

BOMBAY HIGH COURT OVERRULES CENSOR

As readers of *Freedom First* are aware, it was as far back as 17th July 1975 that the Editor started legal proceedings and applied for a Writ of Mandamus from the Bombay High Court to rectify the situation created by the censor in refusing permission for the publication of some eleven items in the way of articles, editorial notes, letters to the Editor and items in 'Many Voices' which we considered were wrongly refused permission by the censor who was misusing his powers.

We are happy to inform our readers that, on November 25 and 26, Mr. Justice R. P. Bhatt delivered his judgement upholding the Editor's point of view and

quashing the decision of the censor on each and every item he had barred from publication.

Since Mr. Binod Rao, the censor, has gone in appeal against this judgement, editorial comment must be suspended. This issue of *Freedom First* is therefore restricted to the publication, for the information of our readers, of extracts from the judgement in our case, without in any way disclosing the contents of the articles in question since the matter is pending appeal. The hearing of the appeal filed by the censor has been fixed for January 5, 1976.

We are grateful to Mr. Soli Sorabjee and G. A. Thakkar, our Counsel, and also to Mr. D. H. Nanavati, our Attorney, who have felt strongly enough about freedom of expression and the press, throughout the last five months, to act and appear in court on behalf of *Freedom First*.

EXTRACTS FROM THE JUDGEMENT

IN this Petition under Article 226 of the Constitution of India, the Petitioner, who is the Editor of 'FREEDOM FIRST', a monthly journal, has challenged the Orders and decision of the Respondent dated 15th July 1975, whereby the Respondent has not permitted the Petitioner to publish a large part of the material sent to the Respondent for scrutinization under the provisions of the Central Government Order dated 26th June 1975. The material sent for scrutiny of the Respondent on 14th July 1975, is annexed at Exhibits B and C to the Petition and related to matters on various subjects.

In order to appreciate the scope of the Petition and the challenge to the impugned orders dated 15th July 1975, it may be necessary to set out certain facts. The Petitioner is a citizen of India, and is a Barrister-at-law of Lincoln's Inn and an Advocate (O.S.) of this Court and is at present practising as a Management Consultant. In January 1972, he took over the Editorship of 'FREEDOM FIRST', a monthly journal of Liberal

Ideas, from one V. B. Karnik, a veteran trade union leader. This journal was established as a monthly journal in June 1952, and has appeared on the first day of every month regularly till June 1975. It is stated in the Petition that this journal, since September 1955, has been the organ of the Democratic Research Service which was established in 1950 as a non-partisan research and information centre. In view of the proclamation of emergency by the President of India on 26th June 1975, the Central Government under Rule 48 of the Defence of India Rules, 1971, (hereinafter referred to as "the said Rules"), issued an Order dated 26th June 1975. A similar order was also issued by the Government of Maharashtra under the same Rule imposing pre-censorship on publication of newspapers, periodicals, pamphlets and other documents. On the publication of the Government of Maharashtra's Order dated 26th June 1975, the Petitioner as Editor of 'FREEDOM FIRST' submitted to one I. Mathur, the Chief Director, Information and Public Relations,

Government of Maharashtra, and who was the authorised person under the said Central Government Order for scrutinization of the matters to be published in the said issue. The said Mathur scrutinized the same and ordered the deletion of certain articles and approved the rest of the material. As only three days remained from the due date of publication of the issue on 1st July 1975, and as the Petitioner could not grasp the full implications of the said State Order, the Petitioner decided to keep the space occupied by the censored items blank, and, for the information of the readers, only print the word "censored" across the whole matter. However, as the Petitioner read from the report of the *Times of India* that serious note would be taken if as a matter of protest the editorial column or other column were left blank, the Petitioner suspended publication of "FREEDOM FIRST".

On 14th July 1975, however, the Petitioner submitted for censorship a new issue of "FREEDOM FIRST" which consisted of material, publication of which been allowed for the earlier issue and also certain fresh material which the Petitioner felt did not contravene any of the guidelines published for the guidance of journalists. On 15th July 1975, the major part of the material so submitted including material which the said Mathur had permitted publication was censored and on 17th July 1975 a Petition was filed in this Court being Miscellaneous Petition No. 812 of 1975, challenging the said decision dated 15th July 1975, whereby the Petitioner was prohibited from publishing the material in the said issue. However, it was uncertain at that time as to which authority had censored the material and applied his mind for the said purpose and as there was a conflict as to who had done so, the Petitioner prayed for withdrawal of the said Petition with liberty to file a fresh Petition, in respect of the said impugned order dated 15th July 1975. On 30th September 1975, this court permitted the Petitioner to withdraw the said Petition with liberty to file a fresh Petition on the same cause of action and in respect of the same subject matter. The present Petition is in respect of the same cause of action and in respect of the same subject-matter viz. decision of the Respondent taken on 15th July 1975, objecting to the publication of the material submitted on 14th July 1975, for publishing the same in the issue of the "FREEDOM FIRST".

The articles which were disallowed related to an article written by former Justice V. N. Tarkunde of the Bombay High Court on the "Scope of the pre-censorship Order", a quotation from the *Financial Express* of 8th July 1975 relating to the admission of a Writ Petition on the question of censorship filed in the Madras High Court; certain items relating to World News, the text of the resolution passed by the Bar Council of Maharashtra for revoking the proclamation of emergency promulgated by the Pre-

sident of India. A quotation under the title "With Many Voices" and other items which originally were allowed to be published by the said Mathur by his order dated 27th June 1975, and which was disallowed by the Respondent under the impugned decision, being a small editorial note quoting from the *Swiss Press Review* regarding American Liberals and their guilt complex. Then an editorial note regarding the resignation of J. R. Jayamardene, the Leader of the Opposition in Ceylon; an extract from P. Kodanda Rao's letter on "Swiss Constitution for India"; an open letter to the U.S. Ambassador to India received by the Editor from one S. Gopalakrishnan; and a quotation under the heading "With Many Voices" relating to Public Sector Commercial Corporations. This is the material which has been censored and publication of which has been disallowed on 15th July 1975 by the Respondent exercising his powers under the Central Government Order dated 26th June 1975.

Before I set out the rival contentions of the parties, it may be necessary to set out the events which led to the prohibition of this material from being published in the issue of the "FREEDOM FIRST". On 26th June 1975, the President of India proclaimed an emergency and on the same day an order was issued by the Central Government under Rule 48 of the said Rules which recited as a preamble that whereas the Central Government was of the opinion that for the purpose of securing the defence of India and Civil Defence, the

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public safety and maintenance of public order, it was necessary in exercise of the powers conferred by sub-rule (1) of 48 of the Defence of India Rules, 1971, to make the said Order" whereby —

- (1) that no news, comments, rumour or other report relating to —

(a) any contravention of alleged or purported contravention of any of the provisions of Part III Rules 31, and 33 of Part IV, rules 37, 38, 39, 43, 46, 47, 48, 50, 51 and 52 of Part V, Part VIII and Part IX of the said Rules including orders made thereunder, or

(b) any action taken in relation to such contravention, or

(c) any action taken under the provisions of the Maintenance of Internal Security Act, 1971 (26 of 1971),

shall be published in any newspaper periodical or other document unless such news, comments, rumour or other report has been submitted for scrutiny to an authorised officer and the publication thereof is authorised in writing by such officer.

- (2) That no such publication shall be made except in accordance with such conditions or restrictions as such officer may impose".

Simultaneously, on the same day, the State Government also issued a similar order as issued by the Central Government dated 26th June 1975. This State order was, however, rescinded on 14th July 1975. It was on 14th July 1975 that the Petitioner had submitted the material mentioned above for scrutiny and the same was scrutinized admittedly by the Respondent, who by his decision dated 15th July 1975, disallowed the publication thereof by the Petitioner.

In this Petition under Article 226 of the Constitution, the Petitioner has not challenged the validity either of rule 48 of the Defence of India Rules, 1971, or of the Central Government Order dated 26th June 1975, and this Petition has proceeded and argued on the assumption that they are validly enacted laws and that the order dated 26th June 1975, has been properly made under the provisions of the said Rules. No complaint has been made in this Petition to the validity of the said order and this Court has been asked to proceed in deciding whether the impugned decision dated 15th July 1975 is valid or illegal on the assumption that the Respondent had the power to scrutinize the article in question and the material placed before the Respondent before the same could be published.

The ground of challenge to the impugned Order dated 17th July 1975 is that the Respondent has acted in excess of his authority and his decision has been vitiated by taking into consideration extraneous and

irrelevant factors and that before any article can be prohibited from publication, there are necessary pre-conditions which must be fulfilled, viz. that the article must have a direct and proximate nexus with the purposes mentioned in the said Rule 48, viz., (1) of securing the defence of India (2) civil defence, (3) the public safety and (4) maintenance of public order, and this is the scope and object also of the Order dated 26th June 1975. In Rule 48 of the said Rules, it is further mentioned viz., that power to impose censorship can be for efficient conduct of military operations.

* * * * *

This then brings me to the main contentions on merits of the Petition, viz. whether the Respondent was entitled to prohibit the publication of these articles and the material submitted to him for his scrutiny under the provisions of the Central Government order dated 26th June 1975. It may be stated that it is unnecessary in this judgement to set out the scope and object of the Central Government Order dated 26th June 1975, as amended by the Central Government order dated 12th August 1975, as the same has been considered and decided by this Court in the above unreported decision dated 12th November 1975, in the case of *Y. D. Lokurkar v. Binod U. Rao & Anr.* in Miscellaneous Petition No. 1230 of 1975 and referred to above. That decision following other decisions of this Court sets out the well-settled princip-



les necessary to be considered when an authority has to scrutinize articles and material to determine whether they contain objectionable matter. Objectionable matter necessarily includes matters relating to securing the defence of India, civil defence, public safety, and interest and maintenance of public order.

Accepted principles for so determining may be said to be that the article must be read as a whole and in its proper context; a stray sentence here and there is not to be taken as a guide for determining the intent of the writer. *It is a fundamental principle of democracy, and specially when it relates to the Freedom of the Press, that everyone ought to have the privilege of expressing opinions which are unpopular or distasteful so long as such criticism is constructive and is not meant in order to subvert the authority of law or the Government in power (Italics ours).*

Before this Court, the Respondent has exhibited as Exhibit 2 a pamphlet entitled 'Preserving Our Democratic Structure' which relates to an extract of the Prime Minister's speech in the Lok Sabha on 22nd July 1975. In that speech in Parliament the Prime Minister while explaining the reasons for the emergency has in no uncertain terms stated as follows:—

"There is no doubt about the need for a regulated expression of public discontent against the policies of even an elected Government. We have always said that; we have never tried to stop such criticism."

"However, when protests and resistance are con-

ceived to destroy the very fabric of society and undo the stability of the political system, such actions become a disguise for action to destroy democracy. Every right that the State concedes to the individual imposes an obligation on him. Similarly, groups and organised associations who enjoy political freedom in a democracy must respect the limits within which those rights have to be exercised".

Therefore, it is not every criticism of the elected Government or the party in power that can be muffled. Constructive criticism is permitted and it is observed so on the floor of the Lok Sabha by the Prime Minister (*Italics ours*). The Government has, therefore, itself put a fetter upon its power and restricted the publication of a matter correlated to the objects mentioned in Rule 48 of the Defence of India Rule, 1971, and which objects are also recited in the Central Government Order dated 26th June 1975. If any article or material comes within the ambit and scope of the said objects, then alone power is vested in the authority scrutinizing the article or material to object and prohibit the publication of such article and material. The power of such an authority is limited and must be confined within the four corners of the statute and the objects mentioned therein. The power is not unlimited because the authority giving such power viz., the Central Government, has itself placed restrictions and limitations on its power and feels it sufficient for the purpose of what may be termed 'pre-censorship'. Therefore, it is in the light of

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these observations and conclusions of mine that one has to consider whether the application of mind by the Respondent and exercise of such power in coming to the conclusion that the material should not be allowed for publication is within the limits of his authority and whether he has followed the well accepted criteria in satisfying himself that the article and material are objectionable in the sense stated above.

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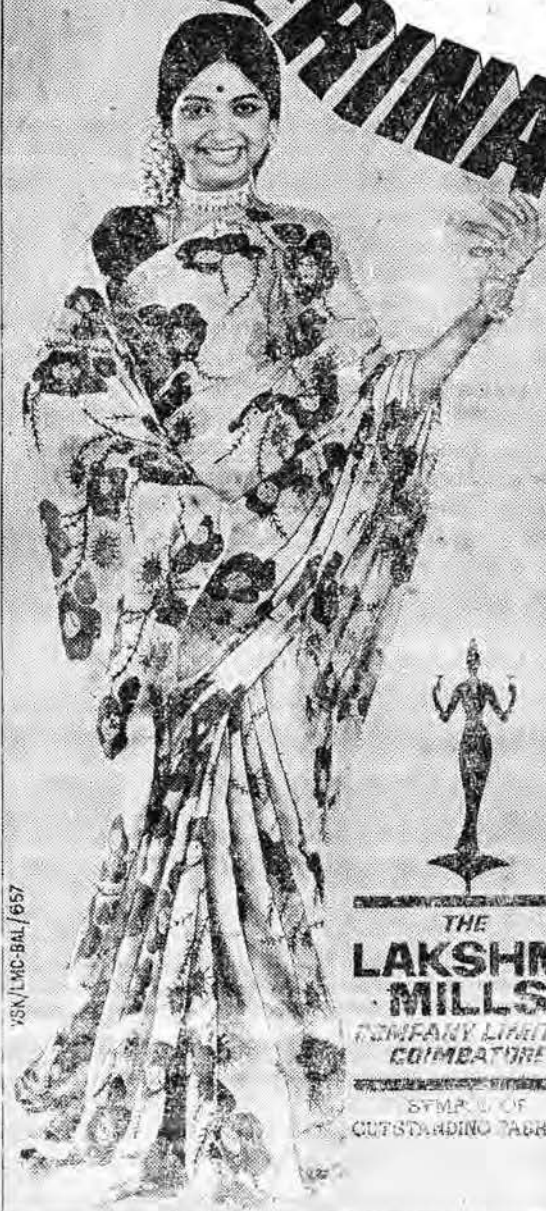
Having considered each and every article on merits, it appears to me that the respondent has taken into consideration extraneous matters and irrelevant factors and decisions and proceeded on considerations not relevant and germane to the matter which fell within the ambit of the provisions of the Central Government Order dated 26th June 1975.

* * * * *

The decision of the Respondent is to be made after the application of his mind and it is a matter of his subjective satisfaction. In that case what is to be considered by the Court is his application of mind on the date he gave his decision, i.e. 15th July 1975. It is not retrospective application of mind from 5th August 1975, and therefore, for the purposes of this Judgement, I am entirely ignoring the guidelines dated 5th August 1975. So far as the guidelines dated 6th August 1975, are concerned, the object of the guidelines also appears to me to be beyond the ambit and scope of the Central Government Order dated 26th June 1975. The objects mentioned in the guidelines dated 5th August 1975, apart from maintenance of public order, include stability of economic growth in the country which in my opinion appears to be outside the ambit and scope of the Central Government Order itself. However, I am not inclined to decide in the present case the vires of those guidelines in the light of the Central Government order dated 26th June 1975. In my view, these guidelines were not before the authority on 15th July 1975, and must be ignored for the purpose of my decision. Much emphasis has been led by Mr. Advani on these guidelines and as stated above, and considered by me, he has relied mostly upon the guidelines of 5th August 1975, to support the decision of the authority, dated 15th July 1975. He has also cited before me several decisions of the Supreme Court and of other High Courts to emphasise the fact that the Court ought not to issue a writ of Mandamus if the Court is of the opinion that it was the mandatory obligation of the Respondent in this case to obey the orders of the Chief Censor contained in the said guidelines. It is unnecessary to consider this aspect of the matter as in my view the guidelines dated 5th August 1975, were not before the Officer when he passed his order. Apart therefrom, as I am of the view that none of these

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Articles has transgressed the limits mentioned in the guidelines, it is unnecessary to decide the question regarding the scope and object of the Central Government order dated 26th June 1975, and the framing of the Guidelines inconsistent therewith.

Mr. Sorabjee, for the petitioner, also relied upon the several decisions of the Supreme Court and also submitted that these guidelines did not have statutory force unless they were published and known to the public at large. It is unnecessary for me to consider this aspect of the matter, as I have proceeded on the assumption that these guidelines, even if effective, have not been followed by the Respondent in the present case.

Having considered each and every article in the light of the Central Government Order dated 26th June 1975, and also applying the guidelines as of 26th June 1975, as well as those of 5th August 1975, which as, stated above, in my view, are in fact not applicable to the facts of the present case, I am of the opinion that the Respondent has misdirected himself in law, and has also considered extraneous and irrelevant matters. Hence the order of the Respondent in relation to these articles dated 15th July 1975 must be set aside.

Once I hold that the Respondent has acted without jurisdiction and there was no authority of law which gave him the power to issue the impugned orders because the Respondent, while issuing these orders, has acted in excess of his authority, the Petitioner being a person interested in the decision and vitally concerned with the same is entitled to approach this Court under Article 226 of the Constitution of India.

In the result, therefore, the Petition must be allowed in terms of prayer (a) and (b) of the Petition and the Rule made absolute in those terms. The Respondent to pay to the Petitioner the costs of this Petition.

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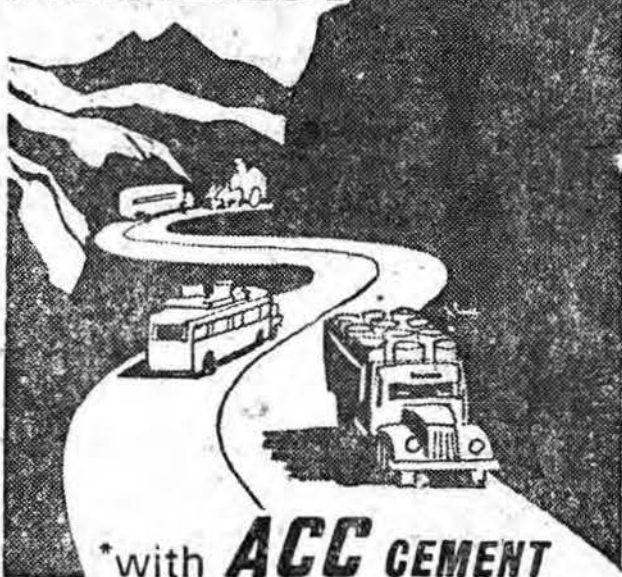
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