

VERDICTUM.IN
IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P. (C) No. 8282 of 2022

In the matter of:

Ashwini Kumar Upadhyay

... ..Petitioner

Vs.

Union of India & Ors.

... ..Respondents

I N D E X

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2.	<u>ANNEXURE-R-1/1:</u> A copy of the judgment & order dated 17/02/2017, passed by the Hon'ble Supreme Court of India in W.P. (C) No. 98/2017	8-10
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Filed by:



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NEW DELHI

DATED: 04 / 11 / 2022

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P. (C) No. 8282 of 2022

In the matter of:

Ashwini Kumar Upadhyay

... ..Petitioner

Vs.

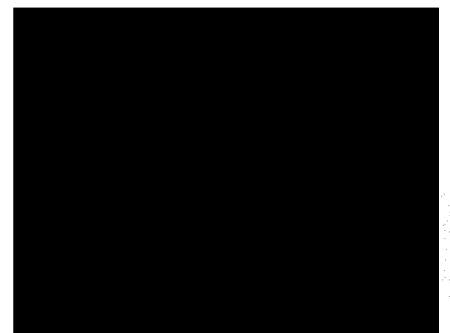
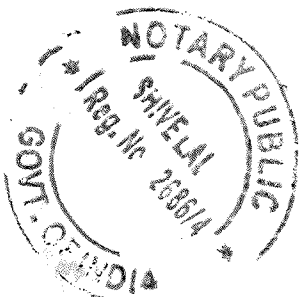
Union of India & Ors.

... ..Respondents

**SHORT COUNTER AFFIDAVIT ON BEHALF OF
RESPONDENT NO. 1**

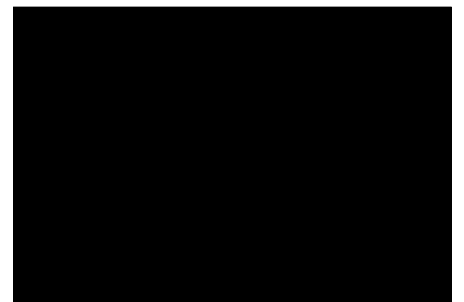
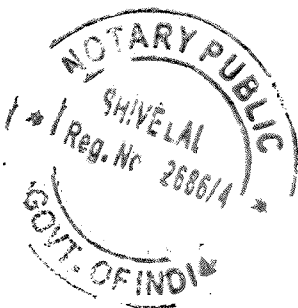
I, Pandey Pradeep Kumar, S/o Shri P.D.P. Shrivastava, aged 57 years, presently working as Deputy Secretary, in the Ministry of Home Affairs, having my office at North Block, New Delhi, do hereby solemnly affirm and state as under:

1. That in my above-mentioned position, I am the authorized signatory of the Answering Respondent and am conversant with the facts of the case, and hence competent to swear this Counter Affidavit on behalf of Respondent No. 1.
2. That I have read the contents of the Writ Petition, and I have understood the contents thereof. All the averments contained in the Writ Petition, except to the extent expressly admitted hereunder, are incorrect, untrue and hence denied.



Preliminary Submissions:

3. That in the instant PIL, the Petitioner has prayed for parity of treatment between the National Anthem and National Song and also to frame guidelines for the National Song 'Vande Mataram' giving it same honour and status at par with the National Anthem of India.
4. That in this regard, it is submitted that on 24/01/1950, the President of the Constituent Assembly of India adopted the '*Jana Gana Mana*' as the National Anthem of India .
5. That the instructions named '*Orders relating to National Anthem of India*' were issued regarding the manner and the circumstances in which the National Anthem has to be played or sung.
6. That in the year 1971, the action of prevention of singing of the National Anthem or causing disturbances to any assembly engaged in such singing was made punishable offence by way of an Enactment of the Prevention of Insults to National Honour Act, 1971 [**copy enclosed**].
7. That however, similar penal provisions have not been made by the Government in the case of National Song '*Vande Mataram*' and no instructions have been issued laying down the circumstances in which it may be sung or played.



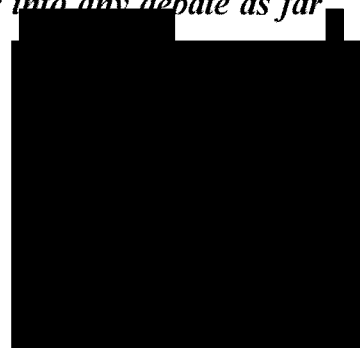
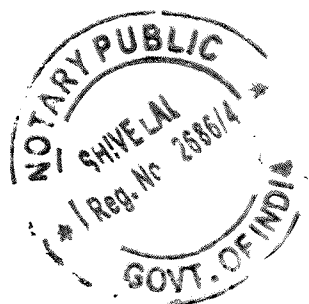
8. The National Anthem and the National Song both have its sanctity and deserve equal respect. However, the subject matter of the present proceedings can never be a subject matter seeking writ of the Hon'ble High Court more particularly in view of the settled position mentioned hereunder.
9. That the issue of National Song was considered by the Hon'ble Supreme Court earlier in W.P. (C) No. 98/2017 titled Ashwini Kumar Upadhyay Vs. Union of India & Ors. regarding framing a national policy to promote and propagate the National Anthem, National Song and National Flag. In its judgment & order dated 17/02/2017, the Hon'ble Supreme Court was pleased to observe as follows:-

“Be it clearly noted, Article 51A (a) of the Constitution of India does not refer to ‘National Song’. It only refers to National Flag and National Anthem. The said Article reads as follows:-

“51A. Fundamental duties – It shall be the duty of every citizen of India-

(a) to abide by the Constitution and respect its ideals and institutions, the national Flag and National Anthem.”

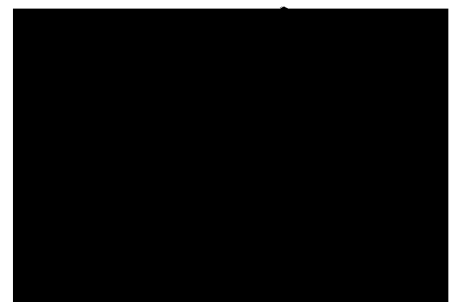
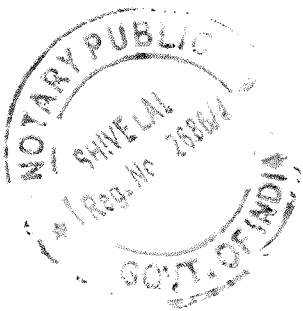
Therefore, we do not intend to enter into any debate as far as the National Song is concerned.”



A copy of the said judgment & order dated 17/02/2017, passed by the Hon'ble Supreme Court of India in W.P. (C) No. 98/2017 is being appended herewith as ANNEXURE-R-1/1.

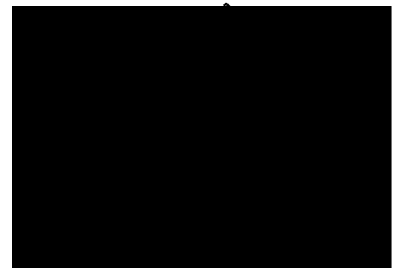
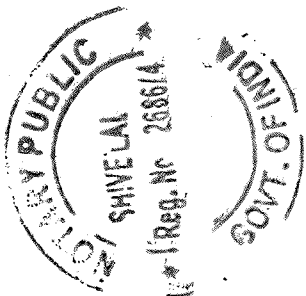
10. That in W.P. (C) No. 10867/2016 titled "Gautam R. Morarka Vs. Union of India & Ors." regarding framing of guidelines for the singing and playing of the song 'Vande Mataram', the Hon'ble High Court of Delhi referred to judgement & order dated 17/02/2017, passed by the Hon'ble Supreme Court of India in W.P. (C) No. 98/2017.
11. That the Hon'ble High Court of Delhi was pleased to dismiss the said Writ Petition vide its judgment & order dated 17/10/2017. While dismissing the Writ Petition, the Hon'ble High Court of Delhi was pleased to observe on the basis of Supreme Court's observations, that-

"... though there can be no dispute with the writ petition that the song 'Vande Mataram' deserves the regard and respect which has been recognized by the respondents and has been noted by the Supreme Court of India, in the aforesaid order we are unable to grant the prayers made in the writ petition".



A copy of the said judgment & order dated 17/10/2017, passed by the Hon'ble High Court of Delhi in W.P. (C) No. 10867/2016 is being appended herewith as ANNEXURE-R-1/2.

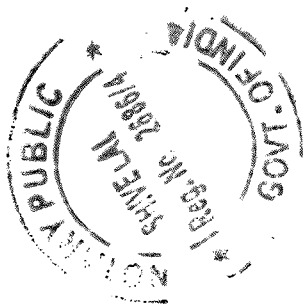
12. That both '*Jana Gana Mana*' and '*Vande Mataram*' stand on same level and every citizen of the country should show equal respect to the both. National song occupies a unique and special place in the emotions and psyche of the people of India.
13. That with regard to the Para-wise averments made in Writ Petition, the Answering Respondent is not filing a Para-wise reply to the same since the present case is in the nature of public interest litigation and not adversarial.
14. That the averments in different paragraphs of the Petition are in the nature of historical developments discussions in the Constituent Assembly, previous litigations and individual suggestions which require deliberation at the administrative and judicial level before the same can be imbibed into the system, subject to the constitutional or the legal mandate. The rest of the contents of the petition are Question of Law, Ground taken by the Petitioner for supporting his petition and making out a case.



15. The Answering Respondents reserve their right to file any Additional Counter Affidavit, if so deemed necessary and expedient, for assisting the Hon'ble Court in proper adjudication of the issues raised in the instant Public Interest Litigation.

It is, therefore, most humbly prayed before this Hon'ble Court that the Central Government is abiding by the directions passed by the Hon'ble High Courts as also the Hon'ble Supreme Court of India from time to time.

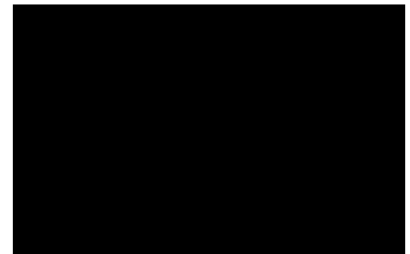
Accordingly, the Answering Respondent will abide by any and every direction that is deemed necessary and expedient by this Hon'ble Court in the facts and circumstances of the present case.



DEPONENT

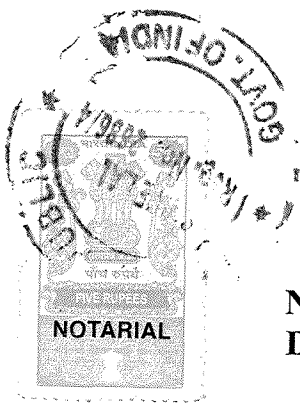
VERIFICATION

Verified at New Delhi on this 04TH day of November, 2022 that the contents of the above affidavit are true and correct to my knowledge and belief. No part of it is false and nothing material has been concealed there from.



DEPONENT
Minister of Law and Justice
भारत सरकार / Govt. of India

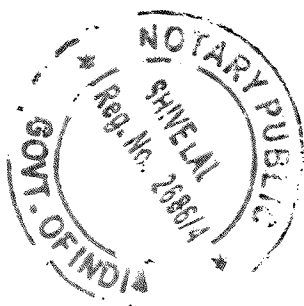
Filed Through:



NEW DELHI
DATED: 04 / 11 / 2022



[MANISH MOHAN]
Central Govt. Standing Counsel



4 NOV 2022

ITEM NO.26

COURT NO.2

SECTION PIL(W)

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Writ Petition(s) (Civil) No(s). 98/2017

ASHWINI KUMAR UPADHYAY

Petitioner(s)

VERSUS

UNION OF INDIA AND ORS

Respondent(s)

(with office report)

Date : 17/02/2017 This petition was called on for hearing today.

CORAM : HON'BLE MR. JUSTICE DIPAK MISRA
HON'BLE MRS. JUSTICE R. BANUMATHI
HON'BLE MR. JUSTICE MOHAN M. SHANTANAGOUDARFor Petitioner(s) Mr. Vikas Singh, Sr. Adv.
Mr. Girdhar Upadhyay, Adv.
Ms. Asha Upadhyay, Adv.
Mr. R.D. Upadhyay, AOR

For Respondent(s)

UPON hearing the counsel the Court made the following
O R D E RHeard Mr. Vikash Singh, learned senior counsel along with Ms.
Asha Upadhyay, learned counsel for the petitioner.In the present writ petition, prayer (a) is to the following
effect :-

- "a) frame a National Policy to promote and propagate the National Anthem, National Song and National Flag in spirit of the Article 51A to achieve the great golden goals, as set out in Preamble of the Constitution of India."

Mr. Vikas Singh, learned senior counsel submitted that it is similar to Writ Petition no.855 of 2016.

On a perusal of the order passed therein, we do not find that it relates in entirety to prayer (a), for our earlier order does not relate to 'National Song' or 'National Flag'. Be it clearly noted, Article 51A(a) of the Constitution of India does not refer to 'National Song'. It only refers to National Flag and National Anthem. The said Article reads as follows :

"51A. Fundamental duties It shall be the duty of every citizen of India.--

(a) to abide by the Constitution and respect its ideals and institutions, the national Flag and the National Anthem."

Therefore, we do not intend to enter into any debate as far as the National Song is concerned.

As far as prayer (d) is concerned, it reads as follows :-

"d) ascertain the feasibility of singing / playing the National Anthem and National Song in the Parliament/Assembly, Public Officers, Courts and Schools on every working day."

In the earlier writ petition, a contention was advanced by the learned Attorney General for India pertaining to schools and, therefore, as far as the prayer relating to 'schools on every working day' is concerned, it is kept alive. The rest of the prayer, i.e., of prayer (d) is dismissed as not pressed. We may hasten to clarify, when we have kept the prayer alive, that does not mean that we have expressed any opinion on the same.

Let the matter be tagged with Writ Petition (Civil) No. 855 of 2016. A copy of the petition be handed over to Ms. Binu Tamta, learned counsel who shall apprise the learned Attorney General for

India that we have tagged this matter with Writ Petition (Civil)
No. 855 of 2016.

(Gulshan Kumar Arora)
Court Master

(H.S. Parasher)
Court Master

Annexure R/2

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*IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C)No.10867/2016

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Date of decision : 17th October, 2017

GAUTAM R MORARKA

..... Petitioner

Through : Mr. Pravin H. Parekh, Sr. Adv.
with Mr. Sumit Goel, Ms.
Ritika Sethi and Ms. Rashi
Gupta, Adv.

versus

UNION OF INDIA AND ANR

..... Respondents

Through : Ms. Suparna Srivastava, CGSC
with Ms. Sanjna Dua and Ms.
Alinda Bhdwal, Adv. for R-
1&2.

CORAM:**HON'BLE THE ACTING CHIEF JUSTICE****HON'BLE MR. JUSTICE C.HARI SHANKAR****JUDGMENT (ORAL)****GITA MITTAL, ACTING CHIEF JUSTICE**

1. The petitioner contends that song '*Vande Mataram*' has been given a equal status as the '*Jana Gana Mana*' by the Constituent Assembly of India which met to sign the Constitution on the 24th of January 1950. It is submitted before us by Mr. Pravin H. Parekh, ld. Senior Counsel for the petitioner that even the Constituent Assembly acknowledged that the song '*Vande Mataram*' had played a historic part in the struggle for India's freedom movement and has to be honoured equally as the National Anthem. Contending that no set of

rules regarding its rendition as well as the protocols to be followed regarding its singing have been framed, the writ petitioner has submitted that appropriate statutory recognition requires to be given to the song 'Vande Mataram' under the Prevention of Insults to National Honour Act, 1971 which was enacted to prevent disrespect and insults to National Symbols. Premised on these assertions, the writ petitioner seeks the following prayers :

“(a) Issue appropriate writ or order quashing the order No.19/6/2014 – Public dated 30.05.2016 passed by the Ministry of Home Affairs, Government of India;

(b) Issue writ of Mandamus or any other appropriate writ directing the respondents to issue appropriate orders/instructions with respect to the National Song 'Vande Mataram' and the courtesies to be observed when the same is being sung/played to ensure the respect and dignity, which the National Song deserves, on the lines of the Orders and Instructions already issued by the respondent no.1 (Annexure P-5) with respect to the National Anthem 'Jana Gana Mana'.

(c) Issue writ of mandamus or any other appropriate writ directing that the respondents to consider moving an appropriate bill for amendment in the Prevention of Insults to National Honour Act, 1971 to incorporate provisions with respect to the National Song 'Vande Mataram' to ensure the respect and dignity which the National Song deserves ; AND

(d) Pass such and further orders as may be deemed just and necessary in the facts and circumstances of the present case and in the interest of justice.”

2. It is trite that this court cannot issue a writ of mandamus to the respondents to enact and effectuate legislation. Therefore, prayer (c) is untenable and no directions as have been sought can be passed.

3. Notice stands issued to the respondents, who in response thereto, have filed a detailed affidavit dated 2nd February, 2017. This court has been informed that the petitioner had made the representations dated 6th February, 2013 and 20th November, 2013 which were in terms of the submissions and prayers made in the writ petition requesting for amendments in the aforesaid legislation and also seeking framing of guidelines regarding the singing and playing of the song '*Vande Mataram*'.

4. We are also informed that the writ petitioner had earlier filed writ petition being WP(C)No.662/2014 before this court. In these proceedings, the order dated 29th January, 2014 was passed directing the Ministry of Home Affairs to consider the representations dated 6th February, 2013 and 20th November, 2013 in accordance with law and to pass appropriate orders.

5. Pursuant to the above directions, a Committee was constituted premised on the representations of the petitioner which held a meeting on 29th March, 2016 and considered the petitioner's representation. Recommendations were made by this Committee resulting in the order dated 30th May, 2016 which was issued by the respondents *inter alia* noting as follows :

'8. *Whereas, after a detailed discussion, the Committee in its meeting held on 29th March, 2016 recommended that status quo may be maintained in this regard for the present, hoping that every citizen of India should remember the historic role*

of the song in our freedom struggle and show due respect to the song when it is played or sung ;

9. *Whereas, protection under the law is not the only way to show respect to a creative work. Billions of Indians have the deepest respect and unabiding faith in the Ramcharitmanas and the Mahabharat. Christians across the world similarly have faith in the Bible; the works of Kalidas and Shakespeare are and have been revered across the world, and across centuries; and Aartis are sung with utmost devotion and respect. Yet none of these have, indeed none of them require, the protection of law. In fact, such work of creativity and/or of religious nature can be said to be beyond and above law. A nation has only one flag and one anthem; that does not mean that any less respect is meant to other songs or prayers, or that the citizens are prevented from loving respecting, singing and being emotionally attached to other songs, books or symbols;*

10. *Whereas, the evocative 'Vande Mataram' inseparably linked with our freedom struggle, is an eternal song which commands respect and love, without it being mandated, or enforced by the long arm of the law. It has become synonymous with valour, and dedication, and love for one's motherland, and does not require any crutches to hold its own in the heads and hearts of India's citizenry;*

11. *Whereas, while being the authoritative symbols of Indian 'State' and national flag and the anthem, equally loved and respected, need codification, Vande Mataram occupies a unique and special place in the emotions and psyche of the people of India, that requires no formal support, or codification.*

12. *Therefore, the request of the applicant cannot be accepted. The applicant would be well advised to translate his obvious love and respect for Vande Mataram to promoting and popularizing it amongst the young, explaining its meaning and significance; that may be a greater contribution*

by him to 'Vande Mataram'."

6. It needs no elaboration that the 'Vande Mataram' is inseparably linked with the freedom struggle as is noted by the committee and the respondents as an eternal song which commands respect and love without it being managed or enforced by the long arm of the law. It is acknowledged that this song has become synonymous with valour and dedication and love for one's motherland.

7. Ms. Suparna Srivastava, Id. CGSC for the respondents has informed this court that a prayer, which was similar in terms to the one prayer pressed by the writ petitioner, was made before the Supreme Court of India in *WP(C)No.98/2017 Ashwini Kumar Upadhyay vs. Union of India & Ors.* This prayer was considered by the Supreme Court of India on 17th February, 2017 when it was ordered as follows :

"Heard Mr. Vikash Singh, learned senior counsel along with Ms. Asha Upadhyay, learned counsel for the petitioner.

In the present writ petition, prayer (a) is to the following effect : -

"a) frame a National Policy to promote and propagate the National Anthem, National Song and National Flag in spirit of the Article 51A to achieve the great golden goals, as set out in Preamble of the Constitution of India."

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order does not relate to 'National Song' or 'National Flag'. Be it clearly noted, Article 51A(a) of the Constitution of India does not refer to 'National Song'. It only refers to National Flag and National Anthem. The said Article reads as follows :

"51A. Fundamental duties it shall be the duty of every citizen of India –

(a) to abide by the Constitution and respect its ideals and institutions, the national Flag and the National Anthem."

Therefore, we do not intend to enter into any debate as far as the National Song is concerned."

8. In view of the above, though there can be no dispute with the writ petitioner that the song '*Vande Mataram*' deserves the regard and respect which has been recognized by the respondents and has been noted by the Supreme Court of India in the aforesaid order, we are unable to grant the prayers made in the writ petition.

This writ petition is accordingly dismissed.

ACTING CHIEF JUSTICE

C.HARI SHANKAR, J

OCTOBER 17, 2017

mk

THE PREVENTION OF INSULTS TO NATIONAL HONOUR ACT, 1971
No. 69 of 1971 (23rd December, 1971)

(Amended by the Prevention of Insults to National Honour (Amendment) Act, 2005)
No. 51 of 2005 (20th December, 2005)

An Act to Prevent Insults to National Honour

Be it enacted by Parliament in the Twenty- second year of the Republic of India as follows: -

1. **SHORT TITLE AND EXTENT**

- (1) This Act may be called the Prevention of Insults to National Honour Act, 1971.
- (2) It extends to the whole of India.

2. **INSULT TO INDIAN NATIONAL FLAG AND CONSTITUTION OF INDIA**

Whoever in any public place or in any other place within public view burns, mutilates, defaces, defiles, disfigures, destroys, tramples upon or *otherwise shows disrespect to or brings into contempt (whether by words, either spoken or written, or by acts) the Indian National Flag or the Constitution of India or any part thereof, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

Explanation 1 – Comments expressing disapprobation or criticism of the Constitution or of the Indian National Flag or of any measures of the Government with a view to obtain an amendment of the Constitution of India or an alteration of the Indian National Flag by lawful means do not constitute an offence under this section.

Explanation 2 – The expression, “Indian National Flag” includes any picture, painting, drawing or photograph, or other visible representation of the Indian National Flag, or of any part or parts thereof, made of any substance or represented on any substance.

Explanation 3 – The expression “public place” means any place intended for use by, or accessible to, the public and includes any public conveyance.

*Explanation 4 - The disrespect to the Indian National flag means and includes—

- (a) a gross affront or indignity offered to the Indian National Flag; or
- (b) dipping the Indian National Flag in salute to any person or thing; or
- (c) flying the Indian National Flag at half-mast except on occasions on which the Flag is flown at half-mast on public buildings in accordance with the instructions issued by the Government; or

- (d) using the Indian National Flag as a drapery in any form whatsoever except in state funerals or armed forces or other para-military forces funerals; or
- (e) #using the Indian National Flag:-
 - (i) as a portion of costume, uniform or accessory of any description which is worn below the waist of any person; or
 - (ii) by embroidering or printing it on cushions, handkerchiefs, napkins, undergarments or any dress material; or
- (f) putting any kind of inscription upon the Indian National Flag; or
- (g) using the Indian National Flag as a receptacle for receiving, delivering or carrying anything except flower petals before the Indian National Flag is unfurled as part of celebrations on special occasions including the Republic Day or the Independence Day; or
- (h) using the Indian National Flag as covering for a statue or a monument or a speaker's desk or a speaker's platform; or
- (i) allowing the Indian National Flag to touch the ground or the floor or trail in water intentionally; or
- (j) draping the Indian National Flag over the hood, top, and sides or back or on a vehicle, train, boat or an aircraft or any other similar object; or
- (k) using the Indian National Flag as a covering for a building; or
- (l) intentionally displaying the Indian National Flag with the "saffron" down.

3. PREVENTION OF SINGING OF NATIONAL ANTHEM

Whoever intentionally prevents the singing of the Indian National Anthem or causes disturbances to any assembly engaged in such singing shall be punished with imprisonment for a term, which may extend to three years, or with fine, or with both.

*3A MINIMUM PENALTY ON SECOND OR SUBSEQUENT OFFENCE

Whoever having already been convicted of an offence under section 2 or section 3 is again convicted of any such offence shall be punishable for the second and for every subsequent offence, with imprisonment for a term, which shall not be less than one year.

Note 1: * Inserted vide The Prevention of Insults to National Honour (Amendment) Act, 2003 (No. 31 of 2003 dated 8.5.2003)

Note 2: # Inserted vide The Prevention of Insults to National Honour (Amendment) Act, 2005 (No. 51 of 2005 dated 20.12.2005)