

HATE SPEECH, FREE SPEECH AND THE LIMITS OF ARTICLE 19(1)(A)

by

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ABSTRACT

In *Amish Devgan v. Union of India*, (2021) 1 SCC 1, the Supreme Court dealt with a television anchor's remarks calling the Sufi saint Khwaja Moinuddin Chishti a "terrorist" and a "robber", which led to FIRs in several States under Sections 153-A, 295-A and 505(2) of the Indian Penal Code, 1860. The Court declined to quash the FIRs, issued directions on the multiple FIRs, and protected the petitioner from arrest. More importantly, it made the first sustained attempt in Indian law to define hate speech. It linked the concept to dignity, fraternity and the unity and integrity of the Nation, and it proposed a test of content, intent and harm, read in context. This comment examines the facts, the contentions and the Court's reasoning. It argues that the framework is a welcome clarification, because it insists on mens rea and a real likelihood of harm. It also argues that the refusal to quash, the "reasonable person" standard and the treatment of influential speakers leave room for subjective application at the FIR stage. The comment concludes that the framework's value will depend on how carefully lower courts apply it, and on whether Parliament eventually legislates on hate speech.

Keywords: hate speech, freedom of speech and expression, Article 19(1)(a), Article 19(2), Sections 153-A, 295-A and 505(2) IPC, dignity, public order

CASE DETAILS

Case Name: *Amish Devgan v. Union of India and Others*¹

Citation: (2021) 1 SCC 1

Court: Supreme Court of India

¹ *Amish Devgan v. Union of India*, (2021) 1 SCC 1 (India).

Bench: A.M. Khanwilkar and Sanjiv Khanna, JJ.

Date of Decision: 7 December 2020

INTRODUCTION

Free speech is essential for a democracy, but speech that is aimed at people based on their community identity can destroy the very democracy it arises from. In the case of *Amish Devgan v. Union of India*, the Supreme Court considers the issue of hate speech. A television presenter had referred to the famous Sufi saint Khwaja Moinuddin Chishti as a “terrorist” and a “thief” on his show, and several States lodged complaints under Sections 153-A, 295-A and 505(2) of the Indian Penal Code, 1860².

This is the first detailed attempt by the Court to define the term hate speech. It relates the definition of hate speech to the concepts of dignity, fraternity, and unity and integrity of the Nation and lays down a test of content, intent, and impact in context. It is submitted that the framework is a positive clarification on the issue. However, it should also be pointed out that the Court’s refusal to quash the FIRs and its application of the reasonable person standard leaves room for subjective implementation at the FIR stage.

FACTS

The individual who filed the complaint, Amish Devgan, works as a journalist and news presenter for the network called News18. The incident took place on 15 June, 2020, when the complainant was leading a discussion in his show “Aar Paar” on the law titled Places of Worship (Special Provisions) Act, 1991. The reason for holding the discussion was due to a petition that was filed in the Supreme Court of India concerning the law.

During the session, the individual referred to Hazrat Khwaja Moinuddin Chishti, also known as Gareeb Nawaz, as “aakrantak Chishti”, meaning terrorist Chishti and “lootera Chishti”, meaning robber Chishti. The group of complainants asserted that he repeated the above-mentioned statements and insinuated that the saint coerced people into conversion to Islam. A number of complaints were filed and FIRs registered in the states of Rajasthan, Telangana, Maharashtra, Madhya Pradesh and Uttar Pradesh. These FIRs claimed violations of the

² Indian Penal Code, No. 45 of 1860, §§ 153A, 295A, 505(2) (India).

provisions of Sections 153-A, 295-A and 505(2) of the Indian Penal Code. The FIR from Madhya Pradesh was transferred subsequently to Noida in Uttar Pradesh.

According to the petitioner, his use of the words mentioned above was an unintended error. He insisted that he was speaking about the other historical figure, Alauddin Khilji, when he made the reference. As soon as he realised the mistake, he issued an apology and a statement of clarification on Twitter and removed the video from the platforms. The informants claimed that the apology was an attempt to save face, coming almost 30 hours later, and that the edit was only aimed at destroying the evidence. They also noted that the two historical figures belong to different time periods.

The petitioner further stated that he was subject to harassment and threats to his life after the show aired. He filed a police complaint in Noida.

The petitioner then approached the apex court under Article 32 of the Constitution³ and requested three forms of relief in the court of law: quashing of the FIRs, consolidation of all FIRs in Ajmer, and protection from being arrested. The court of law granted the petitioner interim relief while his petition was under consideration.

ISSUES

1. Whether the FIRs registered against the petitioner under Sections 153-A, 295-A and 505(2) of the Indian Penal Code, 1860 should be quashed in exercise of the Court's jurisdiction under Article 32.
2. Whether the multiple FIRs arising from the same telecast should be clubbed with the first FIR registered at Ajmer, Rajasthan, or transferred.
3. Whether the petitioner should be protected from arrest and coercive action.
4. What constitutes "hate speech", and to what extent can it be restricted under Article 19(2)⁴ and penalised under the Indian Penal Code?

³ INDIA CONST. art. 32.

⁴ INDIA CONST. art. 19, cl. 2.

CONTENTIONS

A. Petitioner

The petitioner stated that the multiple FIRs against him regarding the same occurrence violated his constitutional rights and had a chilling influence on free expression. He asserted that the FIRs involved an intention to vex and intimidate him and that no part of the cause of action arose in a number of places where the FIRs had been filed. The petitioner explained that his words were spoken by mistake and that he had no intention to hurt religious feelings and that mens rea – a vital aspect of the crime- was missing. He stated that the show should be construed as one and not in segments and that his prompt apology showed his intention to act in good faith. The petitioner, in the alternative, maintained that any injury was so trifling. In support of his argument, he quoted previous judgments such as *Arnab Ranjan Goswami v. Union of India*⁵, *Kedar Nath Singh v. State of Bihar*⁶ and *Balwant Singh v. State of Punjab*⁷.

B. Respondents and informants

According to the informants, the message of the petitioner was that he had used the words in question three times. They contended that the assertion of a mistake was an ex-post-facto explanation. They drew attention to the fact that the apology was made only about 30 hours after the broadcast and not before lodging the FIRs. They alleged that he had subsequently altered the video in question and that Khilji and Chishti were from different times, and thus confusing the two was improbable. They contended that the speech was intended to hurt religious feelings and incite hatred and that Article 19(1)(a)⁸ was subject to the limitations in Article 19(2).

C. States

The States Rajasthan and Telangana backed the proceedings. They mentioned that the apology does not wipe out the crime and the matter needs investigation. They suggested that the petitioner approach the High Court in compliance with section 482 of the Code of Criminal Procedure, 1973⁹. Rajasthan wanted the FIR to be transferred to Ajmer.

⁵ *Arnab Ranjan Goswami v. Union of India*, (2020) 14 SCC 12 (India).

⁶ *Kedar Nath Singh v. State of Bihar*, AIR 1962 SC 955 (India).

⁷ *Balwant Singh v. State of Punjab*, (1995) 3 SCC 214 (India).

⁸ INDIA CONST. art. 19, cl. 1(a).

⁹ Code of Criminal Procedure, No. 2 of 1974, § 482 (India).

V. JUDGMENT AND RATIO DECIDENDI

The Court, speaking through Sanjiv Khanna J., dismissed the prayer for quashing, issued directions on the multiple FIRs, and protected the petitioner from arrest. Before reaching these reliefs, it laid down the law on hate speech.

A. The concept of hate speech

The Court found that hate speech is directed against someone due to their identity, whether in terms of their religion, caste, race, or geographical region, and therefore has no utility beyond humiliating people. Such speech, the Court explained, violates the dignity of the group targeted and the principle of equal citizenship. Dignity in this context refers to human status as an equal member of society. It does not refer to the individual's reputation covered under the parameters of defamation laws. The Court linked it to the concept of fraternity envisaged in the Preamble and the unity and integrity of the nation. It drew on the idea of the “paradox of toleration” and stated that a tolerant society expects tolerance in return.

At the same time, the Court was clear that freedom of speech remains the norm, reiterating the “marketplace of ideas” and asserting that political speech as well as criticism of the government is given the highest level of protection.

B. The test

The Court determined three criteria in connection with deciding if speech can be qualified as hate speech: content, intent and harm. Content is the message itself. Intent refers to the speaker's aim. Harm is the impact on the group affected and on public order. These criteria are interpreted keeping in mind the context that results from knowing who speaks, who the addressees are and where they are.

The court stated that their test is objective, meaning the evaluation of speech is based on the reaction generated among the ordinary person in the street, who is neither hypersensitive nor overly fearful. It pointed out that people who have the ability to influence others, such as journalists, are not deprived of their right to speak. Their influence makes them important for the harm criterion.

C. The penal provisions

The Supreme Court stated that Section 153-A incorporates mens rea, as both “promotes” and “attempts to promote” mean that the actions must involve physical incitement and not just

description of facts or views. Regarding the term “likely,” the Court defined it in the sense of a possibility as such, and not in some imaginary terms. Furthermore, the Court stated that Section 295-A includes “intent” and “wicked” intent to offend religious feelings and followed Ramji Lal Modi and Kedar Nath Singh cases in this regard. As for Section 505(2), the Court emphasised that it included intent to incite or create hostility, and applied the aspect of public order in this and other topics under Article 19(2).

The United States Supreme Court's imminent lawless action standard was rejected by the Indian court, which has determined that hate speech which meets the clear and present danger test can cause serious repercussions in the long term. Additionally, it stated that the use of penal laws alone is not adequate, as there are other means like self-regulation, institutional checks, and statutory regulation also promoting the culture of tolerance.

D. The reliefs

The Court disappointed the applicant in its initial application by rejecting the plea to cancel the FIRs on the grounds that the applicant had failed to approach the High Court initially and that using Article 32 to bypass the normal means of redress was improper. According to the Court, it is for the police to determine the facts in relation to the substance, context, intent, and injury in this case for the simple reason that there is a disagreement between the applicant and the complainants on various issues, including the efficacy of the apology.

With reference to the second prayer, the principles enumerated in T.T. Antony and Arnab Ranjan Goswami were followed, whereby the first FIR is considered as the main FIR, and the statements in the subsequent FIRs as statements under Section 162 of the Criminal Procedure Code¹⁰. The Court declined to transfer the FIRs to Ajmer but ordered that the concerned police stations send all the records to the Noida police, its direction extending to other FIRs concerning the same telecast.

The third prayer of the petitioner was considered by the Court, which ordered that no coercive action be taken against the petitioner as long as he cooperates during inquiry and the issue of bail and cognisance lies with competent courts. The Court also directed the States concerned to check his threat perception and take necessary measures.

¹⁰ Code of Criminal Procedure, No. 2 of 1974, § 162 (India).

E. Ratio and obiter

The binding ratio can be described as follows. First, hate speech is evaluated based on content, intention, and harm in context. Second, the provisions of Sections 153-A, 295-A and 505(2) entail both mens rea and a link to public order. Third, multiple FIRs over the same incident shall be dealt with under the principle of the first FIR rule. The comparative analysis of the US, Canada, Australia, and South Africa and the observations on tolerance should be concluded as persuasive reasoning.

VI. ANALYSIS

A. A much-needed framework

Indian law has previously utilised the phrases "hate speech" and "enmity between groups" without offering a proper definition. Past rulings in cases like *Ramji Lal Modi*¹¹, *Kedar Nath Singh* and *Ram Manohar Lohia*¹² produced an understanding of the relationship between speech and public order, as the Supreme Court in *Pravasi Bhalai Sangathan*¹³ left it to the Law Commission and Parliament to come up with an idea of "hate speech". The *Amish Devgan* judgment could be considered the first one that presents an actual definition and working methodology for what hate speech is.

Its essential contribution is moving the focus from the listeners who feel offended to the actual speech itself. The Court argues that hate speech is a form of violation of social equality and the dignity of the group, which differentiates it from the concept of individual defamation. This connects sections 153-A, 295-A, and 505(2) with articles 14 and 21, as well as the idea of fraternity presented in the Preamble and explains why it is entirely legitimate for the State to restrict hate speech. The three-part test of content, intent, and harm, viewed from the perspective of the context, provides something tangible that can be applied by investigators

B. The gap between principle and outcome

The weak point of the ruling is in the disparity between the principles that it refers to and the relief that it provides. It refers to the marketplace of ideas and raises concerns regarding the chilling effect of criminal law on free speech, but does not quash FIRs of five states against a

¹¹ *Ramji Lal Modi v. State of Uttar Pradesh*, AIR 1957 SC 620 (India).

¹² *Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia*, (1960) 2 SCR 821 (India).

¹³ *Pravasi Bhalai Sangathan v. Union of India*, (2014) 11 SCC 477 (India).

single telecast. The reasoning is that the content, intent, injury and context matter of investigation and that petitioners should have approached the High Court.

This has some logic to it. The facts in dispute include the allegation, the video getting edited, and the explanation provided by Khilji and Chishti. Under Article 32, a court usually does not settle such disputes. But this logic comes with its price. When the premise is based on facts that can be made clear only through the process of trial, then that whole exercise of trial itself becomes the punishment. The journalist would have to go through different investigations in different States before proving the premise. This is somewhat alleviated by the first FIR or the arrest stoppage, but the risk of harassment remains. It is also hard to reconcile this reasoning with the case of Arnab Ranjan Goswami because in that case, the Court had used Article 32 in giving relief to some other journalist without any convincing distinction.

C. The reasonable person and the speaker of influence

The Court evaluates speech based on the criteria of an ordinary citizen, the "man on the top of a Clapham omnibus". The purpose of this is to safeguard free speech against excessive caution and sensitivity most of the time. The interpretation of the reasonable man standard is not intrinsic. A reasonable person might give varying reactions depending on the position of the given community or the specific atmosphere of the given region. In a multi-ethnic country such as India, such judgments are usually made by the investigating officer in the course of his investigation, and the officer typically does so under pressure from the complainant.

The treatment of influential speakers raises a related concern. The Court says that journalists and other influential persons do not have less freedom of speech, but it makes influence relevant to the harm element and sometimes to intent and content. Only a sensible explanation would follow: since a prominent anchor reaches millions. But by this line of reasoning, all it really meant in practice was that the more influential the speaker was, the more readily his words would be treated as harmful. This would have a chilling effect on the very persons the press freedom jurisprudence seeks to uplift.

D. Intent and the apology

Intent is one of the most difficult aspects to establish, and, as the ruling shows, it is true. In order to prove that he did not possess intent, the plaintiff based his arguments on his apology. In response, the defendants asserted that the apology indicated that the plaintiff accepted his

actions. The court took both arguments into account but ordered further inquiries to be carried out to resolve the matter. This cautious approach, however, leaves open the degree of importance an apology can have in legal matters.

E. Penal law and Parliament

The Court stated that penal law is not the only means to achieve tolerance, as there are also methods of self-regulation and external checks. This is a good observation but does not eliminate the main problem. Since there is no special law punishing hate speech, the Court has read existing, general provisions to reach a narrow and constitutional way of interpretation. Though this was a necessary temporary solution, a judicial interpretation could not be considered a legislative gap-filling measure, as stated in the report of the Law Commission. The provisions of IPC mentioned in the judgment have already been included in the Bharatiya Nyaya Sanhita 2023 as sections 196, 299, and 353¹⁴. The principles from the matter of Amish Devgan are to be applied to all of them, but they have not been tested so far.

F. A comparative view

The review conducted by the Court in the context of the United States of America, Canada, Australia, and South Africa reveals that India is close to the dignity-oriented models. It could be observed that the country does not require an imminent lawless action (Brandenburg test), but considers longstanding injury done to a group as relevant. In this situation, it is consistent with the “reasonable restrictions provided under Article 19(2), which implies, on the one hand, that the Indian legislation is stricter than that of the United States, and suggests, on the other hand, that it is important here to focus on the safeguards connected to the intent, etc., and the likelihood.

CONCLUSION

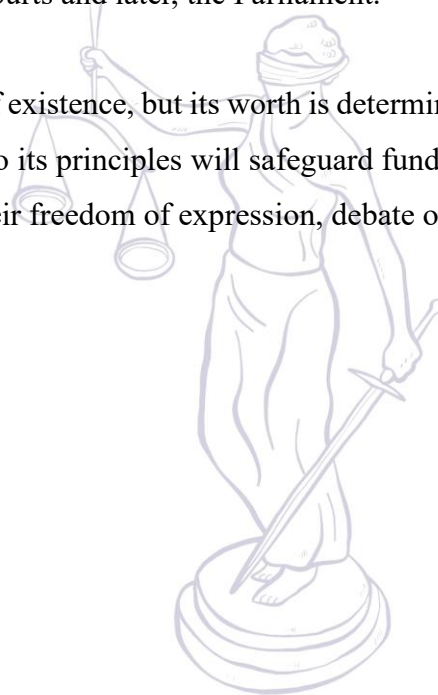
Amish Devgan vs Union of India is a landmark judgment with respect to the free speech law in India. For the first time ever, the Supreme Court has laid down a strict set of criteria to identify hate speech, which rests on dignity, fraternity, and national unity as a basis for evaluation. The Court has prescribed an examination of the content, intent, and harm in the said context. By stressing mens rea and real danger of harm, the Court has narrowed down the scope

¹⁴ Bharatiya Nyaya Sanhita, No. 45 of 2023, §§ 196, 299, 353 (India).

of application of Sections 153-A, 295-A, and 505(2) of the Indian Penal Code, whose application was arbitrary enough previously.

The ruling is rather less than convincing in its application. While the Court does uphold the idea of the marketplace of ideas, and warns against the chilling effect of criminal law, it stops short of quashing the several FIRs filed in the different States over a single telecast. The “reasonable person” test and the treatment of the reputable speakers allow for subjective application at the FIR stage, the only time the speaker is likely to be under maximum exposure. In the absence of a special statute, these loopholes can be sealed only with the consistent application in the lower courts and later, the Parliament.

The paradigm is worthy of existence, but its worth is determined by how well it is utilized. Any test conducted faithfully to its principles will safeguard fundamental rights of both vulnerable sections of society and their freedom of expression, debate or disagreement.



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