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Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

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FREEDOM OF SPEECH AND PUBLIC FUNCTIONARIES: A SOCIO-LEGAL CRITIQUE OF KAUSHAL KISHORE V. STATE OF UTTAR PRADESH (2023)

AUTHORED BY - LOKESH MITTAL & SANIGHDHA

“Without freedom of thought, there can be no such thing as wisdom; and no such thing as public liberty, without freedom of speech.”

-Benjamin Franklin

Introduction

Thiruvalluvar, Poet-philosopher of the Tamil Sangam Era (31 BCE) in his magnum opus had written (as translated by G.U. Pope, English Poet)

*“In flesh by fire inflamed, nature may thoroughly heal the sore;
In soul by tongue inflamed, the ulcer healeth never more.”¹*

It is said that freedom of speech is the most basic right out of all the rights, that are accorded to humans. This is the reason why the Universal Declaration of Human Rights (UDHR 1948) and the Constitution of India via Article 19(1)(a) accords thorough importance to the aforementioned right and gives a special status to the same, while also listing down certain restrictions. It must be noted that the right to freedom of speech and expression is ostensibly the quintessential and indispensable right that is inherent in the human nature. Even if we talk about the other species, that roam on Earth, one will realise and notice that even though they cannot speak like humans, they can and they do express their feelings in their own ways. This makes it so pertinent and obvious to note that one cannot possibly take away the right to freedom of speech and expression in any way, from any person or individual. Coming to the Indian context, one must realise that freedom to speech and expression is a fundamental right accorded to all the citizens (not persons) who have Indian citizenship. It has a lot of facets including right to remain silent, right to seek answer copies via Right to Information Act, the right to know about the antecedents of the politicians and most importantly, the right against hate speech; and many more. It must be noted that the reasonable restrictions that are accorded upon the right to freedom of speech and expression are given under Article 19(2) and the same must be kept in mind while exercising this

¹ Kaushal Kishore v State of Uttar Pradesh W.P. (Criminal 116/2016).

particular right. Speaking something in private spaces is a totally different avenue, than speaking something in the public sphere. Therefore, the individuals who hold the public office are endowed with double the responsibility to speak in a manner that is not disrespectful, shameful, enraging, or negative for any other person, with whom that person is engaging with. The present manuscript strives to delve into the intricacies of this particular right to freedom, while keeping the analysis confined to the decision that was opinionated by the Honourable Supreme Court of India, in the case² of Kaushal Kishore v State of Uttar Pradesh. It must be noted that right to life and personal liberty, the right to dignity and the right to freedom of speech and expression vide Articles 14, 19 and 21 were discussed in this particular case. The research manuscript via case comment contains brief facts of the case, arguments advanced by both side, judgment of the Honourable Supreme Court and the critical analysis of the judgment. In light of the analysis, it would be pertinent to mention a Sanskrit text, garlanding the importance of free but pure and righteous speech by humans-

*“Satyam brūyāt priya brūyān na brūyāt satyam apriyam m |
priya ca nān ta brūyād e a dharma sanātana m r m ś h h ||”³*

The meaning of the verse is that truth must be spoken. Pleasant words must be spoken. Unpleasant words, even if true, should not be spoken, and if spoken, then only in the most pleasant way. This is the eternal law.

Brief Facts

The present case was heard by a Constitutional Bench comprising of five judges of the Apex Court namely- Justice (Retd.) S. Abdul Nazeer, Justice B.R. Gavai, Justice (Retd.) A.S. Bopanna, Justice (Retd.) V Ramasubramanian and Justice B.V. Nagarathana. The decision was given via a 4:1 majority authored by Justice (Retd.) V. Ramasubramanian, with three judges concurring and another opinion authored by Justice B.V. Nagarathana, which was a concurring, but a partly dissenting opinion. The petitioner Kaushal Kishore’s arguments were ably put forward by Lt. learned advocate Fali S. Nariman (amicus curiae), Harish Salve (amicus curiae), Rajeev Dhawan; whereas the arguments of the respondent (State of Uttar Pradesh, Azam Khan, Director General of Police, Uttar Pradesh, Senior Superintendent of Police Lucknow and Senior Superintendent of Police Central Bureau of Investigation CBI) were ably put forward by Senior Advocates Kapil Sibal and former Attorney General of India K.K. Venugopal. Before delving into the crux of the arguments, a brief of the facts, as taken from the detailed judgment by the able Justices is

² Kaushal Kishore v State of Uttar Pradesh W.P. (Criminal 116/2016).

³ *Ibid.*

reproduced below:

- On 29th July 2016, a young girl and her mother were allegedly gang-raped on National Highway 91. When they were on the National Highway passing through Bulandshahr, their car was stopped by criminals who dragged the 13-year-old girl and her mother out and raped them in a field nearby. When the victim of the gangrape filed an FIR, Uttar Pradesh Minister and Samajwadi Party leader Azam Khan made a statement terming it a ‘political conspiracy against the Uttar Pradesh Government.
- In August 2016, the victims approached the Supreme Court and filed a writ petition, seeking action against the minister for making such remarks about the incident. Fearing the absence of a fair investigation in Uttar Pradesh, they requested the Court to transfer the case to another State. The Court engaged Mr. Fali S Nariman to assist the Court as Amicus Curiae and ordered a stay on the investigation. Mr. Nariman pointed out that the Court is constitutionally obliged to evolve new tools to enhance the cause of justice by instilling public confidence in the fairness of trial, clarifying principles of law on interference with police investigation, and clarifying what is to be done if comments are made on the investigation or on the victim by a public personality or a public servant.
- On 17th November 2016, the Court ordered an unconditional apology to be submitted by Mr. Azam Khan. The Court identified the core issue as – whether the right to freedom of speech and expression under Article 19(1)(a) is restricted by only Article 19(2), or is it also restricted by other fundamental rights, specifically Article 21.
- On 20th April 2017, the Court referred the matter to a five-judge constitution bench and requested the Amicus Curiae to formulate questions of law for the Bench to consider. The questions were framed and submitted to the Court on 31st July 2017. On 23 October 2019, a Constitution Bench comprising Justices Arun Mishra, Indira Banerjee, Vineet Saran, M.R. Shah, and S. Ravindra Bhat began hearing the matter.⁴
- However, subsequently due to impending circumstance, the present Bench took the decision and gave out a reasoned judgment.

⁴ *Azam Khan- Freedom of Speech and Expression*, SUPREME COURT OBSERVER, <https://www.scoobserver.in/cases/kaushal-kishor-uttar-pradesh-azam-khan-freedom-of-speech-and-expression-case-background/>

Issues

There are five major issues that are recognised in this present case.⁵ These are

1. Can the freedom of speech and expression be restricted on grounds outside of those mentioned under Article 19(2) of the Constitution of India?
2. Can citizens claim right to life and liberty violations under Article 21 of the Constitution against non-State actors like other private individuals?
3. Does the State have an obligation to protect citizens from violations of their Right to Life and Personal Liberty from other non-State actors?
4. Can statements made by public officials be attributed to the government if it is linked to state affairs?
5. Can governments be held responsible for the statements of public officials which result in constitutional rights violations?

Arguments Advanced

There were a number of parties involved in the present case and amicus curiae were also engaged, whereby the Attorney General of India, also presented his arguments. The crux of the arguments submitted was that on the one hand it was being urged that public functionaries should be held responsible in such cases because they have a higher level of responsibility against the public, and on the other hand it was being argued that it is not the duty of the Court to add additional grounds of reasonable restrictions, without the Legislature first approving it. Thus, the arguments advanced had a number of submissions and suggestions, and the Honourable Bench meandered through, while giving out a reasonable and justified judgment.

Judgement and Analysis

The Book of Proverbs says (16:24), *“Pleasant words are a honeycomb, sweet to the soul and healing to the bones.”* The Court in the present case held, that (4:1) the freedom of speech and expression as a fundamental right cannot be restricted, if in a case an individual violates the dignity of another individual.

The majority judgment of the Court held that in cases, where two or more fundamental rights are in conflict, the Court must either strike a balance or prioritise one over the other. The Court considered that the grounds for restricting the freedom of speech and expression were listed under

⁵ Kaushal Kishore v State of Uttar Pradesh W.P. (Criminal 116/2016).

Article 19(2) of the Constitution. They held that this was an exhaustive list and that no new grounds could be added to the list to impose further restrictions. Therefore, they held that the right to freedom of speech of a public functionary could not be curtailed in order to protect the right to dignity of an individual.⁶ The Court differentiated between the horizontal and vertical explanation of fundamental rights. It was also put forward that the fundamental rights and their interpretations have evolved beyond the narrower scope that once held their guard. Thus, the application of fundamental rights has also changed. But this does not mean that a person can be held liable for the opinions that the person holds, even if they do not conform to the values of the Constitution. Thus, the majority of the Bench sought for balancing two fundamental rights and upholding the constitutional values, in letter and spirit in the truest sense, while also keeping in mind the principles of checks and balances and separation of powers⁷.

In the words of the Honourable majority judgment- *“Take for instance a case where a Minister makes a statement that women are unfit to be employed in a particular avocation. It may reflect his insensitivity to gender equality and also may expose his low constitutional morality. The fact that due to his insensitivity or lack of understanding or low constitutional morality, he speaks a language that has the potential to demean the constitutional rights of women, cannot be a ground for action in Constitutional tort. Needless to say, that no one can either be taxed or penalized for holding an opinion which is not in conformity with the constitutional values. It is only when his opinion gets translated into action and such action results in injury or harm or loss that an action in tort will lie.”*⁸ However, in the opinion of Justice B.V. Nagarathna, in a partially dissenting opinion, one fundamental aspect of the rights protected by article 21 of the Constitution is dignity. Consequently, the Constitution’s article 19 (1) (a) cannot be used as justification for restricting the rights guaranteed according to article 21. She ruled that the statement in question could not be protected under article 19 (1) (a) since it was insulting, degrading, and resembled hate speech. According to her, the facts of this case dealt with an abuse of free expression that was used to assault a person’s basic rights rather than the need to balance two fundamental rights.⁹

⁶ *Kaushal Kishore v State of Uttar Pradesh W.P. (Criminal 116/2016)*, CENTRE FOR COMMUNICATION GOVERNANCE, <https://privacylibrary.ccgmlud.org/case/kaushal-kishore-vs-state-of-uttar-pradesh-ors>.

⁷ *Rudul Sah vs. State of Bihar*, (1983) 4 SCC 141; *Sebastian M. Hungary vs. Union of India*, (1984) 3 SCC 82; *Bhim Singh vs. State of J&K*, (1985) 4 SCC 677; *People’s Union for Democratic Rights vs. Police Commissioner*, (1989) 4 SCC 730; *Saheli vs. Commissioner of Police*, (1990) 1 SCC 422; *State of Maharashtra vs. Ravikant S. Patil*, (1991) 2 SCC 373; *Kumari vs. State of Tamil Nadu*, (1992) 2 SCC 223; *Shakuntala Devi vs. Delhi Electric Supply Undertaking*, (1995) 2 SCC 369; *Tamil Nadu Electricity Board vs. Sumanth*, (2000) 4 SCC 543; *Railway Board vs. Chandrima Das*, (2000) 2 SCC 465.

⁸ *Kaushal Kishore v State of Uttar Pradesh W.P. (Criminal 116/2016)*.

⁹ *The case of Kaushal Kishore v State of Uttar Pradesh*, <https://www.jyotijudiciary.com/the-case-of-kaushal-kishore-vs-state-of->

[up/#:~:text=In%20a%20partially%20dissenting%20opinion,guaranteed%20according%20to%20article%2021.](#)

Thus, the Court propounded a balanced judgment in the case, however, the question is still open for deliberation, which is that can a person, who is a State functionary and is sitting at the helm of things whereby responsibility and carefulness are the hallmarks of integrity; pass certain condemnable remarks out of exercising the right to freedom of speech and expression and still be let off the guard because the same is not a ground of reasonable restrictions in the Constitution of India? Conclusively, a thorough analysis of the present case and the question that has sprung up must be addressed by appropriate forums and amendments be sought about for further clarification.

