SOUTH ASIAN JOURNAL OF LAW AND POLICY REVIEW

VOL.1 December 2015 ISS.1

# ARTICLES

## *R. RAJAGOPAL V. STATE OF TAMIL NADU AIR 1995 SC 264*

***- Akshay Bhatia***

BACKGROUND AND FACTS OF THE CASE ..... 58
ISSUES RAISED IN THE PETITION ..... 61
JUDGEMENT ..... 61
CONTENT ANALYSIS OF THE JUDGEMENT ..... 65

### BACKGROUND AND FACTS OF THE CASE

The following petition relates to the freedom of press vis-A-vis the right to privacy of the citizens of India. The Judgement was delivered by a single judge bench of the Supreme Court by B.P Jeevan Reddy, J. in 1995 also raises the issue as to the parameters of the right of the press to criticise and comment on the acts and conduct of public officials. The first Petitioner was the editor, printer and publisher a popular Tamil weekly magazine, Nakkheeran, which was published from Madras. The second petitioner in question was the associate editor of the magazine. The petitioners were seeking issuance of an appropriate writ, order or discretion under Article 32 of the Constitution, restraining the respondents, viz., 1. State of Tamil Nadu represented by the Secretary, Home Department, 2. Inspector General of Prisons, Madras and 3 Superintendent of Prisons ( Central Prison), Salem, Tamil Nadu from taking any action as had been contemplated in a letter by the Inspector General of Prisons dated 15-6-1994 and further restraining them from interfering with the publication of the autobiography of the prisoner in question, Auto Shankar, in their magazine.

Auto Shankar. Alias. Gauri Shankar. Alias. Shankar was a notorious criminal involved in the murder of six women in and around Chennai between 1987 and 1988. Shankar started out as a painter, later driving auto rickshaws, transporting illicit arrack from coastal areas between Tiruvanmiyur and Mamallapuram to Chennai. His autos were used as transport of young women exploited in the booming flesh trade then. With his younger brother, brother-in-law and five other accomplices. Shankar had soon established himself as the uncrowned king of all criminal activities in Chennai. He also ran prostitution dens in various areas of the city with the connivance of the police. [1]

[1] The Hindu dated August 23, 2003

Shankar's influence peaked in the mid 1980's and lasted for a couple of years before his murders were exposed. This was during a time of political turbulence in Tamil Nadu with the passing away of former Chief Minister M.G Ramachandaran in December 1987, which resulted in Governor's rule being imposed between January 1988 and 1989. Several complaints by the parents of missing persons resulted in the police forming a special task force to look into the matter of missing women around the area. The police managed to rope in a constable named, Aari, who was well known to Shankar. With the help of his inputs, the police managed to rope in Shankar and his accomplices. After his arrest, the policemen made a thorough search of his property and found a diary containing photographs of Shankar with policemen of different ranks posing with him. This resulted in the suspension of multiple policemen who has served in Shankar's area of notoriety, however a bigger can of worms was to be opened soon. Shankar and his men were then transferred to Chennai central prison, from where he made an astonishing escape with the help of a woman. He was subsequently tracked down at Rourkela Steel City, Odisha brought back and hanged at Salem prison along with two of his accomplices.

Though not of utmost relevance to the petition at hand, this information gives us valuable and pertinent knowledge as to the exploits of Auto Shankar which would keep us in stead when we look at the case from an objective view. However, for the purpose of this case commentary, it would be wise for us to consider the timeline up to 5-4-1994, when his mercy petition against death sentence was dismissed by the Madras High Court.

In the following petition, the petitioners had come forward with the following issue: Auto Shankar had written his autobiography running into almost 300 pages while languishing in Chenglepat sub-jail during the year 1991. The autobiography had been handed to his wife, Smt Jagdishwari, with the knowledge and approval of the jail authorities, for being delivered to his advocate, Shri Chandrasekharan. Shankar had requested to his advocates that hism autobiography be published in a Tamil weekly magazine, Nakkheeran, published by the petitioners. Shankar had affirmed his desire in several letters written to his advocate and the first petitioner. The autobiography set out the close nexus between Shankar and several IAS, IPS and Government officials, some of whom had indeed been his partners in several crimes. Before the commencement of the serial publication of the autobiography in their magaizine, the petitioners announced the news that the magazine would be coming out with the sensational life story of the dreaded criminal Auto Shankar. Naturally, this announcement sent waves of shock and disbelief among numerous police and administrative officials who were afraid that their connections with Shankar would be exposed to the public. Some of these officials then, forced Shankar by using third degree methods inside his prison cell to write letters addressed to the Inspector General of Prisons and Editor of Nakkheeran, stating that he did not wish that his life story be published in the magazine. In relation to this letter, certain correspondence occurred between the petitioners and the prison authorities. Inspector General of Prisons write the

impugned letter dated 15-6-1994 to the Editor of the magazine, stating that 1) their suggestion that Auto Shankar had written his biography in jail in the year 1991 is false. 2) The fact that the biography had been handed over by Shankar to his wife with the knowledge and approval of the prison authorities is false. 3) That the power of attorney was not executed by Shankar in favour of his advocate, Shri Chandrasekaran in connection with the publication of the alleged book.. The letter also contended that prison records did not bear any entry as to the execution of any power of attorney in relation to Shankar.

The petitioners submitted that the contention of the Prison officials were untrue, the argument of jeopardy to Shankar's interest hollow and that they possessed a right to punish the said book in their magazine with the ascent of Shankar himself. The petitioners went ahead and published parts of the biography in the three issues of their magazine dated 11-6-1994, 18-6-994 and 22-6-1994. They stopped any further publication in lieu of the threatening tone of the letter dated 15-5-1994. They had reason to believe that the police authorities would swoop down upon their printing press, seize issues of the magazine, damage the press and their property with a view to terrorize them. Their assertions were not without a precedent, and they relayed a previous occasion where substantial damage was done to their press and properties after the magazine had published an investigative report of phone tapping by the State Government of opposition leaders. In that instance, the editor and publisher were arrested, jailed, paraded and subjected to third degree methods. They believed that this along with the letter gave them reason to be wary of the Police authorities. The petitioners assured that they had freedom of press guaranteed by Article 19(1)(a), which, according to them, entitled them to publish the autobiography. The petitioners claimed that Shankar also had a right to have his story published. They stated that they had approached the Madras High Court for similar relief but their petition the Court had raised objections in relation to the maintainability of the same. It was submitted that the writ petition in the High Court was dismissed by a Single Judge on 18-6-1994 stating that whether the Shankar had indeed written the autobiography and entitled the petitioners to publish the same was a disputed question fact. This is held in relation of the Petitioner's counsel's failure to produce the letter written by Shankar to the Petitioner authorising him to publish his story. The Court declared that it had genuine doubts over the veracity of the claim of the Petitioner's in relation to the author of the book. In this context the Court found that a disputed claim to the authencity as well authority to publish the book coupled with the contents of the book raised serious issues as to whether it would be prudent to allow such a relief. It was further submitted that since the book contained allegations that a number of IAS, IPS and public officials patronised and were aware of Shankar's criminal activities and such a contention had no basis and would tarnish the image of persons holding responsible positions in public institutions.

In the present petition, neither Auto Shankar nor his wife are parties. The honourable Supreme Court does not possess a copy of the autobiography in connection and does not wish to go into such disputed

question of fact. For the purpose of the present writ petition under Article 32 of the Constitution, the Court proceeded don the assumption that the prison had neither written the book nor gave permission to the petitioners to publish the same in their magazine. The Court also makes it clear that that is only an assumption for the purpose of the following petition ad not an undisputable finding of fact.

**ISSUES RAISED IN THE PETITION**

1. Whether a citizen of this country can prevent another person from writing his life story or biography? Does such unauthorised writing infringe the citizen's right to privacy? Whether the freedom of press guaranteed by Article 19(1)(a) entitles the press to publish such unauthorised account of a citizen's life and activities and if so to what extent and in what circumstances??

2. (a) What are the remedies open to a citizen of this country in case of infringement of his right to privacy and further in case such writing amounts to defamation

(b) Whether the Government has any legal authority to impose prior restraint on the press to prevent publication of material defamatory of its officials?

(c)Whether the public officials, who apprehend that they or their colleagues may be defamed, can impose a prior restraint upon the press to prevent such publication?

(d) Whether the prison officials can prevent the publication of the life story of a prisoner on the ground that the prisoner being incarcerated and thus not being in a position to adopt legal remedies to protect his rights, they are entitled to act on his behalf?

**JUDGEMENT**

In the judgement, B.N Jeevan Reddy,.J has discussed the freedom of press vis-A-vis the right to privacy of the petitioners specifically and citizens of India on the whole. The Right to Privacy is an independent and distinctive concept originating in the field of Tort law, under which a new cause of action for damages resulting from unlawful invasion of privacy was recognised. The right has two aspects (1) the general law of pivacy and (2) the constitutional recognition given to the right to privacy which protects personal privacy under unlawful governmental invasion. The first of these aspects has been exploited here, where for example, a person’s name or likeness has been used without his consent, for advertising or non-advertising purposes of for threat matter his life story has been written whether laudatory or controversial and published without his consent as explained below. This right has in recent times, acquired a constitutional status. However, the right to privacy has not been enumerated as a fundamental right in our Constitution but has been inferred from Article 21. The earliest decision dealing with this aspect is *Kharak Singh v. State of Uttar Pradesh*[2] however a more elaborate appraisal of the right took place in a later decision in Gobind, where Matthew. J. speaking for himself, Krishna Iyer and Goswami. JJ. Traced the origins of this right and also pointed

[2] 1963 AIR 1295

out the right how the right has been dealt with by the United States Supreme Court in two of its well-known decisions in Griswold v. Connecticut and Roe v. Wade[3] and *Roe v. Wade*[4] . Upon referring to Kharak Singh and the said American decisions, the learned Judge stated the law in the following words "... privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test. It must be mentioned here that privacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must there exist serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values. Any right of privacy must encompass and protect the personal intimacies of the home, the family, the marriage, motherhood, procreation nd child-rearing. This cataloguer approach to the question is obviously not as instructive as it does not give analytical picture of the distinctive characteristics of the right to privacy. Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been the asserting that a claimed right must be a fundamental right implicit in the concept of ordered liberty.

As Ely says:

There is nothing to prevent one from using the word 'privacy' to mean the freedom to live one's life without governmental interference. But the Court obviously does not so use the term. Nor could it, for such a right is at stake in every case. there are two possible theories for protecting privacy of home. The first is that activities in the home harm others only to the extent that they cause offence resulting from the mere thought that individuals might be engaging in such activities and that such 'harm' is not constitutionally protectable by the State. The second is that individuals need a place of sanctuary where they can be free from societal control. The importance of such a sanctuary is that individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted. The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.

Jeevan Reddy,. J has also relied on the European Convention on Human Rights, which came into dorce on 3-9-1953 represents a valiant attempt to tackle the new problem. Article 80 of the Convention is worth citing[5]

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

[3] 410 U.S. 113 (1973)
[4] 381 U.S. 479 (1965)
[5] European Convention on Human Rights, 1953

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

The Judge has further discussed some important decisions in the United States as right to privacy has been the subject matter of several decisions in the country.

The right to privacy was first referred to as a right and elaborated in the celebrated in the celebrated article by Warren and Brandies entitled "The right to privacy" [6] The expression "right to privacy" was first referred to in *Olmstead vs United States*[7], however it was first extensively discussed in *Times, Inc vs Hill*[8] . On a particular day in the year 1952, three escaped convicts intruded into the house of James Hill and held him and members of his family hostage for nineteen hours, where after they released them unharmed. The police immediately went after the culprits, two of whom were shot dead. The incident became prime news in the local newspapers and the members of the press started swarming the Hill's home for an account of what happened during the hold- up. The case of the family was that they were not ill- treated by the intruders but the members of the press were not impressed. Unable to stop the siege of the press correspondents, the family shifted to a far-away place. Life magazine sent its men to the former home of Hill family where they re-enacted the entire incident, and photographed it, showing inter alia that the members of the 6 See 26 Stanford Law Rev. When Life published the story, Hill brought a suit against Time Inc. The New York Supreme Court found that the whole story was "a piece of commercial fiction" and not a true depiction of the event and accordingly confirmed the award of damages. However, when the matter was taken to United States Supreme Court, it applied the rule evolved by it in New York Times Co. v. Sullivan10 and set aside the award of damages holding that the jury was not properly instructed in law. It directed a retrial. Brennan, J. held that

""We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with the knowledge of its falsity or in reckless (emphasis added) "We create grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in press news articles with a person's name, picture or portrait, particularly as related to non-defamatory matter."

[6] Harvard Law Review 193, 1890
[7] 277 U.S. (1928
[8] 385 U.S. 374 (1967)

The next relevant decision Reddy,. J has relied upon is *Cox Broadcasting v. Cohn A Georgia*[9] . The facts of which were, A Georgia law prohibited and punished the publication of the name of a rape victim, the appellant a reporter of the newspaper obtained the name of the rape victim from the records of the court and published it. The father of the victim sued for damages. White, K recognised that "in this sphere of collision between claims of privacy and those of the free pres, the interests on both sides are plainly rooted in traditions and significant concerns of the society of our society" but chose to decide the case on the narrow question whether the press can be said to have violated the said statute or the right to privacy of the victim by publishing her name, having obtained it from public records. The learned Judge held that the press cannot be said to have violated the Georgia law or the right to privacy if it obtains the name of the rape victim from the public records and publishes it. The judge claimed that the freedom of press to publish the information contained in the public record is of critical importance to every system of Government in that country and that, may be, in such matters ""citizenry is the final judge of the proper conduct of public business".

Moving on from the American and Indian judgements on the issue of privacy, Reddy, J stated that nowhere in the counter-affidavit by the respondents it has been stated that Auto Shankar had requested or authorised the prison officials to protect his right to privacy or the Inspector General of Prisons, as the case may be, to adopt appropriate proceedings to protect his privacy. If so, the respondents cannot take upon themselves an obligation of protecting his right to privacy. No prison rule is bought to our notice which empowers the prison officials to do so. Moreover, the occasion for such action arises only on the event of the publication and not before, as indicated here.

Lastly, in relation to the objection raise by the respondent as to the maintainability of the present writ petition. The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

Reddy, J has stated that the aforesaid rule is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. His is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency Article 19(2) an

[9] 420 U.S. 469 (1975

exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media. In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen, as explained in above. It needs no reiteration that judiciary, which is protected by the power to punish for contempt of court and Parliament and legislatures protected as their privileges are by Articles 105 and 104 respectively of the Constitution of India, represent exceptions to this rule.

Applying the above principles, the judges felt that it must be held that the petitioners have a right to publish, what they allege to be the life story/autobiography of Auto Shankar insofar as it appears from the public records, even without his consent or authorisation. But if they go beyond that and publish his life story, they may be invading his right to privacy and will be liable for the consequences in accordance with law. Similarly, the State or its officials cannot prevent or restrain the said publication. The remedy of the affected public officials/public figures, if any, would be after the publication, as explained hereinabove.

## CONTENT ANALYSIS OF THE JUDGEMENT

In the following petition, the Judges have made key observations about the freedom of press vis-à-vis the right to privacy of individuals. Reddy, J. has, for the purpose, of the present petition taken, fact that the autobiography had not been written by Auto Shankar and that the Editors of the magazine did not have the permission to publish the same. The judge has proceeded in delivering the judgement that, the Petitioners have a right to publish the autobiography and that members of the police and the administrative services have no right to interfere with the publication of the same. The press is an important tool of Democracy and has been right named, the Fourth Estate. Classic common law was the product of the conditions of the time and was bereft of investigative journalism and the press. Before the present case, there had the right to speech and expression guaranteed in article 19(1)(a) was ambiguous and unexplained at both legislative and judicial levels and so serious academic or judicial interpretation had gone to bring it in consonance with the constitution. The common law accepts the defence of qualified privilege which allows the defendant to plead that the publisher of the statement or story had made the communication in the performance of a duty or for the protection of

an interest and was made to persons who likewise had an interest to receive such communication. The Judge has noted and was not averse to the idea that in the changed circumstance of today, the press has a duty to inform the people and the people have an interest in receiving the information. The only consideration is that the precaution must not be abused and individual reputation must not become a casualty. For this, it must not be enough that the press forfeit the privilege on the proof of malice, a few more conditions had also to be tagged to ensure that the press had acted not only honestly but also reasonably.

The rule framed in *New York Times vs Sullivan* had been extended to public figures generally. The decision in this case is limited to public officials. It has become a prevalent feature of our society that, persons who hold nay office flaunt themselves everywhere and exercise considerable influence in arriving at decisions on public matters must come under the purview. The Supreme Court has expressly stated that the decision in this case has been limited to civil liability for defamation and not criminal liability for defamation provided in sections 499 and 500 of the Indian Penal Code.

The Court was also faced with the issue of balancing speech right with privacy interest here. The important aspect of privacy right here is that: THE RIGHT AGAINST UNWARRANTED PUBLICITY OF PERSONAL AFFAIRS. Privacy rights demand that people should not be unnecessarily inquisitive about the personal matters of an individual, there are situations when personal matters become legitimate concern of public and in that case the press has the right to inform the public about the same. While such an instance has arisen is the down to the discretion of the court. Privacy and reputation both claim protection against protection and compete against the speech right, there exist a basic distinction between the two. In a case where injury is done to reputation, the complaint is that the statement is false. When there is an interference with privacy, the complaint is not on the veracity of the statement, but whether the same is laudatory or condemnatory. The alleged nexus between the government officials and ministers with Auto Shankar come into the purview of the same.

Another facet of this judgement is the PERMISSIBILITY OF PRIOR RESTRAINT. As restrictions of the speech right that are permissible can be imposed punitively as well as preventively, the latter kind is called prior restraint. The exercise of this speech right carries extra importance, because it is practicable and in the context of media which can be simultaneously appeals to our aural and visual sense, it is also deemed necessary. [10] As far as print media is concerned, prior restraint or pre-censorship is seen as an anathema. In this respect, Blackstone's statement "The liberty of the press consists in laying no previous restraint upon publications and not in freedom of censure when criminal matter is published." Is considered a classic and has been quoted by Patanjali, J. in *Brij Bhushan v.*

[10] See K.A Abbas v. The Union of India (1970) 2 SCC 780

*State of Delhi*[11] . There has been almost an unwritten rule of presumptive invalidity against prior restraint upon publications and the Government has to discharge a very heavy burden of proving substantial loss of vital state interest. In the present case, Reddy, J. was rightly not persuaded even though there existed a risk the magazine's publication could harm the reputation of some Government officials and encroach upon the privacy of Auto Shankar.

The CHILLING EFFECT doctrine has also been introduced by the Supreme Court for the first time in this case. The doctrine, used regularly in the United States, Canada, South Africa and European Union talks about governmental laws and activities which are of a nature that results in self-censorship. While not directly censoring free speech, it results in censorship due to fear in the mind of publishers, scared of governmental crackdowns. John Milton had first talked about the doctrine in 1654 in his book "For to distrust the judgement and the honesty of one who hath but a common repute in learning and never yet offended, as not to count him fit to print his mind without a tutor or examiner, lest he should drop a schism or something of corruption, is the greatest displeasure and indignity to a free and knowing spirit that can be put upon him . Reddy, J. has explained that putting a stop on the publishing of the autobiography would result in such an effect. The Government and state officials, Madras police and the respective civil servants in question cannot use force or engage in harassment by damaging the Petitioner's press, physical intimidation, illegal detention or sending intimidator letters or any communication which would hinder the Petitioners from publishing their material or plant fear in their minds.

///

[11] AIR 1950 SC 129