



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 3480 OF 2011
WITH
INTERIM APPLICATION NO. 2355 OF 2023
IN
CRIMINAL WRIT PETITION NO. 3480 OF 2011

Joseph Paul de Sousa,
Residing at: B:D/3, "Connaught Mansions",
S.B.S. Road, Opp. Colaba P.O.,
Upper Colaba, Mumbai – 400 005.

.....Petitioner

Vs.

1. The State at the instance of:
Crime Branch, CID – Mumbai,
Cyber Cell (C.C.I.C.),
Police Headquarters,
Mumbai – 400 004.
2. Zinnia M. Khajotia,
403, Bakhtavar, S.B. Singh Road,
South Colaba, Mumbai – 400 005.
3. The Regional Passport Office, Mumbai,
Assistant Passport Officer (Policy),
Manish Commercial Centre,
1st Floor, Dr. A. B. Road,
Worli, Mumbai – 400 030.

.....Respondents

Mr. Haresh Jagtiani, Senior Advocate a/w Mr. Suprabh Jain, Mr. Pushpvijay Kanoji & Mr. Siddhesh Jadhav i/b Haresh Jagtiani & Associates for the Petitioner.

Mr. Vinod Chate, A.P.P for Respondent No. 1-State.

Mr. Kushal Mor a/w Mr. Tanmay Karmarkar & Mr. Roshan Chouhan for Respondent No. 2.

CORAM: A. S. GADKARI AND
DR. NEELA GOKHALE, JJ.

RESERVED ON: 29th JULY 2024.

PRONOUNCED ON: 21st AUGUST 2024.

JUDGMENT (Per Dr. Neela Gokhale, J.) :

- 1) The Petitioner seeks quashing of First Information Report

(F.I.R.) No. 30 of 2009 dated 29th December 2009 registered with Cyber Cell, Mumbai for the offense punishable under Sections 354, 509 & 506(2) of the Indian Penal Code, 1860 (I.P.C.) and Section 67 of the Information Technology Act, 2000 (I.T. Act). He also seeks to quash and set aside the criminal proceedings arising out of the aforesaid F.I.R. bearing C.C. No. 255/PW/2010 pending before the Court of Metropolitan Magistrate, 37th Court at Esplanade, Mumbai.

2) Mr. Harish Jagtiani learned senior counsel appeared for the Petitioner. Mr. Kushal Mor, learned counsel represented the Respondent No. 2 and Mr. Vinod Chate, learned A.P.P. appeared for the State.

3) *The facts of case are as under :*

3.1) The Petitioner and the Respondent No. 2-Ms. Zinnia are residents of the building called “Connaught Mansions” situated on the Shahid Bhagat Singh Road, Colaba, Mumbai. They are acquainted with each other since 1980. According to Ms. Zinnia, her mother was the Chairperson of the Co-operative Housing Society since 1942. Since her mother was old and unable to look after the affairs of society, the Petitioner without being elected as such, usurped the office of Chairman and started interfering in the society work despite strong objection from the other residents of the building.

3.2) Ms. Zinnia, the Respondent No. 2 contends that, on 7th February 2009 at 11.00 p.m. she logged in to her e-mail ID

zinniamk@gmail.com to find an e-mail from jpdesousa123@rediffmail.com in her inbox. The subject of the e-mail was titled as “Burden of Proof & the Legacy of Guilt”. The recipient e-mail ID was that of the Petitioner herein. The e-mail contained a sentence “frankly, even if you streaked across Mumbai or squatted in the nude on Nandgaon’s Beach, you will never ever get people to pay attention to your opinions and views.” The said e-mail was Carbon Copied (cc’ed) to sharanh14@gmail.com, sehira.ebrahim@amarchand.com, deltascf@bom3.vsnl.net.in. These email-IDs are of other residents in the society. It is the case of Ms. Zinnia that, this e-mail has defamed her in the society.

3.3) She then received another e-mail on 9th February 2009 which contained another sentence “fig leaf of anonymity will be plucked and get you nowhere...”.

3.4) On 22nd March 2009 she received another e-mail from the Petitioner’s e-mail ID which also included a sentence “I am going to win this one and how!!!. Will not be a limited over match – I like to take trouble dressing a corpse – a perfect undertaker they called me”.

3.5) It is the case of Respondent No. 2 that, the language in the entire contents of three e-mails, including the three sentences, is of such obscene, vulgar and of overtly sexual nature that outrages her modesty. By way of the e-mails, he has also threatened to kill her. Ms. Zinnia therefore made a written Complaint dated 7th August 2009 to the Cyber Crime

Investigation Cell (C.C.I.C.), Crime Branch, Mumbai. Pursuant to a preliminary enquiry, the present F.I.R. is registered.

4) By Order dated 2nd February 2012, the proceedings before the trial Court were directed to be stayed.

5) At the outset, Mr. Jagtiani, learned senior counsel took us through the ingredients of the offenses as alleged against the Petitioner. He submitted that, the contents of the alleged offensive e-mails may perhaps be in bad taste but do not by any stretch of imagination fall within the scope and ambit of the alleged offenses. On this ground alone, the criminal proceedings deserve to be quashed and set aside. He then advanced his objections to the continuance of the criminal proceedings, enumerated as under:

a. The F.I.R. is in complete violation of the mandate provided by the Apex Court in the case of *T. T. Anthony Vs. State of Kerala And Others*¹. There cannot be a second F.I.R. on the same facts in respect of the same offense.

b. He submitted that, there is a history of prior friction and animosity between the Petitioner and the Respondent No. 2 arising from the businesses of the Khajotia family. The acrimony between the parties has traipsed its way across the High Court of London at United Kingdom (U.K.) to this High Court entangled with personal

1. (2001)6 Supreme Court Cases 181.

vendetta to the Respondent No. 2 and her late husband's family. This animosity has resulted in the Respondent No. 2 filing the F.I.R. out of sheer personal spite and vendetta with a view to cause undue harassment to the Petitioner. The ulterior motive is to wreak vengeance on the Petitioner to spite a personal grudge.

c. There is a delay of 7-8 months in lodging the F.I.R.

d. There can be no application of Section 354 of the I.P.C. due to lack of any allegation regarding assault or use of force against the Respondent No. 2. Moreover, he contends that, there can be no application of Section 509 of the I.P.C. as well since there is no intention to insult/outrage the modesty of a woman. Mr. Jagtiani while interpreting Section 509 of the I.P.C. contended that, to attract the said offense, it is necessary that the offending words should be uttered or communicated by way of a gesture. The offense cannot be committed by written words. Thus, he submitted that, the e-mails which are obviously not 'utterances' nor 'gestures', do not fulfill the ingredients of Section 509 of the I.P.C. Furthermore, none of the three e-mails remotely suggest a threat with any bodily injury or death to the Respondent No. 2.

e. As regards Section 67 of the I.T. Act, an argument was advanced that the provision *prima-facie* deals with obscenity. It is also submitted that, the definition of the words 'lascivious' and

‘prurient’ appearing in the provision signifies that form of immorality which relates to sexual impunity which is absent in the e-mails.

f. The Courts in a catena of decisions have ruled that a mere outburst of an accused is not sufficient to cause an alarm or harm to the victim but with a view to deter her from interfering with the Petitioner’s personal matters would not constitute an offense of criminal intimidation.

g. Finally, Mr. Jagtiani submits that the F.I.R. does not disclose commission of a cognizable offense justifying investigation by Police. He thus seeks quashing of the F.I.R. and setting aside the entire criminal proceedings ensuing therefrom i.e. the C.C. No. 255/PW/2010.

5.1) Mr. Jagtiani has placed reliance on the following decisions of the Supreme Court in the cases of:

- *Abhijeet J. K. Vs. State of Kerala And Others*²;
- *S. Khushboo Vs. Kanniammal And Another*³;
- *Apoorva Arora And Another Vs. State (Government of NCT of Delhi) And Another*⁴;
- *Nelson Motis Vs. Union of India And Another*⁵;
- *Padma Sundara Rao (Dead) And Others Vs. State of T. N. And Others*⁶;

2. 2020 SCC OnLine Ker 703.

3. (2010) 5 Supreme Court Cases 600.

4. (2024) 6 Supreme Court Cases 181.

5. (1992) 4 Supreme Court Cases 711.

6. (2002) 3 Supreme Court Cases 533.

- *M. V. Joshi Vs. M. U. Shimpi And Another*⁷;
- *A. W. Meads Vs. The King Emperor*⁸;
- *Sandeep Rammilan Shukla & Ors. Vs. State of Maharashtra And Others*⁹;
- *Babubhai Vs. State of Gujarat And Others*¹⁰;
- *State of Haryana And Others Vs. Bhajan Lal And Others*¹¹;
- *Ramkripal S/o. Shyamlal Charmakar Vs. State of M. P.*¹²;
- *Dr. Subramanian Swamy Vs. C. Pushparaj*¹³;
- *Mohammed Rizwan Fazluddin Kadri Vs. State of Gujarat*¹⁴;
- *Maqbool Fida Husain Vs. Raj Kumar Pandey*¹⁵.

5.2) He has also placed reliance on the Oxford Thesaurus to explain the meaning of the word 'gesture' appearing in Section 509 of the I.P.C.

6) *Per-contra*, Mr. Mor, learned counsel for Respondent No. 2, recounts the acrimonious relationship between the parties borne out of a series of litigation in U.K. and India. His submissions are as under:

6.1) According to Mr. Mor the Petitioner habitually employs a *modus-operandi* to circulate nasty, threatening letters and e-mails maligning reputation of individuals and families into whose affairs he meddles for a purely financial motive. He further narrates the plight of the Respondent No. 2 of facing defamation at the hands of the Petitioner by

7. 1961 SCC Online SC 56.

8. 1944 SCC OnLine FC 19.

9. 2008 ALL MR (Cri.) 3486.

10.(2010) 12 Supreme Court Cases 254.

11. 1992 Supp (1) Supreme Court Cases 335.

12. (2007) 11 Supreme Court Cases 265.

13. MANU/TN/0053/1998.

14. Special Criminal Application No. 1832 of 2009 decided on 22nd February 2010.

15. Criminal Revision Petition No. 114 of 2007 decided on 8th May 2008.

way of persistently circulating e-mails containing details of her personal life and that of her family, their business, their relationship with their friends and family. These details are also factually incorrect.

6.2) Mr. Mor has denied all the allegations made by the Petitioner against the Respondent No. 2 in the Petition. By way of an Affidavit-in-Reply dated 5th March 2012, it is denied that the registration of the F.I.R. or the Complaint has any relation to the animosity with the Petitioner and neither is the same on account of alleged orders passed in London or by this Court nor on account of any action taken by Dallah Albaraka Group. It is reiterated that, the F.I.R. is based on threatening the Respondent No. 2 and lewd e-mails sent to her, which on plain reading are intended to outrage the modesty of a woman.

6.3) Mr. Mor vehemently argues that, the e-mails not only demonstrate intent of the Petitioner in outraging the modesty of Respondent No. 2 but is also an attempt to terrorize a widow and a lone woman. Mr. Mor contends that, the attempt of the Petitioner to label the contents of the e-mail as 'mere idioms' not denoting any derogatory meaning is in vain. He submitted that, the e-mail/s if read as whole particularly the offending words contained in the e-mail read as independent phrase/sentence, is highly derogatory and outrages her modesty. He thus states that, the ingredients of the offenses alleged are fulfilled and the Petitioner has committed a cognizable offense.

6.4) Mr. Mor places reliance on the following decisions of the Supreme Court and other High Courts in the cases of :

- *M. M. Haries Vs. State of Kerala*¹⁶;
- *Emperor Vs. Tarak Das Gupta*¹⁷;
- *State of Punjab Vs. Major Singh*¹⁸;
- *Raju Pandurang Mahale Vs. State of Maharashtra And Another*¹⁹;
- *Indrakunwar Vs. State of Chhattisgarh*²⁰;
- *K. S. Puttaswamy And Another Vs. Union of India And Others*²¹.

6.5) He further places reliance on definitions in the concise Oxford Dictionary to elaborate the meaning of the terms 'lascivious' and 'prurient' and other words appearing in the context of the present case.

7) Mr. Vinod Chate, learned A.P.P. opposed the Petition and also supported the case of Respondent No. 2.

8) Analysis :

8.1) At the very outset, we deal with the objection of Mr. Jagtiani regarding registration of a second F.I.R. not being maintainable. According to Mr. Jagtiani, the Respondent No. 2 gave a written Complaint on 7th August 2009 to the Senior Police Inspector, C.C.I.C. regarding the three e-mails. There was an enquiry and upon finding that, the e-mails were sent by the Petitioner, he was called upon to give his statement. As per the

16. 2005 SCC OnLine Ker 100.

17. 1925 SCC OnLine Bom 28.

18. 1966 SCC OnLine SC 51.

19. (2004) 4 Supreme Court Cases 371.

20. 2023 SCC OnLine SC 1364.

21. (2017) 10 Supreme Court Cases 1.

convenience of the Petitioner, he gave his explanation. The present F.I.R. dated 29th December 2009 was lodged by the Respondent No. 2. This, according to Mr. Jagtiani is a second F.I.R. and as per settled law, not maintainable. We have looked at the documents including the written Complaint and the latter F.I.R. It is clear that, there is no 'second F.I.R.' as alleged by the Petitioner. Pursuant to the written Complaint made to the C.C.I.C. by the Respondent No. 2 the Police had conducted a preliminary enquiry and after reaching to a *prima-facie* conclusion that, a cognizable offense is made out have registered the F.I.R. impugned herein. This course of action is perfectly legal and there is no 'second' F.I.R. as alleged by the Petitioner. In this regard, we have no hesitation in holding the act of the Respondent No. 1 in registering the present F.I.R. to be maintainable and there is no any irregularity or illegality in the same.

8.2) In order to determine *prima-facie* commission of an offense, it is necessary to first establish as to whether ingredients of the offense are satisfied. Relevant extracts of the subject e-mails are reproduced herein for clarity and convenience:

- E-mail dated 7th February 2009

"There are very few people who matter in Mumbai, who are uninformed and unaware of the Khajotia story...Everyone knows of the role of the Khajotias in the "financial nightmares" the Bachhans had, the numerous families who were duped with false promises; the scamming of banks and insurance companies.

They also know that I stopped a 100 crore loan from the State Bank of India that the Khajotia's had applied for and for which heavy bribes were allegedly paid...I have files of material on the Khajotia story. I have letters from you and your husband begging for relief and pleading for me to call off the heat...The two of you even offered in writing to pay me a huge sum of money!!! Really!!! Let me tell you, in B W, that there is nothing you can ever hope to do in order to establish credibility in India. You and your family ran away from the U.K. to get away from proceedings from the Crown Court and Sarosh Zaiwala a leading U.K. Solicitor...This is a matter of record...

...I understand that the Khajotias are valued patients of Nina Madnani and that she has been seriously trying to remove those "black spots and blemishes" ...But can she ever do that? Does she realise that you wake up every day with a plea... (like Lady Macbeth) "Out, out damned spot..." The black spots and blemishes of guilt on a conscience cannot be treated by a dermatologist!...

...So Bonnie, you are back where you have always been at the big ZERO. I truly feel you should see a shrink and get an analyst. I have said that several times before as well. When you have a name that is spun off as Kyaajootyaar little you say and do carries any weight. I would love to make my files on you part of my response to any Competent Authority. It would kaputs for your family in India thereafter...

By the way, how many people in Bakhtawar care about you. Frankly none! You are public nuisance to your neighbors at Connaught Mansions at Bakhtawar and at Nandgaon...Do you have a single loyal friend who can survive your spineless

character?

It is your choice – the way forward from here... I am prepared to confront you (and your past) anything.

As far as your colleagues are concerned- I am formally cc'ing this e-mail to them so that they can after reading it AND repeat checking out my comments independently...

- E-mail dated 9th February 2009

“Let me start by explaining just why you are called Bonnie...

...Of the exploits that marked your track record and which merited comparison with the infamous duo – Bonnie & Clyde and hence the decision to refer to you as Bonnie...

...I am amazed at your stupidity, lack of focus and foggy (isn't that a word you like?) mind...

I challenge your colleagues to ascertain your background independently and see what they come up with... Perhaps they will discover more than I have chosen to reveal thus far... And yet, on the other hand, they may discover that you are a blessed angel... Come out of the shadows Bonnie and be open with your intentions because you stand no chance at all and the fig leaf of anonymity will be plucked and get you nowhere...”

- E-mail dated 22nd March 2009

“...Shall we say match on? Let the Games begin – I say – I am going to win this one and how!!! It will not be a limited over match – I like to take trouble dressing a corpse – a perfect undertaker they call me.”

8.3) The thrust of Mr. Mor's arguments is on commission of the offense punishable under Section 509 of the I.P.C. and Section 67 of the I.T.

Act. Contrary to this, Mr. Jagtiani attempts to persuade us that. Section 509 contemplates ‘utterance’ of a spoken word or words or making a gesture leading to outrage the modesty of a woman. In that sense he says that, meaning of the term ‘utterance’ always indicates ‘verbal utterance’ and not a ‘written word’, meaning thereby an e-mail is not contemplated in the word ‘utterance’. For better exposition, the section is reproduced below:

“...509. Word, gesture or act intended to insult the modesty of a woman.— Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both...”

8.4) The essential ingredients of Section 509 of the I.P.C. are as under:

- i. Intention to insult the modesty of a woman;
- ii. The insult must be caused by:
 - a. uttering any words, or making any sound
 - b. or gesture,
 - c. or exhibiting any object

intending that such word or sound shall be heard or that the gesture or object shall be seen by such woman, or

iii. intruding upon the privacy of such a woman.

8.5) Section 509 of the I.P.C. delineates three pivotal components for establishing an offense, *Firstly*, the presence of an intention to insult the modesty of a woman; *Secondly*, the manner in which this insult is perpetrated and *Thirdly* and independently, an intrusion on her privacy. The manner of such intrusion is not restricted by an 'utterance' or 'gesture'. To constitute the offense, the intrusion of privacy is not qualified by any manner; be spoken or otherwise.

8.6) A narrow interpretation of the section, as Mr. Jagtiani would like us to take, would indicate that the insult itself can take place only through two distinct modes, verbally or visually by uttering specific words, making sounds, or displaying gestures or objects, with the deliberate intent that these words, sounds, gestures, or objects are heard or seen by the woman involved. He places reliance on the decision in the case of *Nelson Motis Vs. Union of India (supra)* to canvass that, if the words of a statute are clear and free from any vagueness and are therefore reasonably susceptible to only one meaning, it must be construed by giving effect to that meaning, irrespective of consequences. He states that the expression used in the statute alone declares the intent of the legislature. We have read the decision in the said case. It relates to the interpretation of Rule 10(4) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965. He also relies on the decision of the Supreme Court in *M.V.*

Joshi Vs. M.U. Shimpi (supra) to buttress his argument that a rule of strict construction requires that the language of a statute should be so construed that no case shall be held to fall within it which does not come within the reasonable interpretation of the statute. He further points to the observation of the Apex Court in the said decision that, the primary test is the language employed in the Act and when the words are clear and plain the Court is bound to accept the expressed intention of the legislature.

8.7) As enunciated in the above cases, there is absolutely no quarrel with the principle that the interpretation of a provision is related to the intent of the legislature. In fact, the mischief sought to be addressed by Section 509 of the I.P.C. is an insult or affront to the dignity of a woman which outrages her modesty. When the manner in which this mischief plays up arises for determination, it is the bounden duty of the Court to adopt a purposive approach of interpretation; i.e., which gives rational meaning to the language of the legislature. Advent of modern technology has opened-up wide spectrum of means to communicate an insult. When an e-mail containing objectionable content likely to outrage the modesty of a woman stares at her, can we permit the perpetrator to walk away undaunted, simply because the insult is written and not spoken. Interpretation must correspond to societal transformations and re-evaluate legal principles to ensure fairness, justice, and equity.

8.8) As society evolves, so must the interpretation of the law to

address emerging challenges and promote social progress. The law is a dynamic entity capable of reflecting and adapting to a society's changing needs and values. As Lord Denning cautioned in the case of *Seaford Court Estate*²² that, 'the English language is not an instrument of mathematical precision'. It must be understood to support legislative intent. The intention of the legislature is to deter action of the offender as could be perceived as one which can shock the sense of decency of a woman. The manner in which the offender does this is not restricted to oral abuse or gesture alone. The word 'utterances' include statements, speeches, exclamations, notes and all of it can well be in a text form relayed physically or by electronic medium.

8.9) In the case of *R Vs. Ireland*²³ it is held that, the rule of strict construction does not also prevent the Court in interpreting a statute according to its current meaning and applying the language to cover developments in science and technology not known at the time of passing of the statute. Thus psychiatric injury caused by silent telephone calls was held to amounts to 'assault' and 'bodily harm' under Sections 20 & 47 of the Offense Against Persons Act, 1861.

8.10) Closer home, the State of Chhattisgarh by an amendment to Section 509 of the I.P.C. has introduced a new category of offense of outraging the modesty of a woman. Section 509-B of the I.P.C. is inserted to

22. (1949)2 All ER 155.

23. (1997)4 All ER 225.

include harassment of a woman by ‘means of telecommunication device or other electronic mode including internet’ also made punishable. Although there is no such amendment made in the State of Maharashtra, penal statutes are known to be interpreted having regard to the subject matter of the offense and the object of law it seeks to achieve. The purpose of law is not to allow the offender to sneak out of the meshes of law. Criminal jurisprudence does not say so.

8.11) According to us the word ‘utterance’ must not be given a pedantic interpretation. If such narrow interpretation is accepted, many a men will walk away, unhindered by consequences merely by shooting e-mails or using social media platforms to malign and insult a woman and outrage her modesty. Modern technology makes such manner of perpetrating the offense verily real. Similarly, to ‘exhibit’ an object is not restricted to actually and physically exhibiting it by the accused himself, but the exhibition can be by way of an agency of a device such as a personal computer, mobile phone or any other electronic device.

8.12) In a decision of this Court in the case of *Emperor Vs. Tarak Das Gupta (supra)*, both the learned Judges separately opined that, a letter sent by post is included in the act of ‘exhibiting an object’ even if it be not by the accused himself but by the agency of a post office. Fawcett, J. (Madgavkar, J. concurred) held as under:

“The only point of substance that has been urged by Mr. Sopher

for the petitioner is that the case does not come under the words “exhibits any object” contained in section 509, which is the part of the section on which the conviction rests. No doubt the word “exhibit” does ordinarily express the idea of actually showing a thing to a person. On the other hand, such showing need not be immediate. It was admitted by Mr. Sopher that “exhibit” was practically equivalent to the word “expose”, and a thing can be exhibited or exposed to a person, although at first it may be wrapped in something which prevents that person from actually seeing the object contained in the wrapper.

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*...In the present case, the accused did not himself go to the complainant and show her the letter, but he employed the agency of the Post Office for the purpose of securing its receipt by her. The natural result of his posting the letter would be its receipt by the addressee and her opening the envelope and seeing its contents. In my opinion, the fact that the accused used these means for letting the complainant see the letter, instead of himself taking it and showing it to her is immaterial. The maxim *qui facit per alium per se* is one entirely applicable to the present circumstances; and the mere fact that the letter was in a closed envelope before it reached the complainant, and that the accused did not himself tear open that envelope but that this was done by the complainant, does not prevent it being a case falling within the meaning of the words “exhibits any object”.*

8.13) In the case of *M. M. Harries Vs. State of Kerala (supra)* the Learned Single Judge, while holding that a bunch of anonymous letters received by a woman containing offensive and foul words, outraging her

modesty falls within the scope and ambit of the offense under Section 509 of the I.P.C., observed as follows:

“8. ...But, what does the expression ‘gesture’ actually mean? Lord Denning, an English Judge cautioned in *Seaford Court Estates’s* case (vide 1949 2 A11. E.R. 155) that ‘the English language is not an instrument of mathematical precision’. To an Indian Judge, English is even more intrinsic being a foreign language. So, to understand the real meaning of an English word, I shall safely depend upon the dictionary first.

9. A reference to the dictionary is inevitable in this case because the word ‘gesture’ not defined under the Indian Penal Code. The meaning of the word ‘gesture’ as per *Concise Oxford Dictionary*, eighth edition is, “a significant movement of a limb or the body; the use of such movements esp. to convey feeling or as a rhetorical device; an act to evoke a response or convey intention”. As per *Collins Cobuild ‘English Dictionary for advanced learners’* third edition, ‘gesture’ is “something that you say or do in order to express your attitude or intentions, often something that you know will not have much effect”. As per *Law Lexicon*, the word ‘gesture’ means “a posture or movement of the body; an action expressive of the sentiment or passion of intended to show inclination or disposition”.

10. It is thus clear from the above discussion that the word ‘gesture’ refers not merely to body signs. Though the word ‘gesture’ is ordinarily used to mean movement of the limbs or body to convey a person’s feelings, it can also connote an act done by a person to convey his intentions. According to dictionary meaning, an act done by a person to express his

attitude or intentions also is a 'gesture'. A person can express his attitude or convey his intentions in a number of ways. For example, by speaking, giving, looking, writing etc., etc. In that sense of the word, a person can make a gesture by doing an act without involving any body signs.

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13. *But the question is whether the interpretation of the expression 'making gesture' referred to in Section 509 I.P.C., going by the mere dictionary-meaning will in any way be in conflict with the intention of the legislature or whether it will be in consonance with the same. While answering this question, I shall bear in mind, the cardinal principles which are to be followed in interpreting a word or expression in a statute. As observed in Chief Justice of A.P v. L.V.A. Dixitulu MANU/SC/0416/1978: (1979) 2 S.C.C. 34 "the primary principle of interpretation is that a constitutional or statutory provision should be construed 'according to the intent of they that made it'(Coke). Normally, such intent is gathered from the language of the provision".*

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18. *Later, legislature found that a woman must be protected not only from physical aggressions made in the course of outraging her modesty, but she should also be shielded from various other acts which do not involve even a touch. Legislature was quite aware that a woman's modesty can be insulted or outraged in various ways. A mere word, a wink, a touch or even a look would suffice to insult the modesty of a Woman. Physical advances may not be necessary in all cases. Everything depends on the intention of the mischief-maker and the manner in which*

he conveys his intentions. It is evident that legislature intended that any aggression into a woman's modesty whether by any word, deed, touch or look need be curbed and deterred.

19. *That is why even a verbal attack on a woman, a gesture and other acts stated in Section 509 I.P.C. were brought under the said Section. It is clear from a reading of Section 509 I.P.C. that by introducing the said provision, legislature intended that any sort of aggression into a woman's modesty whether by any word, deed or act should be deterred, as evident from the title to the Section itself. Thus, the acts which are done intending to insult the modesty of a woman which may not necessarily involve even any physical advances are also brought within the sweep of a separate provision viz., Section 509 I.P.C.*

20. *In such circumstances, can it be for a moment presumed that the legislature intended that a person who writes a letter to a woman with the intention to insult her modesty should go unpunished? If such a person, instead of uttering the insulting words, puts in writing all what he determines to utter against a woman and sends it to her, intending to insult her modesty, will any Court be justified in holding that the legislature expected such person to escape safely? was it the intention of the legislature that such a culprit must go unhurt only because he used his pen and not his tongue, to insult the victim? After suffering all the trauma, when a woman comes before Court with the best proof for the assault or violence made on her modesty by producing the letter, can the Court refuse to look into the same on the ground that the legislature never intended to bring cases involving writings within the purview of Section 509 I.P.C.?*

21. *I find it extremely difficult to reach a conclusion which will defeat the very object of Section 509 I.P.C. There can be little doubt that the legislature would not have intended that a person who insults the modesty of a woman by his writings must be kept out of the province of Section 509 I.P.C. In a country like India, legislature would not have ever intended that a person who expresses his attitude or intention to insult modesty of a woman by sending a letter should be absolved from criminal liability. I am of view that the very object of the provision will be defeated if a contrary view is taken. Thus, while interpreting the meaning of the relevant expression in Section 509 I.P.C. in the light of the relevant rules of interpretation, I find that ‘writing of letter’ to a woman, intending to insult her modesty can be construed as ‘making a gesture’ under Section 509 I.P.C. I feel quite confident to hold that Indian legislature’s intention will not be contrary to what I have already concluded.”*

8.14) This decision in the case of *M. M. Haries Vs. State of Kerala (supra)* was tested before the Apex Court²⁴. The Apex Court upheld the decision only expunging the words ‘an offense’ under Section 509 of the I.P.C. will clearly be attracted’ appearing in paragraph no. 22 of the decision, at the behest of the counsel appearing in the matter. Thus, the ratio of the decision is upheld by the Supreme Court thereby ratifying the overarching interpretation of the words ‘utterance’ and ‘gesture’ to remove the mischief in interpretation of the section.

8.15) Having ratiocinated that, words and gestures communicated

24. Special Leave to Appeal (Cri.) No. 4503 of 2005 decided on 1st October 2007.

through e-mails also fall within the ambit of Section 509 of the I.P.C., the next point for determination is whether the words in the e-mail were intended to outrage the modesty of the Respondent No. 2. The e-mails speak for themselves. A plain reading of the contents of all three e-mails clearly reveals a tirade by the Petitioner against the Respondent No. 2, her late husband and her family. The Respondent No. 2-Ms. Zinnia is referred to as 'Dear Bonnie'. 'Bonnie' is neither an endearment nor an alias of the Respondent No. 2 but is a reference to the character in a famous movie titled 'Bonnie & Clyde'. The movie is on the life of two criminals named Bonnie & Clyde, known for a series of bank robberies, murders, and kidnappings that took place between 1932 and 1934, the height of the Great Depression. The intention of the Petitioner in referring to the Respondent No. 2 in the e-mails as 'Bonnie' itself reveals his intent to insult her. He proceeds to berate her in the e-mails by narrating aspects in her life insinuating that, many respectable and distinguished members in society have outcast the Respondent No. 2 and her family and that she has been exposed in their eyes. Names of various famous personalities are dropped alleging that she and her late husband lost credibility in their opinion. The Respondent No. 2 and her family are degraded and made out to be crooks and beggars in the e-mails. The contents of the e-mails, over and above the alleged offending words that are part of the F.I.R. are undeniably defamatory and aimed to lower the image and reputation of the

Respondent No. 2 in the eyes of society and particularly to the persons, to whom its copies are forwarded. We say this, as the e-mails were cc'ed to other members of the housing society in which the parties reside. The act of copying third persons in the e-mails emphasizes the intent of the petitioner in hurting, abusing, and insulting the Respondent No. 2 to an extent that is undoubtedly likely to outrage her modesty.

8.16) The cornerstone of Section 509 of the I.P.C. is the requirement of intent, where the accused must possess a deliberate intention to affront or insult the modesty of a woman. This intent sets apart ordinary speech or actions from those that amount to an offense under Section 509 of the I.P.C. The Apex Court in the case of *State of Punjab Vs. Major Singh (supra)* has made observations regarding outraging the modesty of a woman, and the relevant observations read as under:

“3. I would first observe that the offense does not, in my opinion, depend on the reaction of the woman subjected to the assault or use of criminal force. The words used in the section are that the act has to be done “intending to outrage or knowing it to be likely that he will thereby outrage her modesty”. This intention or knowledge is the ingredient of the offense and not the woman's feelings. It would follow that if the intention or knowledge was not proved, proof of the fact that the woman felt that her modesty had been outraged would not satisfy the necessary ingredient of the offense. Likewise, if the intention or knowledge was proved, the fact that the woman did not feel that

her modesty had been outraged would be irrelevant, for the necessary ingredient would then have been proved. The sense of modesty in all women is of course not the same; it varies from woman to woman. In many cases, the woman's sense of modesty would not be known to others. If the test of the offense was the reaction of the woman, then it would have to be proved that the offender knew the standard of the modesty of the woman concerned, as otherwise, it could not be proved that he had intended to outrage "her" modesty or knew it to be likely that his act would have that effect. This would be impossible to prove in the large majority of cases. Hence, in my opinion, the reaction of the woman would be irrelevant.

4. *Intention and knowledge are of course states of mind. They are nonetheless facts which can be proved. They cannot be proved by direct evidence. They have to be inferred from the circumstances of each case. Such an inference, one way or the other, can only be made if a reasonable man would, on the facts of the case, make it. The question in each case must, in my opinion, be: will a reasonable man think that the act was done with the intention of outraging the modesty of the woman or with the knowledge that it was likely to do so? The test of the outrage of modesty must, therefore, be whether a reasonable man will think that the act of the offender was intended to or was known to be likely to outrage the modesty of the woman. In considering the question, he must imagine the woman to be a reasonable woman and keep in view all circumstances concerning her, such as, her station and way of life and the known notions of modesty of such a woman. The expression "outrage her modesty" must be read with the words "intending*

to or knowing it to be likely that he will". So read, it would appear that though the modesty to be considered is of the woman concerned, the word "her" was not used to indicate her reaction. Read all together, the words indicate an act done with the intention or knowledge that it was likely to outrage the woman's modesty, the emphasis being on the intention and knowledge."

8.17) The above stated judgment of the Apex Court underscores that, the offense of outraging a woman's modesty hinges primarily on the intention or knowledge of the accused rather than the woman's actual reaction. It clarifies that the legal requirement is that the act must be done "intending to outrage or knowing it to be likely that he will thereby outrage her modesty." This places the emphasis on the accused's intent or awareness and the woman's emotional response is not the determining factor. The judgment acknowledges the variability in women's senses of modesty and the impracticality of proving the accused's knowledge of an individual woman's standard of modesty. Instead, it suggests that a reasonable person, considering the circumstances and the woman's characteristics, should assess whether the accused intended to or knew that the act was likely to outrage the woman's modesty.

8.18) The Apex Court in the case of *Ramkripal Vs. State of M. P.* (*supra*) has discussed the essence of woman's modesty. The relevant portion of the judgment has been reproduced as under:

“12. What constitutes an outrage to female modesty is nowhere defined in I.P.C. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty in this Section is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex...”

8.19) The contents of the e-mails that ‘even if she sat nude on the Nandgaon Beach, no-one would pay attention to her opinion and view’ and the words ‘fig leaf’ and ‘full monty’ etc. in reference to the Respondent No. 2 and copied to e-mails of other residents of the society is sufficient/likely to conjure up images of the Respondent in the mind of third persons. Similarly, the other defamatory content is also sufficient to make other recipients of the e-mails begin to doubt the credibility of the Respondent No. 2 and her family. The word ‘squatting in the nude’ in full public view has a particular meaning assigned to it. The Petitioner is not merely being rude or unchivalrous, as Mr. Jagtiani would have us believe. But the words are directly related to the gender of the Respondent No. 2. Although the Petitioner qualified the words by intertwining them with ‘her views and opinions’ i. e. directing attention to the competency of the mind and not the body, the underlining meaning and intent is clearly linked to her gender. This is enough to outrage her modesty. It cannot be believed and accepted that, the Petitioner lacked knowledge of the effect of his writings on the

Respondent No. 2. According to us it was intentional, to impute to her modesty. The vein and strain of the writings emphasize the intent of the Petitioner in putting words on electronic medium and transmitting the same to the Respondent No. 2 herself and others in the society to insult the Respondent No. 2. The essence of Section 509 of the I.P.C. that, emphasizes intent to be the linchpin of the offense and necessitates a deliberate affront to a woman's modesty for the Section to be invoked *prima-facie* appears to be satisfied.

8.20) Alternatively, insult can manifest as an intrusion upon the woman's privacy, meaning thereby encroaching upon her personal space or violating her sense of privacy intentionally, in a manner that affronts her modesty. The second part of section 509 'intrudes on her privacy' is stand alone and unrelated to 'essence of her modesty' the outrage of which is related to sex. The content of the e-mails share information and details about the Respondent No. 2 and her family, which the Petitioner claims to know. Sharing such details of the Respondent No. 2 with third persons, especially the residents of the same Society who she is likely to see frequently and without her consent is an affront to her personal dignity. She has a right to be left alone and live her life in a dignified manner. In the event that the Petitioner had any disagreement with her, it was for him to take it up with her directly by verbal communication or written or through electronic medium but the act of copying others on e-mails with no

purpose evident but to degrade her, clearly demonstrates his intent. The Supreme Court in its decision in the case of *Puttaswamy Vs. Union of India* (*supra*) has discussed various facets of privacy of an individual as under:

“42. Privacy is a concomitant of the right of the individual to exercise control over his or her personality. It finds an origin in the notion that there are certain rights which are natural to or inherent in a human being. Natural rights are inalienable because they are inseparable from the human personality. The human element in life is impossible to conceive without the existence of natural rights.

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119. To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures the fulfillment of dignity and is a core value which the protection of life and liberty is intended to achieve.

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127. ...The right to privacy is an element of human dignity. The sanctity of privacy lies in its functional relationship with dignity. Privacy ensures that a human being can lead a life of

dignity by securing the inner recesses of the human personality from unwanted intrusion. Privacy recognises the autonomy of the individual and the right of every person to make essential choices which affect the course of life. In doing so privacy recognises that living a life of dignity is essential for a human being to fulfill the liberties and freedoms which are the cornerstone of the Constitution.

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250. ...The nine primary types of privacy are, according to the above depiction:

(i) *bodily privacy which reflects the privacy of the physical body. Implicit in this is the negative freedom of being able to prevent others from violating one's body or from restraining the freedom of bodily movement;*

(ii) *spatial privacy which is reflected in the privacy of a private space through which access of others can be restricted to the space; intimate relations and family life are an apt illustration of spatial privacy;*

(iii) *communicational privacy which is reflected in enabling an individual to restrict access to communications or control the use of information which is communicated to third parties;...”*

8.21) Thus, from the plain reading of the F.I.R. and the subject e-mails, we are of the considered opinion that the e-mails *prima-facie* intrude upon the privacy of the Respondent No. 2 apart from being prone to outrage her modesty.

8.22) On the invocation of Section 67 of the I.T. Act, Mr. Jagtiani contends that, alleged act of the Petitioner does not fulfill the necessary

ingredients of the words 'lascivious' and 'prurient'. The section reads as under:

“67. Punishment for publishing or transmitting obscene material in electronic form.— Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees.”

8.23) Mr. Mor relied upon the definition of the words 'Lascivious' and 'Prurient' as appearing in the Oxford Dictionary. 'Lascivious' means lustful, wanton, inciting to lust. 'Prurient' means marked by or arousing an immoderate or unwholesome interest or desire. The e-mails are electronic transmissions. According to Mr. Jagtiani, the e-mails merely signify the outburst of the Petitioner which is not sufficient to fall within the mischief of the offense. Mr. Jagtiani draws our attention to the observation of the Apex Court in the case of *Apoorva Arora Vs. State (supra)*. The challenge in the case was against a refusal to quash a F.I.R. alleging that, a season of an episode in the web series titled 'Happily F***** Up' had vulgar and

obscene language in the titles and various portions in the episode constituted offenses under Sections 292, 294 & 509 of the I.P.C. and Sections 67 & 67A of the I.T. Act. While reversing the order, the Supreme Court held as under:

“45. The last issue is that of the standard or perspective used by the High Court to determine obscenity. It is well settled that the standard for determination cannot be an adolescent’s or a child’s mind, or a hypersensitive person who is susceptible to such influences. However, the High Court has incorrectly used the standard of ‘impressionable minds’ to gauge the effect of the material and has therefore erred in applying the test for obscenity correctly.”

8.24) The observations of the Apex Court were in context of a work of art, while determining whether a piece of art or content of a movie or serial is obscene. In this context the Apex Court observed that, profanity and vulgarity do not *per-se* amount to obscenity and while a person may find vulgar and expletive filled language to be distasteful, unpalatable, uncivil, and improper that by itself is not sufficient to be “obscene”.

8.25) Juxtaposed with the case in hand, the words in the e-mail are with reference to the Respondent No. 2 streaking across Mumbai and squatting nude on the Nandgaon Beach and also her being exposed on removal of the proverbial ‘fig-leaf’. The phrase “fig leaf” has been used for years and it comes from the Bible. When Adam and Eve were placed in the Garden of Eden, they were naked. Once they ate from the Tree of

Knowledge, they realized they were naked. They took fig leaves to hide their private parts because they were embarrassed to be seen naked. This is how the term “fig leaf” began to be used metaphorically to mean any object or act of embarrassment that needed to be covered up so no one would see. The words portraying the Respondent No. 2 sitting nude on the Nandgaon Beach to residents of the society is likely to appeal to the prurient interest of some. The effect of the words may also tend to deprave and corrupt persons reading the e-mail about the Respondent No. 2. Some may conjure up images of the Respondent No. 2. This seems to be the only and very intent of the Petitioner which he knows would degrade her and offend her dignity. Profanity and vulgarity in a TV serial or movie does not *per-se* mean obscenity in so far as a work of art is concerned, as observed by the Apex Court in the said case. This work is attributed to the freedom of creativity of the creator or the artist. As against this, the transmitted e-mails to the Respondent No. 2, copied to third persons are a personal attack on her dignity, poise and self-esteem. They are intended and likely to appeal to prurient interests or tend to deprave and corrupt persons reading them.

8.26) Lastly, Mr. Jagtiani relied on the decision of the Supreme Court in the case of *Khushboo Vs. Kanniammal (supra)*, where F.I.R.s were lodged against a well-known actress. She expressed her personal opinion to a magazine conducting a survey on the subject of sexual habits of people

residing in bigger cities in India to the effect that increasing incidence of premarital sex, especially in the context of live-in relationships, called for societal acceptance of the same. The Supreme Court observed that, offense under Section 509 of the I.P.C. cannot be made out when the Complainants' grievance is with publication of what Khushboo had stated in written form. Mr. Jagtiani laid emphasis on this observation that, the Petitioner cannot be held liable for 'publication' of the e-mails. This argument is totally misconceived. The case was primarily relating to the opinion expressed by Khushboo being protected by Article 19(1)(a) of the Constitution of India. The transmission by the Petitioner of the offensive e-mails to her and other residents in the society demonstrates clear intent of the Petitioner to insult the Respondent No. 2. As we have already discussed hereinabove that, no matter that the offensive material was transmitted through electronic media, it would still be ensconced in the interpretation of the words 'utter' and 'gesture' and 'exhibit'. Alternatively, it intrudes on the Respondent No. 2's privacy.

9) Mr. Mor restricted his arguments to justify invocation of Section 509 of the I.P.C. and Section 67 of the I.T. Act. He was prudent to do so. There is no allegation in the F.I.R. pertaining to 'assault' or 'criminal force' by the Petitioner against Ms. Zinnia. The intention to outrage her modesty is facilitated by way of transmission by e-mail through electronic device. Similarly there is no threat to cause death or grievous hurt

extended by the Petitioner. No doubt by the words “I like to take trouble dressing a corpse – a perfect undertaker they called me.”, the Petitioner has tried to convey his ability to perform the job of an undertaker i.e. a person whose business is preparing dead-bodies for burial/cremation, the sentence itself does not constitute a threat to cause death or grievous hurt.

9.1) Thus, we are of the view that a plain reading of the F.I.R. and the e-mails mentioned therein *prima-facie* discloses commission of the alleged offenses under Section 509 of the I.P.C. & Section 67 of the I.T. Act only and not under Sections 354 & 506(2) of the I.P.C.

10) Considering the facts in the present matter and the settled legal position as discussed above, we are not inclined to quash the F.I.R. insofar as the offenses punishable under Section 509 of the I.P.C. and Section 67 of the I.T. Act are concerned. However the offenses punishable under Sections 354 & 506(2) of the I.P.C. invoked in the F.I.R. are not made out and accordingly stand deleted from the F.I.R.

10.1) We therefore hasten to add that, our observations herein are only on the correctness of the offenses invoked pertaining to their purposive and pervasive interpretation and *prima-facie* finding to that effect.

11) The Petition is accordingly partly allowed.

11.1) Rule is partly made absolute.

12) We are informed that, the Respondent No. 2 is now about 80 years of age. In these circumstances, we request the trial Court to expedite the trial in the present case and preferably conclude the same in one year.

13) In view of disposal of the Petition, Interim Application No. 2355 of 2023 does not survive and is accordingly disposed off.

(DR. NEELA GOKHALE, J.)

(A. S. GADKARI, J.)