

N. RADHAKRISHNAN @ RADHAKRISHNAN VARENICKAL A

v.

UNION OF INDIA AND OTHERS

(Writ Petition (Civil) No. 904 of 2018)

SEPTEMBER 05, 2018 B

**[DIPAK MISRA, CJI, A. M. KHANWILKAR AND
DR. D. Y. CHANDRACHUD, JJ.]**

Constitution of India – Art.19(2) – Freedom of speech and expression – Imposition of reasonable restriction – Petitioner seeking issuance of writ to ban the novel named ‘Meesha’ – Allegation that the said literary work insulting and derogatory to the temple going women and has the potentiality to disturb the public order, decency – Held: If books are banned on such allegations, there can be no creativity – Such interference by constitutional courts would lead to end of art – Freedom enjoyed by an author is not absolute, but before imposition of any restriction, the duty of the Court is to see whether there is really something that comes within the ambit and sweep of Art.19(2) – Creativity and the author’s perception of the universe are to be borne in mind – It cannot be asked to succumb to specifics, else would tantamount to imposition – Writer should have free play with words – Passion of imagination cannot be directed – Final publication must not run counter to law but the application of the rigours of law has to also remain alive to the various aspects – On facts, character of ‘Meesha’ as has been projected shows the myriad experiences with different situations – Appreciated from either point of view, it cannot be denied that it is a manifestation of creativity – In view thereof, Writ petition dismissed. C D E F

Dismissing the Writ Petition, the Court

HELD: 1.1 Literature symbolizes freedom to express oneself in multitudinous ways. Literature can act as a medium to connect to the readers only when creativity is not choked or smothered. The free flow of the stream of creativity knows no bounds and imagination brooks no limits. A writer or an artist or any person in the creative sphere has to think in an unfettered way free from the shackles that may hinder his musings and ruminations. The writers possess the freedom to express their G H

A views and imagination and readers too enjoy the freedom to perceive and imagine from their own viewpoint. Sans imagination, the thinking process is conditioned. [Paras 25, 26][14-A-C]

1.2 Creative voices cannot be stifled or silenced and intellectual freedom cannot be annihilated. It is perilous to obstruct free speech, expression, creativity and imagination, for it leads to a state of intellectual repression of literary freedom thereby blocking free thought and the fertile faculties of the human mind and eventually paving the path of literary pusillanimity. Ideas have wings. If the wings of free flow of ideas and imagination are clipped, no work of art can be created. The culture of banning books directly impacts the free flow of ideas and is an affront to the freedom of speech, thought and expression. Any direct or veiled censorship or ban of book, unless defamatory or derogatory to any community for abject obscenity, would create unrest and disquiet among the intelligentsia by going beyond the bounds of intellectual tolerance and further creating danger to intellectual freedom thereby gradually resulting in “intellectual cowardice” which is said to be the greatest enemy of a writer, for it destroys the free spirit of the writer. People live not in a totalitarian regime but in a democratic nation which permits free exchange of ideas and liberty of thought and expression. It is only by defending the sacrosanct principles of free speech and expression or, to borrow the words “the freedom to think as you will and to speak as you think” and by safeguarding the unfettered creative spirit and imagination of authors, writers, artists and persons in the creative field that can be preserved as the basic tenets of our constitutional ideals and mature as a democratic society where the freedoms to read and write are valued and cherished. [Para 27][14-D-H; 15-A]

1.3 The aforesaid also calls from the readers and admirers of literature and art to exhibit a certain degree of adherence to the unwritten codes of maturity, humanity and tolerance so that the freedom of expression reigns supreme and is not inhibited in any manner. The flag of democratic values and ideals of freedom and liberty has to be kept flying high at all costs and the Judiciary must remain committed to this spirit at all times unless they really run counter to what is prohibited in law. And, needless to emphasise that prohibition should not be allowed entry at

someone's fancy or view or perception. [Para 28][15-B-C] A

1.4 It would usher in a perilous situation, if the constitutional courts, for the asking or on the basis of some allegation pertaining to scandalous effect, obstruct free speech, expression, creativity and imagination. It would lead to a state of intellectual repression of literary freedom. When it is said so, this Court is absolutely alive to the fact that the said right is not absolute but any restriction imposed thereon has to be extremely narrow and within the reasonable parameters as delineated by Art. 19(2). It is free thinking and intellectual cowardice. Creative writing is contrary to intellectual cowardice and intellectual pusillanimity. [Para 33][19-G-H; 20-A] B C

1.5 It is the duty of the Court to see whether such a dialogue was contrived to give rise to any kind of sensuous situation or projection of a class to humiliate them. A creative work has to be read with a matured spirit, catholicity of approach, objective tolerance and a sense of acceptability founded on reality that is differently projected but not with the obsessed idea of perversity that immediately connects one with the passion of didacticism or, for that matter, perception of puritanical attitude. A reader should have the sensibility to understand the situation and appreciate the character and not draw the conclusion that everything that is written is in bad taste and deliberately so done to pollute the young minds. On the contrary, he/she should elevate himself/herself as a co-walker with the author as if there is social link and intellectual connect. The feeling of perverse judging should be abandoned. A creative writing is expectant of empathetic reading. It is not averse to criticism but certainly does not tolerate unwarranted protest. [Para 34][20-B-E] D E F

1.6 One has to understand and appreciate the characteristics of the character and the plots and sub-plots that are woven in the story. The character of *Meesha* as has been projected shows the myriad experiences with different situations. The situations can be perceived as certain sub-plots which evolved around the fundamental characteristics of the protagonist. The theory of consistency of character as adopted by certain writers seems to have been maintained in the narrative. The situations and the treatment of situations may be different but H

- A the basic response of the protagonist remains unchanged. All these, can be from one reader's point of view. To another reader, it may seem that the sub-plots have been enthusiastically contrived to bring in tempting situations to draw the protagonist in and to exposit chain reactions. Appreciated from either point of view, it cannot be denied that it is a manifestation of creativity.
- B The perception of a character which is in consonance with the story invites empathetic readers to view him/her from a different perspective. A reader with mature sensibility would connect with the plight of the protagonist or may distance himself/herself by expressing the view that the projection is derogatory and hurtful
- C to a section of people. He/she treats the novel as scandalous and offensive. The Court is not to be swayed by any kind of perception. One may have a grave dislike towards a particular manner of expression but that would not warrant for issue of a mandamus from the Court to ban the book or the publication. The language used in the dialogue cannot remotely be thought of as obscene.
- D The concept of defamation does not arise. Nurturing the idea that it is derogatory and hurtful to the temple going women would tantamount to pyramiding a superstructure without the infrastructure. [Para 35] [20-F-H; 21-A-C]
- E 1.7 If one understands the progression of character through events and situations, a keen reader will find that beneath the complex scenario, the urge is to defeat and to conquer and not to accept a denial. Both the facets are in the realm of obsession and the author allows the protagonist to rule his planet. His imagination encircles his world. A reader has the liberty to admire
- F him or to sympathise. Either way, the dialogue to which the objection is raised is not an intrusion to create sensation. It is a facet of projection of the characters. A pervert reader may visualise absence of decency or morality or the presence of obscenity but they are really invisible. [Para 36][21-D-E]
- G 1.8 If books are banned on such allegations, there can be no creativity. Such interference by constitutional courts will cause the death of art. The freedom enjoyed by an author is not absolute, but before imposition of any restriction, the duty of the Court is to see whether there is really something that comes within the ambit and sweep of Article 19(2). [Para 37][21-F-G]
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1.9 It is to be borne in mind that a book should not be read in a fragmented manner. It has to be read as a whole. The language used, the ideas developed, the style adopted, the manner in which the characters are portrayed, the type of imagery taken aid of for depiction, the thematic subsidiary concepts projected and the nature of delineation of situations have to be understood from an objective point of view. There may be subjective perception of a book as regards its worth and evaluation but the said subjectivity cannot be allowed to enter into the legal arena for censorship or ban of a book. [Para 38][22-C]

1.10 The creativity and the author's perception of the universe are to be borne in mind. What is true to poetry is applicable to novels or any creative writing. It has to be kept uppermost in mind that the imagination of a writer has to enjoy freedom. It cannot be asked to succumb to specifics. That will tantamount to imposition. A writer should have free play with words, like a painter has it with colours. The passion of imagination cannot be directed. True it is, the final publication must not run counter to law but the application of the rigours of law has to also remain alive to the various aspects. The craftsmanship of a writer deserves respect by acceptance of the concept of objective perceptibility. [Para 39][22-D-F]

Devidas Ramachandra Tuljapurkar v. State of Maharashtra and others (2015) 6 SCC 1 : [2015] 7 SCR 853; Raj Kapoor and others v. State and others (1980) 1 SCC 43 : [1980] 1 SCR 1081; Samaresh Bose and another v. Amal Mitra and another (1985) 4 SCC 289 : [1985] 3 Suppl. SCR 17; Bobby Art International and others v. Om Pal Singh Hoon and others (1996) 4 SCC 1 : [1996] 2 Suppl. SCR 136; Viacom 18 Media Private Limited and others v. Union of India and others (2018) 1 SCC 761; Nachiketa Walhekar v. Central Board of Film Certification (2018) 1 SCC 778; Adarsh Cooperative Housing Society Ltd. v. Union of India and others 2018 (4) SCALE 390; S. Rangarajan v. P. Jagjivan Ram and Others (1989) 2 SCC 574 : [1989] 2 SCR 204 – referred to.

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Case Law Reference

[2015] 7 SCR 853 referred to Para 2

[1980] 1 SCR 1081 referred to Para 3

[1985] 3 Suppl. SCR 17 referred to Para 29

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[1996] 2 Suppl. SCR 136 referred to Para 30

(2018) 1 SCC 761 referred to Para 31

(2018) 1 SCC 778 referred to Para 31

2018 (4) SCALE 390 referred to Para 32

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[1989] 2 SCR 204 referred to Para 37

CIVIL ORIGINAL JURISDICTION: Writ Petition (Civil) No. 904 of 2018.

Under Article 32 of the Constitution of India.

D

Ms. Pinky Anand, ASG, Jaideep Gupta, Sr. Adv. Gopal Sankaranarayanan, Ms. Usha Nandini. V, Ms. Bina Madhavan, Tom Joseph, Ms. Saudamini Sharma, Ms. Kirti Dua, G. Prakash, Jishnu M.L., Mrs. Priyanka Prakash, Mrs. Beena Prakash, M. T. George, Anil Prathap, Advs. for the appearing parties.

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The Judgment of the Court was delivered by

DIPAK MISRA, CJI 1. A writer or an author, while choosing a mode of expression, be it a novel or a novella, an epic or an anthology of poems, a play or a playlet, a short story or a long one, an essay or a statement of description or, for that matter, some other form, has the right to exercise his liberty to the fullest unless it falls foul of any prescribed law that is constitutionally valid. It is because freedom of expression is extremely dear to a civilized society. It holds it close to its heart and would abhorrently look at any step taken to create even the slightest concavity in the said freedom. It may be noted here that we are in this writ petition, preferred under Article 32 of the Constitution, dealing with creativity and its impact and further considering the prayer for banning a book on the foundation that a part of it is indecent and offends the sentiments of women of a particular faith. Having said this, we would like to refer to two authorities highlighting the importance of creativity and necessity of freedom of expression and how the principle of pragmatic

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realism assures the said creative independence as civilization, indubitably A
a progressive one, perceives and eagerly desires for its accentuated
protection, nourishment and constant fostering. It is so because
curtailment of an author's right to freedom of expression is a matter of
serious concern.

2. In *Devidas Ramachandra Tuljapurkar v. State of B
Maharashtra and others*¹, the Court, dealing with the meaning of the
words "poetic licence", observed:-

"... it can never remotely mean a licence as used or understood C
in the language of law. There is no authority who gives a licence
to a poet. These are words from the realm of literature. The poet
assumes his own freedom which is allowed to him by the
fundamental concept of poetry. He is free to depart from reality; D
fly away from grammar; walk in glory by not following systematic
metres; coin words at his own will; use archaic words to convey
thoughts or attribute meanings; hide ideas beyond myths which
can be absolutely unrealistic; totally pave a path where neither
rhyme nor rhythm prevail; can put serious ideas in satires, ifferisms, E
notorious repartees; take aid of analogies, metaphors, similes in
his own style, compare like "life with sandwiches that is consumed
everyday" or "life is like peeling of an onion", or "society is like a
stew"; define ideas that can balloon into the sky never to come F
down; cause violence to logic at his own fancy; escape to the
sphere of figurative truism; get engrossed in the "universal eye
for resemblance", and one can do nothing except writing a critical
appreciation in his own manner and according to his understanding.
When a poet says "I saw eternity yesterday night", no reader G
would understand the term "eternity" in its prosaic sense. The
Hamletian question has many a layer; each is free to confer a
meaning; be it traditional or modern or individualistic. No one can
stop a dramatist or a poet or a writer to write freely expressing
his thoughts, and similarly none can stop the critics to give their
comments whatever its worth. One may concentrate on Classical G
facets and one may think at a metaphysical level or concentrate
on Romanticism as is understood in the poems of Keats, Byron or
Shelley or one may dwell on Nature and write poems like William
Wordsworth whose poems, say some, are didactic. One may also

¹ (2015) 6 SCC 1

A venture to compose like Alexander Pope or Dryden or get into individual modernism like Ezra Pound, T.S. Eliot or Pablo Neruda. That is fundamentally what is meant by poetic licence.”

B 3. In *Raj Kapoor and others v. State and others*², Krishna Iyer, J., speaking for himself, while quashing the criminal proceedings initiated against the petitioner therein for the production of the film, namely, ‘**Satyam, Sivam, Sundaram**’, observed:-

C “12. ... Jurisprudentially speaking, law, in the sense of command to do or not to do, must be a reflection of the community’s cultural norms, not the State’s regimentation of aesthetic expression or artistic creation. Here we will realise the superior jurisprudential value of *dharma*, which is a beautiful blend of the sustaining sense of morality, right conduct, society’s enlightened consensus and the binding force of norms so woven as against positive law in the Austinian sense, with an awesome halo and barren autonomy around the legislated text is fruitful area for creative exploration. But morals made to measure by statute and court is risky operation with portentous impact on fundamental freedoms, and in our constitutional order the root principle is liberty of expression and its reasonable control with the limits of ‘public order, decency or morality’. Here, social dynamics guides legal dynamics in the province of ‘policing’ art forms.”

[Emphasis added]

4. The learned Judge further went on to say:-

F “15. ... The relation between Reality and Relativity must haunt the Court’s evaluation of obscenity, expressed in society’s pervasive humanity, not law’s penal prescriptions. Social scientists and spiritual scientists will broadly agree that man lives not alone by mystic squints, ascetic chants and austere abnegation but by luscious love of Beauty, sensuous joy of companionship and moderate non-denial of normal demands of the flesh. Extremes and excesses boomerang although some crazy artists and film directors do practise Oscar Wilde’s observation: ‘Moderation is a fatal thing. Nothing succeeds like excess’.

G 16. All these add up to one conclusion that finality and infallibility are beyond courts which must interpret and administer the law

H ²(1980) 1 SCC 43

with pragmatic realism, rather than romantic idealism or recluse
extremism.” A

[Emphasis added]

5. We have referred to the aforesaid decisions in the beginning as we intend to adjudicate the *lis* on the touchstone of “pragmatic realism”. When we say “pragmatic realism”, it has to be understood in the context of creativity, for the present Writ Petition preferred under Article 32 of the Constitution seeks for issue of an appropriate writ to ban the novel, namely, “Meesha” meaning Moustache which appeared in a popular Malayalam weekly, “Mathrubhumi”, published from Kozikhode, Kerala and circulated throughout the country and abroad. B C

6. It is averred by the petitioner that the said literary work is insulting and derogatory to temple going women and it hurts the sentiments of a particular faith/community. It is further asserted that the portion of the book ‘Meesha’ which was published in ‘Mathrubhumi’ shows temple going women in bad light and it has a disturbing effect on the community. D

7. It is contended that the editor of ‘Mathrubhumi’ has failed in his duty by not editing or scrutinizing the portion of the book ‘Meesha’ which was published in the weekly. It is put forth by the petitioner that he has approached this Court singularly for the protection of the legitimate interest of the women community. The petitioner submits that such writings which have appeared in ‘Mathrubhumi’ are not a manifestation of the freedom of expression but are collusive efforts aimed at dividing the society, for such imputations are discriminatory against women and threaten the very fabric of the society which embodies within itself the virtues of pluralistic community, religion and gender balance. The petitioner avers that defamatory and degrading publications which cater to perverted and communal minds need to be checked and nipped in the bud as they have a tendency to propel the general public to view the women community as mere sexual and material objects which, in turn, denies the women community their fundamental rights and also jeopardizes their safety and well-being. E F G

8. It is also alleged by the petitioner that the impugned incriminating material appearing in ‘Mathrubhumi’ defiles the places of worship and causes the public to look down upon them with contempt and ridicule, whereas worshipping of deities by visiting the temples with purity of body and mind is an integral part of the Hindu religion. H

A 9. It is urged that the said publication in ‘Mathrubhumi’ has the
proclivity and potentiality to disturb the public order, decency or morality
and it defames the women community, all of which are grounds for the
State to impose reasonable restrictions under Article 19(2) on the
fundamental right of freedom of speech and expression. To buttress his
stand, the petitioner has submitted that after the publication of the
B incriminating material, women visiting temples are subjected to ridicule
and embarrassment through various social media platforms and instances
such as these are bound to have an adverse effect on the liberty, freedom
and empowerment of women.

C 10. The petitioner has also averred that if such a work of literature
is not checked, it may trigger a ‘Charlie Hebdo’ kind of a backlash in our
country and, therefore, it is necessary for this Court to lay down guidelines
to regulate and prohibit, those who control/manage/publish both on print
and electronic media platforms, from publishing such insensitive,
incriminating and defamatory articles which could disrupt the peaceful
D co-existence of various communities and religions in the country.

E 11. In view of the aforesaid, the petitioner has prayed to this Court
to issue a writ of Mandamus or any other writ/directions to the Respondent
No. 1, the Union of India, the Respondent No. 2, the State of Kerala and
the Respondent No. 4, the Chief Editor of ‘Mathrubhumi’ weekly, to
search and seize all copies of ‘Mathrubhumi’ weekly volume-2 dated
11.07.2018 from all the States and/or issue a writ of prohibition or any
other directions to the Respondents to prevent any further publication/
circulation of the novel titled ‘Meesha’ in the form of a book or in any
other form including the internet. The petitioner has also prayed to issue
appropriate directions in the nature of mandamus or otherwise to the
F Ministry of Information and Broadcasting, New Delhi, to frame such
guidelines as to prevent the recurrence of such instances which have
the tendency to cause threat to the integrity of the society and the safety
of women.

G 12. It may be noted here that when the Writ Petition was listed on
02.08.2018, this Court, before issuing notice, deemed it appropriate to
pass an order on the same date which reads as follows:-

“Mr. M.T. George, learned counsel shall file within five days hence
the central theme of the book and the three chapters, which have
been published in a weekly newspaper, namely, Mathrubhumi.”

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13. In pursuance of the aforesaid order of this Court, Mr. M.T. George, learned counsel appearing on behalf of the Chief Editor of 'Mathrubhumi', the Respondent No. 4 herein, has filed the translated copy of the central theme of the book 'Meesha' along with an English translation of the three chapters of the novel. A

14. A perusal of the central theme of 'Meesha' reveals that the book is a narration which revolves back to the 19th century and extends to the present times with Vavachan alias Meesha (Moustache), Paviyam, Chella and Sita as its central characters. Vavachan is one of the six children of Paviyam and Chella and their family is engaged in agriculture for a living. The novel begins with young Vavachan travelling in a boat with his father for gathering fodder grass. On the way, Paviyam tries to steal a bunch of raw bananas from a Pulaya (farm) but his attempt was foiled by a young woman of the household, named, Sita. Vavachan at his young age is stunned and baffled when he sees the half-naked body of Sita. After this rendezvous, a storm hits and Paviyam, the father, along with his son Vavachan lose their way. After the storm subsides and time passes, Vavachan comes across two men who tell him that the world was about to witness a big war and they were going to Malaya (town) to escape a famine. Vavachan gets hooked with the idea of Malaya though he had no idea as regards its location. B
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15. As the narration proceeds, Vavachan along with his family lived in constant hunger. One day, a theatre group comes to their village from Malabar. The proprietor of the theatre group needs an actor with a big and ferocious moustache to play the role of a policeman. But there was no one in the village who was sporting a big moustache as it was considered as act of defiance especially among the lower castes. The proprietor of the theatre group comes across Vavachan who had never shaven in his life and sported thick hair and a beard. The proprietor gave Vavachan a tonsure treatment, that is to say, he shaved his head but allowed a ferocious Moustache (Meesha) to remain. Thereafter, Vavachan was put on stage where he only has to scream twice blood-curdling 'daa' (you). E
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16. In response, people got scared and ran away from the scene and Vavachan's moustache, which he refused to shave off even after the show, became a notorious legend. The upper caste people who resented Vavachan's Moustache ascribed to him every kind of crime, even though he was innocent and just wanted to go to Malaya and marry H

A the girl, Sita, who had bedazzled him when he was young and whom he had seen half-naked.

B 17. When the period of famine and hunger struck, Vavachan, with armed men after him, fled from his village and hid in the fields of Kuttanadan where labyrinthine canals and marshes saw human presence only during the farming season. Gradually, with the passage of time, Vavachan got immersed in the Kuttanadan environment where he encountered the myths, legends, folklore and superstitions ingrained among the people.

C 18. Paviyam and Chella, the parents of Vavachan, die without seeing him. But after Chella's death, he returns to his native village and runs away with a book from Kalan and reads it fully. The stories of (Meesha) Vavachan alias Moustache get etched in the region's sub-consciousness. The moustache becomes a legend himself with super natural powers. The landlords and the government become afraid that Meesha's activities would hurt the farming activities in Kuttanadan and they deploy a legendary sub-inspector named Thanu Linga Nadar to deal with Meesha. However, at that time, Kuttanadan witnessed a deluge and Nadar's mysterious death increased Meesha's terror. Subsequently, Meesha locks horns with a local strongman named Karumathara Ittichan and rumors went around that Meesha was killed in fight with Ittichan.

E 19. But Meesha had reached Kumarakom, an important place in northern Kuttanadan, where an Englishman called Brenen Sayip (Saheb) had installed a machine to pump out water from the fields of Kuttanadan. Refusing to divulge the secret of the machine, Brenen Saheb charges hefty amounts from the people. Avarachan, a man interested in science, F manages to steal the secret with the help of Meesha. Meesha works as a help of Baker Sayip who has vast fields and also conducts missionary work in the region. There Meesha befriends a fisherman called Ouseph, who was born to a Malayali woman from Baker Sayip's father.

G 20. Baker Sayip is a well-known crocodile hunter who was known to have caused the extinction of crocodiles in the Vembanad Lake. However, the last crocodile is after Baker for revenge. In the end, it is Meesha who conquers the crocodile and due to this feat of Meesha, Baker Sayip becomes his *bête noire*. When Meesha realizes that Baker has turned against him, he escapes from there along with Ouseph.

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21. Thereafter, Meesha comes across a prostitute, Kuttathi, who had heard about the adventures of Meesha. One Kunjachan, the son of the lake area's owner troubles Kuttathi and is a big nuisance for her. Meesha slams Kunjachan as well. In return, Kuttathi, with the assistance of one Narayanan, who also sports a moustache, helps Meesha to find his childhood crush Sita. Meesha saves Sita from a robber called Katta Pulavan. Thereupon, Meesha asks Sita to accompany him, but Sita is unwilling and refuses to submit herself to Meesha.

22. Thus, Vavachan alias Meesha, who is able to defeat everyone in life, is defeated by a woman in the end.

23. Presently, we may refer to and quote the dialogue from the book "Meesha" that has impelled the petitioner to move this Court in the instant writ petition. The English translation of the dialogue appears at page twenty-six of the translated copy of the three chapters submitted by Mr. M.T. George, learned counsel appearing for the Respondent No. 4, the Chief Editor of the weekly 'Mathrubhumi'. It reads thus:-

"Why do these girls take bath and put on their best when they go to the temple?" a friend who used to join the morning walk until six months ago once asked.

"To Pray", I said.

"No", he said. "Look carefully, why do they need to put their best clothes in the most beautiful way to pray? They are unconsciously proclaiming that they are ready to enter into sex", he said. I laughed.

"Otherwise," he continued, "why do they not come to the temple four or five days a month? They are letting people know that they are not ready for it. Especially, informing those Thirumenis (Brahmin priests) in the temple. Were they not the masters in these matters in the past?"

24. The primary issue that emerges for consideration is whether the aforesaid portion of the book 'Meesha' which the petitioner asserts to be derogatory to the women community is an aberration of such magnitude which requires the intervention of this Court on the ground that it has the potentiality to disturb the public order, decency or morality and whether it defames the women community, and, therefore, invites imposition of reasonable restriction under Article 19(2) of the Constitution.

A 25. For deciding this question, we must advert to the fundamental idea behind art and literature and the liberalism associated with artistic expression. Literature symbolizes freedom to express oneself in multitudinous ways. One should never forget that only when creativity is not choked, it helps the society to be able to accept the thoughts and ideas of a free mind.

B 26. Literature can act as a medium to connect to the readers only when creativity is not choked or smothered. The free flow of the stream of creativity knows no bounds and imagination brooks no limits. A writer or an artist or any person in the creative sphere has to think in an unfettered way free from the shackles that may hinder his musings and ruminations. The writers possess the freedom to express their views and imagination and readers too enjoy the freedom to perceive and imagine from their own viewpoint. Sans imagination, the thinking process is conditioned.

D 27. Creative voices cannot be stifled or silenced and intellectual freedom cannot be annihilated. It is perilous to obstruct free speech, expression, creativity and imagination, for it leads to a state of intellectual repression of literary freedom thereby blocking free thought and the fertile faculties of the human mind and eventually paving the path of literary pusillanimity. Ideas have wings. If the wings of free flow of ideas and imagination are clipped, no work of art can be created. The culture of banning books directly impacts the free flow of ideas and is an affront to the freedom of speech, thought and expression. Any direct or veiled censorship or ban of book, unless defamatory or derogatory to any community for abject obscenity, would create unrest and disquiet among the intelligentsia by going beyond the bounds of intellectual tolerance and further creating danger to intellectual freedom thereby gradually resulting in “intellectual cowardice” which is said to be the greatest enemy of a writer, for it destroys the free spirit of the writer. It shall invite a chilling winter of discontent. We must remember that we live not in a totalitarian regime but in a democratic nation which permits free exchange of ideas and liberty of thought and expression. It is only by defending the sacrosanct principles of free speech and expression or, to borrow the words of Justice Louis Brandeis, “the freedom to think as you will and to speak as you think” and by safeguarding the unfettered creative spirit and imagination of authors, writers, artists and persons in the creative field that we can preserve the basic tenets of our constitutional

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ideals and mature as a democratic society where the freedoms to read and write are valued and cherished. A

28. The aforesaid also calls from the readers and admirers of literature and art to exhibit a certain degree of adherence to the unwritten codes of maturity, humanity and tolerance so that the freedom of expression reigns supreme and is not inhibited in any manner. The flag of democratic values and ideals of freedom and liberty has to be kept flying high at all costs and the Judiciary must remain committed to this spirit at all times unless they really and, we mean, really in the real sense of the term, run counter to what is prohibited in law. And, needless to emphasise that prohibition should not be allowed entry at someone's fancy or view or perception. B C

29. In *Samaresh Bose and another v. Amal Mitra and another*³, the question that arose before this Court was whether the accused persons had committed an offence under Section 292 IPC. In the said case, an author had written a novel under the caption '*Prajapati*' which was published in '*Sarodiya Desh*'. The contention before the trial court was that the novel was obscene and both the accused persons, namely, the author and the publisher had sold, distributed, printed and exhibited the same. The accused persons who faced trial stood convicted. Their conviction was affirmed by the High Court. This Court, while dealing with the issue for the purpose of deciding the question of obscenity in any book, story or article, opined:- D E

"29. ... The decision of the court must necessarily be on an objective assessment of the book or story or article as a whole and with particular reference to the passages complained of in the book, story or article. The court must take an overall view of the matter complained of as obscene in the setting of the whole work, but the matter charged as obscene must also be considered by itself and separately to find out whether it is so gross and its obscenity so pronounced that it is likely to deprave and corrupt those whose minds are open to influence of this sort and into whose hands the book is likely to fall. Though the court must consider the question objectively with an open mind, yet in the matter of objective assessment the subjective attitude of the Judge hearing the matter is likely to influence, even though unconsciously, F G

³ (1985) 4 SCC 289

A his mind and his decision on the question. A Judge with a puritan
and prudish outlook may on the basis of an objective assessment
of any book or story or article, consider the same to be obscene.
It is possible that another Judge with a different kind of outlook
B may not consider the same book to be obscene on his objective
assessment of the very same book. The concept of obscenity is
moulded to a very great extent by the social outlook of the people
who are generally expected to read the book. It is beyond dispute
C that the concept of obscenity usually differs from country to country
depending on the standards of morality of contemporary society
in different countries. In our opinion, in judging the question of
obscenity, the Judge in the first place should try to place himself in
the position of the author and from the viewpoint of the author the
Judge should try to understand what is it that the author seeks to
convey and whether what the author conveys has any literary
and artistic value. The Judge should thereafter place himself in
D the position of a reader of every age group in whose hands the
book is likely to fall and should try to appreciate what kind of
possible influence the book is likely to have in the minds of the
readers. ...”

The Court, further analyzing the story of the novel, expressed
E thus:-

“35. ... If we place ourselves in the position of readers, who are
likely to read this book—and we must not forget that in this class
of readers there will probably be readers of both sexes and of all
ages between teenagers and the aged—we feel that the readers
as a class will read the book with a sense of shock and disgust,
F and we do not think that any reader on reading this book would
become depraved, debased and encouraged to lasciviousness. It
is quite possible that they come across such characters and such
situations in life and have faced them or may have to face them in
life. On a very anxious consideration and after carefully applying
G our judicial mind in making an objective assessment of the novel
we do not think that it can be said with any assurance that the
novel is obscene merely because slang and unconventional words
have been used in the book in which there have been emphasis on
sex and description of female bodies and there are the narrations
of feelings, thoughts and actions in vulgar language. Some portions
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of the book may appear to be vulgar and readers of cultured and refined taste may feel shocked and disgusted. Equally in some portions, the words used and description given may not appear to be in proper taste. In some places there may have been an exhibition of bad taste leaving it to the readers of experience and maturity to draw the necessary inference but certainly not sufficient to bring home to the adolescents any suggestion which is depraving or lascivious.”

30. In this regard, we may refer with profit to the pronouncement in *Bobby Art International and others v. Om Pal Singh Hoon and others*⁴, popularly known as “*Bandit Queen case*”. The Court analysed the storyline, the humiliation faced by the female child, the torment faced by her and, eventually, the innocent woman becoming a dreaded dacoit and observed that to appreciate the story, the character of the person portrayed had to be viewed. In that context, the Court held:-

“27. First, the scene where she is humiliated, stripped naked, paraded, made to draw water from the well, within the circle of a hundred men. The exposure of her breasts and genitalia to those men is intended by those who strip her to demean her. The effect of so doing upon her could hardly have been better conveyed than by explicitly showing the scene. The object of doing so was not to titillate the cinemagoer’s lust but to arouse in him sympathy for the victim and disgust for the perpetrators. The revulsion that the Tribunal referred to was not at Phoolan Devi’s nudity but at the sadism and heartlessness of those who had stripped her naked to rob her of every shred of dignity. Nakedness does not always arouse the baser instinct. The reference by the Tribunal to the film ‘Schindler’s List’ was apt. There is a scene in it of rows of naked men and women, shown frontally, being led into the gas chambers of a Nazi concentration camp. Not only are they about to die but they have been stripped in their last moments of the basic dignity of human beings. Tears are a likely reaction; pity, horror and a fellow-feeling of shame are certain, except in the pervert who might be aroused. We do not censor to protect the pervert or to assuage the susceptibilities of the over-sensitive. ‘Bandit Queen’ tells a powerful human story and to that story the scene of Phoolan Devi’s enforced naked parade is central. It helps

⁴ (1996) 4 SCC 1

A to explain why Phoolan Devi became what she did: her rage and vendetta against the society that had heaped indignities upon her.”

The aforesaid, as is evident, appreciates the agonies and torture suffered by the protagonist and the nature of depiction of the scenes on celluloid and lays down the principle not to be guided by the sensitivity of a pervert viewer. The principle of assuagement is not to be taken recourse to so as to make the idea of freedom of expression susceptible to suit the views and perceptions of a pervert thinker or viewer. Similarly, while reading a book, the setting, the constituents that constitute the elements of the character and the purpose are to be kept in view.

C 31. In this context, reference to the view expressed in *Viacom 18 Media Private Limited and others v. Union of India and others*⁵ would be apposite. In the said case, the challenge was to the ban imposed by four States for screening the movie ‘**Padmaavat**’. The Court quashed the notifications of banning on the bedrock that the expression of an idea through the medium of cinema which is a popular medium has its own status and the artistic expression should not be tinkered with. The Court went on to observe that if intellectual prowess and natural or cultivated power of creation is inhibited without the permissible facet of law, the concept of creativity would pave the path of extinction; and when creativity dies, values of civilization corrode. The Court, in the said context, reproduced a passage from an order in *Nachiketa Walhekar v. Central Board of Film Certification*⁶ which reads as under:-

F “Be it noted, a film or a drama or a novel or a book is a creation of art. An artist has his own freedom to express himself in a manner which is not prohibited in law and such prohibitions are not read by implication to crucify the rights of expressive mind. The human history records that there are many authors who express their thoughts according to the choice of their words, phrases, expressions and also create characters who may look absolutely different than an ordinary man would conceive of. A thought provoking film should never mean that it has to be didactic or in any way puritanical. It can be expressive and provoking the conscious or the sub-conscious thoughts of the viewer. If there has to be any limitation, that has to be as per the prescription in law.”

⁵ (2018) 1 SCC 761

H ⁶ (2018) 1 SCC 778

32. In *Adarsh Cooperative Housing Society Ltd. v. Union of India and others*⁷, the issue before this Court was whether screening of feature film, which incorporated a perception with regard to a particular situation, would affect the trial which involved the petitioner, the society or the exercise of “error jurisdiction” of the appellate court. This Court negatived the said contention and ruled that courts of law decide the *lis* on the basis of the materials brought on record and not on the basis of imagination as projected in the language of the theatre or a script on celluloid. The Court opined thus:-

“...there can be multitudinous modes, manners and methods to express a concept. One may choose the mode of silence to be visually eloquent and another may use the method of semi melodramatic approach that will have impact. It is the individual thought and approach which cannot be curbed.”

And again:

“...the doctrine of sub-judice may not be elevated to such an extent that some kind of reference or allusion to a member of a society would warrant the negation of the right to freedom of speech and expression which is an extremely cherished right enshrined under the Constitution. The moment the right to freedom of speech and expression is atrophied, not only the right but also the person having the right gets into a semi coma. We may hasten to add that the said right is not absolute but any restriction imposed thereon has to be extremely narrow and within reasonable parameters. In the case at hand, we are obligated to think that the grant of certificate by the CBFC, after consulting with the authorities of the Army, should dispel any apprehension of the members or the society.”

33. It would usher in a perilous situation, if the constitutional courts, for the asking or on the basis of some allegation pertaining to scandalous effect, obstruct free speech, expression, creativity and imagination. It would lead to a state of intellectual repression of literary freedom. When we say so, we are absolutely alive to the fact that the said right is not absolute but any restriction imposed thereon has to be extremely narrow and within the reasonable parameters as delineated by Article 19(2) of the Constitution. Here, we may remind ourselves of the expression used

⁷ 2018 (4) SCALE 390

A by George Orwell. It is free thinking and intellectual cowardice. Creative writing is contrary to intellectual cowardice and intellectual pusillanimity.

34. Keeping in view the aforesaid principles, the objections raised as regards the contents of the novel and the language used which is reflected in the dialogue as reproduced hereinbefore are to be decided.

B The grievance, as is reflectible, pertains to derogatory comments on women, especially when they go to temple. As stated earlier, it is the duty of the Court to see whether such a dialogue was contrived to give rise to any kind of sensuous situation or projection of a class to humiliate them. A creative work has to be read with a matured spirit, catholicity of approach, objective tolerance and a sense of acceptability founded on reality that is differently projected but not with the obsessed idea of perversity that immediately connects one with the passion of didacticism or, for that matter, perception of puritanical attitude. A reader should have the sensibility to understand the situation and appreciate the character and not draw the conclusion that everything that is written is in bad taste and deliberately so done to pollute the young minds. On the contrary, he/she should elevate himself/herself as a co-walker with the author as if there is social link and intellectual connect. The feeling of perverse judging should be abandoned. A creative writing is expectant of empathetic reading. It is not averse to criticism but certainly does not tolerate unwarranted protest. The author of “Wuthering Heights” expects the readers to appreciate the morbidity that surrounds the character of “Heathcliff”. Similarly, the great poet of “Nala Damayanti” desired the readers to enjoy the description of the beauty of the princess appreciating the narrative but not to engage in pervert thinking.

F 35. One has to understand and appreciate the characteristics of the character and the plots and sub-plots that are woven in the story. The character of *Meesha* as has been projected shows the myriad experiences with different situations. The situations, as we find, can be perceived as certain sub-plots which evolved around the fundamental characteristics of the protagonist. The theory of consistency of character as adopted by certain writers seems to have been maintained in the narrative. The situations and the treatment of situations may be different but the basic response of the protagonist remains unchanged. All these, we say, can be from one reader’s point of view. To another reader, it may seem that the sub-plots have been enthusiastically contrived to bring in tempting situations to draw the protagonist in and to exposit chain

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reactions. Appreciated from either point of view, it cannot be denied that it is a manifestation of creativity. The perception of a character which is in consonance with the story invites empathetic readers to view him/her from a different perspective. A reader with mature sensibility would connect with the plight of the protagonist or may distance himself/herself by expressing the view that the projection is derogatory and hurtful to a section of people. He/she treats the novel as scandalous and offensive. The Court is not to be swayed by any kind of perception. One may have a grave dislike towards a particular manner of expression but that would not warrant for issue of a mandamus from the Court to ban the book or the publication. The language used in the dialogue cannot remotely be thought of as obscene. The concept of defamation does not arise. Nurturing the idea that it is derogatory and hurtful to the temple going women would tantamount to pyramiding a superstructure without the infrastructure.

36. If one understands the progression of character through events and situations, a keen reader will find that beneath the complex scenario, the urge is to defeat and to conquer and not to accept a denial. Both the facets are in the realm of obsession and the author allows the protagonist to rule his planet. His imagination encircles his world. A reader has the liberty to admire him or to sympathise. Either way, the dialogue to which the objection is raised is not an intrusion to create sensation. It is a facet of projection of the characters. It is, in a way, imaginative reality or as Pablo Picasso would like to put it, “*Everything you can imagine is real*”. A pervert reader may visualise absence of decency or morality or the presence of obscenity but they are really invisible.

37. If books are banned on such allegations, there can be no creativity. Such interference by constitutional courts will cause the death of art. True it is, the freedom enjoyed by an author is not absolute, but before imposition of any restriction, the duty of the Court is to see whether there is really something that comes within the ambit and sweep of Article 19(2) of the Constitution. At that time, the Court should remember what has been said in *S. Rangarajan v. P. Jagjivan Ram and others*⁸ wherein, while interpreting Article 19(2), this Court borrowed from the American test of clear and present danger and observed:-

“45. ... Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing

⁸ (1989) 2 SCC 574

- A the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a “spark in a power keg”.”
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38. To apply the said litmus test, it is to be borne in mind that a book should not be read in a fragmented manner. It has to be read as a whole. The language used, the ideas developed, the style adopted, the manner in which the characters are portrayed, the type of imagery taken aid of for depiction, the thematic subsidiary concepts projected and the nature of delineation of situations have to be understood from an objective point of view. There may be subjective perception of a book as regards its worth and evaluation but the said subjectivity cannot be allowed to enter into the legal arena for censorship or ban of a book.

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- D 39. Quite apart from the above, the creativity and the author’s perception of the universe are to be borne in mind. What is true to poetry is applicable to novels or any creative writing. It has to be kept uppermost in mind that the imagination of a writer has to enjoy freedom. It cannot be asked to succumb to specifics. That will tantamount to imposition. A writer should have free play with words, like a painter has it with colours. The passion of imagination cannot be directed. True it is, the final publication must not run counter to law but the application of the rigours of law has to also remain alive to the various aspects that have been accepted by the authorities of the Court. The craftsmanship of a writer deserves respect by acceptance of the concept of objective perceptibility.
- E
- F

40. It ought to be remembered that eventually, what the great writer and thinker Voltaire had said – “*I may disapprove of what you say, but I will defend to the death your right to say it*” becomes the laser beam for guidance when one talks about freedom of expression.

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41. In view of the aforesaid analysis, the writ petition, being devoid of merit, stands dismissed. However, there shall be no order as to costs.