on the ground of religious sensibilities, it really poses a challenge to sustain secularism, which is the bedrock of this country. Indian notion of secularism is considerably supported by the State. It does not believe in a strict separation of State and religion. Rather, it seeks to ensure the equality of all religions. The State follows an interventionist attitude if the practice of religion colludes with the fundamental rights of an individual. Therefore, the

strict separation of State and religion like how it is understood in the Western conception is impossible in India.

38. There are two significant contexts, in which, the State intervenes in the functioning of the religious spheres; firstly by ensuring the rule of law; and secondly in a developmental sense, by imparting positive discrimination towards certain religious minorities. There is absolute freedom of conscience, belief and religion for all citizens of India.

39. The debates that took place in the Constituent Assembly on Indian secularism consumed a lot of time in finalising Articles 25 to 30 of The Constitution of India. The debates surrounding secularism is inextricably linked with the notions of both minority and majority communalism. It is quite unfortunate that the hope that was reposed by the Founders of The Constitution never met its expectations. The communally delicate sensitivity of the people has been exploited by politically interested and fringe groups for their own selfish gains. Thus, both the minority as well as the majority communalism have largely been responsible for the complexities that are associated with the Indian notion of

secularism. Although the Supreme Court has consistently held that secularism is a part of the basic structure of the Indian Constitution and it is from the Constitutional framework that we should understand the Indian notion of secularism, we, the people of India, in our entire post-colonial history, are grappling with the problem of balancing two notions of secularism namely the intervention of the State in religious affairs in the name of rule of law and the maintenance of the secular State for protecting individual freedom of conscience. The State has been coerced towards resorting to such an act of balancing primarily because of the divisive role played by politically interested, religious and fringe groups of both the majority and the minority religions.

THE PURPOSE OF RELIGION

40. The word 'religion' is derived from its Latin terms '*re*-back' and '*ligare*-to bind'. Religion means that it binds one back to the origin or foundation head. The great science of religion has been reduced to mere allegiance to personalities. The religious systems are governed by maxims and mandates. There is a saying: 'Grammar is the grave of language'. Try to save the grammar, and keep it

invariable, the language will be dead. Just so, the rigidity of precepts and preceptors saps the vitality of religion.

41. If the purpose of religion is not understood, it can take away the sense of neutrality and ability to think in terms of rationality and individuality. That is the reason why Karl Marx sarcastically said that religion is the opium of people. This statement will prove to be true if the real purpose of religion is not understood and it is attempted to be used belligerently by blind adherence to the rightness or virtue as imposed by bare texts. If religion becomes a bellicose jingoism, it can prove to be fatal to the secular fabric of this country.

ON FACTS

42. Coming to the facts, the petitioner had given an interview to a YouTube channel running nearly 44.25 minutes. That interview covered a lot of issues. The extract of that interview was culled out, which approximately has a duration of 6.5 minutes and this was shared on the twitter handle of the party on 22.10.2022. This date is significant since it was just two days before the Diwali festival. A free translation of the words spoken by the petitioner reads as follows:

> *"Who filed the writ petition in the Supreme Court? Which NGO filed it? Is it not a Christian Missionary NGO? Let them deny this. The first case was filed in the name of that boy. The pollution was because of bursting of crackers affecting his study in Delhi. He is backed by the NGO. Why? You want to completely destroy the Indian culture and no crackers should be burst? For over 2000 years, the crackers have been part of our culture and that is attempted to be destroyed in the Supreme Court in a controversial manner. The internationally funded NGO has spent large sums of money and is engaging big big lawyers to conduct this case and we are all running to the Supreme Court to counter this."*

43. Diwali, as is well known, is a Hindu festival of lights that celebrates the triumph of light over darkness or good over evil. For staunch Hindu believers, it symbolises the return of Lord Rama of Jyothi with his wife Seetha and brother Lakshman from a 14-year-long exile and a war, in which, Prince Rama stood victorious.

44. The content of the above message is that there is a Christian Missionary NGO, which is internationally funded and it is involved in completely destroying Hindu culture by filing cases in the Supreme Court by preventing Hindus from

bursting crackers. Prima facie, the statements disclose a divisive intent on the part of the petitioner to project as if a Christian NGO is acting against Hindu culture. The intent can be gathered from the fact that the statements were made two days before the Diwali festival. The intent can also be gathered from the fact that this particular extract of the interview was culled out from the main interview and it was shared on the twitter handle of his party.

45. The petitioner is a former Senior IPS Officer, who is expected to know the laws of the land and he is the President of the BJP State Unit in Tamil Nadu. He is a well-known leader and a mass influencer. Therefore, the statements made by him will have a very wide reach and influence on the people particularly those belonging to the Hindu religion and it carries a lot of impact on this demographic group. The target of his speech is aimed towards a particular religious group and what they were told by the petitioner is that the minority religious group is attempting to destroy the culture of the majority religious group.

46. From the speech of the petitioner, it is unmistakable that he was attempting to portray a calculated attempt made by a Christian Missionary NGO,

which is funded internationally, to destroy Hindu culture. It also whips up a communal fervour when he says "*we are all running to the Supreme Court to counter this"* The public was, therefore, led to believe that Christians are out to finish off Hindu's and that "we" (in this context Hindus) were running to the Supreme Court to defend it. A petition filed in the interests of the environment was suddenly converted into a vehicle for communal tension.

47. It is clear from the above discussion that there exists a *prima facie* intent to create hatred towards a particular religion. These statements were made by a person of stature, whose words have a lot of impact on the masses and as a result, they, *prima facie,* have a psychological impact on the targeted group. As the Supreme Court said in ***Amish Devgan Vs. Union of India, 2021 (1) SCC 1:***

> "*Persons of influence, keeping in view their reach, impact and authority they wield on general public or the specific class to which they belong, owe a duty and have to be more responsible. They are expected to know and perceive the meaning conveyed by the words spoken or written, including the possible meaning that is likely to be conveyed. With experience and knowledge, they are expected to have a higher level of communication skills. It is reasonable to hold that they would be careful in using the words that convey their intent."*

48. The learned counsel for the petitioner submitted that the respondent is not a man of good character and that he has a mala fide intention in prosecuting this complaint. The law does not insist that a man giving a complaint must be a paragon of virtues and if that is the condition precedent, not many are eligible to give complaints. The character of the respondent and his antecedents will assume some importance only if it is a personal dispute between the petitioner and the respondent. In the instant case, this Court is dealing with a larger issue impacting the society and nation and therefore, the character of the respondent becomes insignificant. Hence, the objections raised on this ground are hereby rejected.

49. The next important ground that was raised by the learned counsel for the petitioner is that even after 400 days subsequent to the statements made by the petitioner, nothing had happened in terms of violence or disturbance to public order and that therefore, the offence itself is not made out.

50. To make out an offence under Section 153A of the IPC, the Court has to take note of Clauses (a) and (b) to Sub-Section (1). There must be words, which are either spoken or written and they must promote or attempt to promote on the

ground of religion, disharmony or feelings of enmity or hatred or ill-will between different religious groups or communities and that are likely to disturb the public tranquillity. The contents of the submissions made by the learned counsel for the petitioner *prima facie* satisfy every one of the ingredients mentioned supra.

51. The learned counsel for the petitioner would state that there is no material to show that the statements made by the petitioner created enmity or hatred or ill-will nor they disturb the public tranquillity. The decision in the case of ***Pravasi Bhalai Sangathan*** has a lot of significance. The Apex Court made it very clear that every such hate speech need not immediately result in violence or disturbance to public order and that it can have various impacts on the group, to which, such statements were aimed at. The Apex Court warned that such statements can act like a ticking bomb, which will wait to burst at the appropriate point of time by creating violence and in the most extreme cases, even to genocide. These observations are more relevant in this social media era.

52. The twitter handle, in which, the shortened and focussed version has been posted is a permanent data that is available. At an appropriate time/moment,

this data can be circulated and the ticking bomb will have its desired effect at that point of time. In other words, the concept of looking at hate speeches *qua* the result it yields, after such statements are made, should never be understood in its traditional way and the Courts have to necessarily take into consideration the fact that such content has a permanent data available and it can be used at any time to suit the situation. Hence, the psychological impact of a statement made by a popular leader must not be merely confined by testing it only to immediate physical harm and it is the duty of the Court to see if it has caused a silent harm in the psych of the targeted group, which, at a later point of time, will have their desired effect in terms of violence or even resulting in genocide. Therefore, the non-physical impact of the statements made will also come within the scope of Section 153A of the IPC.

53. A Judge, who decides these cases, cannot be sitting in a pulpit nor would ignore what is happening in the society during the relevant point of time. A Judge, who is holding a Constitutional position, has made his oath on The Constitution of India and therefore, he is duty bound to ensure that the basic

features of The Constitution and the fabric of this country are not attempted to be destroyed.

54. Sections 153A and 505 of the IPC are analogous to each other. Hence, if the offence under Section 153A is made out, it goes without saying that the offence under Section 505(1)(b) of the IPC is also *prima facie* made out. In the light of the above discussions, the submissions made by the learned counsel for the petitioner as if no offence has been made out under Sections 153A and 505 of the IPC are liable to be rejected.

55. There is another added factor which impels this Court to decline the exercise of powers under Section 482 Cr.P.C. The learned Judicial Magistrate No.4, Salem while issuing process has given a well-considered order setting out the reasons which impelled him to issue a summons. It is very rare to see such a well considered order taking cognizance, particularly at the Magisterial Level. The learned Magistrate has taken the pain to go through the material on record, which is apparent from the detailed cognizance order passed. The application of mind is also apparent from the fact that the complaint was rejected/dismissed in so far as

the second accused is concerned on the ground that no offence has been made out against him. Where a prima facie case exists, and where the satisfaction of the Magistrate is demonstrable from the summoning order itself, this Court while exercising power under Section 482 Cr.P.C would be slow to interfere. On balance, this Court must, therefore, decline to interfere with the prosecution in exercise of its powers under Section 482 Cr.P.C

56. Before drawing the curtains, this Court draws the attention of the petitioner to the following observations of Chief Justice P.B.Gajendragadkar, whose spoke for a unanimous Constitution Bench in the case ***Yagnapurushdasji Vs. Muldas [reported in AIR 1966 SC 1119],*** on the incredible heterogeneity of Hinduism :

> *"When we think of the Hindu religion, we find it difficult, if not impossible, to define Hindu religion or even adequately describe it. Unlike other religions in the world, the Hindu religion does not claim any one prophet; it does not worship any one God; it does not subscribe to any one dogma; it does not believe in any one philosophic concept; it does not follow any one set of religious rites or performances; in fact, it does not appear to satisfy the narrow traditional features of any*

> *religion or creed. It may broadly be described as a way of life and nothing more.*
>
> *The Hindu religion is a reflection of the composite character of the Hindus, who are not one people, but many. It is based on the idea of universal receptivity. It has ever aimed at accommodating itself to circumstances, and has carried on the process of adaptation through more than three thousand years. It has first borne with and then, so to speak, swallowed, digested and assimilated something from all creeds."*

57. In the result, the above criminal original petition is dismissed. However, the observations made in this order will not preclude the petitioner from raising all the grounds before the Court below and the same will be considered by the Court below on their own merits and in accordance with law. Consequently, the connected Crl.M.Ps. are also dismissed.

08.2.2024

Index : Yes
Neutral Citation : Yes
Speaking Order : Yes

RS

N.ANAND VENKATESH,J

RS

To
1.The Judicial Magistrate No.4,
Salem, Salem District.

2.The Public Prosecutor,
High Court, Madras.

Crl.O.P.No.27142 of 2023
& Crl.M.P.Nos.18842 &
18844 of 2023

08.2.2024