



LL.B. III Term

LB-3031 – MEDIA LAW AND CENSORSHIP (INCL. SELF REGULATION)

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Prescribed Readings:

- Basu, Dr. Durga Das, *Law of The Press*, 5th Ed, Lexis Nexis, 2010
- Bloy, Duncan & Hadwin, Sara, *Law and the Media*, 2nd Ed., Sweet & Maxwell, 2013
- Divan, Madhavi Goradia, *Facets of Media Law*, Eastern Book Company, 2010
- Paul, Sebastian, *Ethics and The Media*, 3rd Ed., Lexis Nexis, 2015
- Prasad, Kiran, *Media Law in India*, Kluwer Law International, 2011
- Shukla, V.N., *Constitution of India*, 11th Ed., Eastern Book Company, 2011
- Sorabjee, Soli J., “Constitution, Courts and Freedom of the Press and the Media”, B.N. Tirpak et al (eds.), *Supreme But Not Infallible : Essays in Honour of the Supreme Court of India*, 2000

1. Different forms of Media, History of Legislative Efforts (3 Lectures)

- 1.1. *Forms-Print media; Broadcast media; Social media*
- 1.2. *Legislative efforts in India*

2. Media, Free Speech and the Constitution

- 2.1. **Freedom of speech and expression** under Article 19 (1) (a) and the Reasonable restrictions under Article 19 (2); Derivative rights - right to know, right to broadcast; Hate Speech (**3 Lectures**)

1. *Bennett Coleman & Co. v. Union of India*, AIR 1973 SC 106
2. *Prabha Dutt v. Union of India*, 1982 SCR (1) 1184
3. *Secy., Ministry of Broadcasting v. Cricket Association of Bengal*, (1995) 2 SCC 161
4. *ABP Pvt Ltd. v. Union of India*, (2014) 3 SCC 327 01
5. *Shreya Singhal v. Union of India*, (2015) 5 SCC 1 23

2.2 Privacy, defamation, sting operations, and Misuse of Sting Operations (8 Lectures)

Privacy: Define “privacy”; Differentiating between right to privacy of a public figure and private figure; is there an expectation of reasonable amount of privacy; Paparazzi; Publishing information obtained illegally; Right of Publicity,

6. *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1 44

7. *Rajagopal v. State of Tamil Nadu*, 1994 SCC (6) 632 52

Right to be forgotten

8. *X v. Union of India*, 2021 SCC OnLine Del 1788

Defamation: Against public person; Publishing with knowledge of falsity or with reckless disregard for the truth; Right to Reply

9. *Swatanter Kumar v. The Indian Express Ltd*, 207 (2014) DLT 221 65

Sting Operations: Investigative Journalism; Leveson Report

10. *R.K. Anand v. Registrar, Delhi High Court*, (2009) 8 SCC 106 86

11. *Rajat Prasad v. CBI*, (2014) 6 SCC 495 105

12. *Court On Its Own Motion v. State*, (2008) 146 DLT 429 112

Ref: *Consultation Paper-cum-Questionnaire on Undercover Sting Operations*, Law Commission of India

2.3 Right to Information (2 Lectures)

How far does public access to information go; Is there a right to gather news or attend meetings; Fairness doctrine and access to the media; Compelling journalist to disclose information related to crime and source

13. *CPIO, Supreme Court of India v. Subhash Chandra Aggarwal*, AIR 2010 Delhi 159 119

2.4 Trial by media and fair trial (3 Lectures)

Pre-trial publicity; Cameras in Courtroom; Restrictive Orders

14. *M.P. Lohia v. State of West Bengal*, (2005) 2 SCC 686 136

15. *Naveen Jindal v. Zee Media Corporation Ltd*, CS(OS) 143/2015 138

Ref: *Trial by Media: Free Speech and Fair Trial under Criminal Procedure Code, 1973*, 200th Report, Law Commission of India

3 Contempt of Court (4 Lectures)

Scandalising, vilification of institution of Court; Unverified reporting; Fair comment and criticism

16. *In re S. Mulgaokar v. Unknown*, 1978 SCR (3) 162 153

17. *Rajendra Sail v. Madhya Pradesh Bar Association*, (2005)6 SCC109 173

18. *Sanjoy Narayan, Editor-in-Chief, Hindustan v. Hon. High Court of Allahabad through Registrar General*, 2011 (9) SCALE 532 185

19. *Rajeev Dhawan v. Gulshan Kumar Mahajan*, (2014) 41 SCD 785, Contempt P. (CrI.)2/1994 187

Ref: Articles 129, 142 (2), 215; entry 77, List I, Seventh Schedule, Constitution of India

The Contempt of Court Act, 1971 (as amended)

Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, The Contempt of Courts (Amendment) Bill, 2004

(Twelfth Report), Paras 3.8.1 and 7.4, Report of the National Commission for the Review of the Working of the Constitution

4 Media & Its Regulation (8 Lectures)

Regulation can occur at the Central, State, local or self-regulatory level

4.1 Regulation of the print media

Ref: Press Council of India Act

Resolution for a Media Council, Press Council of India, 2012

4.2 Regulation of the Broadcasting sector (Public and Private)

20. *Secy., Ministry of Broadcasting v. Cricket Association of Bengal*, (1995) 2 SCC 161

21. *In re Destruction of Public and Private Properties v. State of A.P. & Ors*, (2009) 5 SCC 119 192

Ref: Prasar Bharti Act 1990; Report of the Prasar Bharati's Expert Committee, 2013; Cinematography Act 1952; Cable T.V. Networks (Regulation) Act of 1995

Consultation Paper on the Proposed Draft of the Broadcasting Services Regulation, Ministry of I&B, Self-Regulatory Measures-BCCC Guidelines on Self Regulation; BCCC Report to the MI&B; BCCC Orders and Advisories; NBSA Regulations; NBA Code of Ethics

4.3 Regulation of the Social Media

Sections 6,7, 8 and other relevant provisions of Information Technology Act, 2001

Shreya Singhal v. Union of India, (whether it would be asserted again- a need of such power)

22. *X v. Union of India*, 2021 SCC OnLine Del 1788 196

Ref: Section 66A, Information Technology Act of 2001;

52nd Report of the Parliamentary Standing Committee on Information Technology

31st Report of the Parliamentary Standing Committee on Subordinate Legislation, 2012-13

Advisory on Implementation of Section 66-A of the Information Technology Act, 2000, Department of Electronics and Information Technology, 9 January, 2013

Convergence Bill; Regulatory commissions of new media; Indian Telegraph Act of 1885

5 Media, Advertisement & the Law (3 Lectures)

5.1 Commercial speech: Commercial Speech Doctrine and protection provided under Art 19(1) (a); Regulating what is false or misleading / may regulate even truthful advertising

5.2 Government advertisements and the media: broadcasting political messages

23. *Ajay Goswami v. Union of India*, AIR 2007 SC 493 209

24. *Common Cause v. Union of India*, (2015) 42 SCD 686 230

Ref: Advertisement Act of 1954

Indecent Representation (Prohibition) Act, 1986

The Drugs and Magic Remedies (Objectionable) Advertisements Act of 1954

6 Media, Censorship and the Gag Orders (7 Lectures)

Pre- and Post Restraint; Cinema and censorship; Variable obscenity - differing standards for obscenity - adults/minors; Gag orders, print/broadcasting/social media; restraint on reporting of judicial proceedings; Reporting on Women/ Juveniles

25. *Odyssey Communications Pvt Ltd. v. Lokvidayan Sanghatana*, (1988) 3 SCC 410 242
26. *S. Rangarajan v. P. Jagjivan Ram*, 1989 SCR (2) 204 245
27. *Bobby Art International v. Om Pal Singh Hoon*, (1996) 4 SCC 1 261
28. *Union of India v. Motion Picture Association*, AIR 1999 SC 2334 270
29. *Devidas Ramachandra Tuljapurkar v. State of Maharashtra*, 14 May 2015 (Criminal Appeal No. 1149 of 2010)
30. *Shreya Singhal v Union of India*, 24 March 2015 (whether it would be *asserted again-need for such power*)
31. *Reliance Petrochemicals Ltd v. Proprietors of Indian Express Newspapers, Bombay Pvt Ltd.*, 1988 SCR Supp. (3) 212 278
32. *Sahara India Real Estate Corp. Ltd. v. Securities & Exchange Board of India*, (2012) 10 SCC 603 294

Ref: The Dramatic Performances Act, 1876

Section 5D of the Cinematograph Act relating to the establishment and functioning of Film Certification Appellate Tribunal

Section 228 A, Indian Penal Code, 1860; Sections 4 and 7, Contempt of Courts Act

Section 151, Civil Procedure Code; Section 14, Official Secrets Act, 1923

Section 22, Hindu Marriage Act, 1955; Section 53, Indian Divorce Act, 1869

Section 33, Special Marriages Act, 1954; Section 33, Parsi Marriage and Divorce Act

7 Reporting of Legislative Proceedings (2 Lectures)

33. *Jatish Chandra v. Hari Sadhan*, AIR 1951 SC 613
34. *MSM Sharma v. Krishna Sinha*, AIR 1959 SC 395
35. *C K Daphary v. O P Gupta*, (1971) 1 SCC 626

36. *Jawaharlal Darda v. M G Kapsikar*, (1998) 4 SCC 112

Ref: Article 361 A, Constitution of India

Parliamentary Proceedings (Protection of Publication) Act, 1977

8 Media and other contemporary issues (5 Lectures)

8.1 Paid news

37. *Ashok Shankarrao Chavan v. Madhavrao Kinhalkar*, (2014) 7 SCC 99 312

Ref: Report on Paid News, PCI, 2010

Report of the Committee on Electoral Reforms, MoL&J, 2010

47th Report of the Parliamentary Standing Committee on Information Technology,
Issues Related to Paid News

8.2 Poll surveys

Ref: Guidelines on Pre-Poll and Exit Poll, PCI, 1996

8.3 Cross ownership: diversification of ownership

Ref: Recommendations on Issues relating to Media Ownership, TRAI, 12 August
2014

Recommendations on Cross Media Holdings, TRAI, 25 February 2009

TRAI Consultation Paper on Cross Media Ownership, 15 March 2013

Report of the Administrative Staff College of India, July, 2009 (MI&B)

8.4 Competition issues

8.5 Licensing issues; responsibility of licensee

8.6 Copyright issues

The List of statutes and references are indicative of the scope of the subject.

MEDIA, FREE SPEECH AND THE CONSTITUTION

ABP Pvt.Ltd. v. Union of India

(2014) 3 SCC 327

P. Sathasivam, CJI (for himself and Ranjan Gogoi and Shiva Kirti Singh, JJ.): 1) These writ petitions, under Article 32 of the Constitution of India, have been filed by the petitioners (management of various newspapers) praying for a declaration that the Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 (in short the Act) is *ultra vires* as it infringes the fundamental rights guaranteed under Articles 14, 19(1)(a) and 19(1)(g) of the Constitution of India. The petitioners further prayed for quashing of the notification dated 11.11.2011 issued by the Central Government accepting the recommendations made by Justice Majithia Wage Boards for Working Journalists and Non-Journalist Newspaper and News Agency Employees. Factual Background:

2) It is pertinent to give a vivid background of the case before we advent to decide the issue at hand. Way back in 1955, the Government of India enacted the impugned Act to regulate the conditions of service of Working Journalists and in 1974 via amendment for other Newspaper Employees employed in newspaper establishments. For the purpose of fixing or revising the rates of wages of employees in newspaper establishments, the Central Government is empowered under Sections 9 and 13C of the Act to constitute two Wage Boards, *viz.*, one for the working journalists and other for non-journalist newspaper employees respectively. Likewise, the Act also specifies that the Central Government shall, as and when necessary, constitute these Wage Boards. The composition of the Wage Boards is specified, as mentioned below:-

- (a) Three persons representing employers in relation to Newspaper Establishments;
- (b) Three persons representing working journalists for Wage Board under Section 9 and three persons representing non-journalist Newspaper Employees for Wage Board under Section 13C of the Act;
- (c) Four independent persons, one of whom shall be a person who is, or has been a Judge of the High Court or the Supreme Court, and who shall be appointed by the Government as the Chairman thereof.

3) It is relevant to note that since 1955, six Wage Boards have been constituted for working journalists and four Wage Boards for non-journalist newspaper employees in order to fix or revise the rates of wages.

4) The Government constituted two Boards on 24.05.2007, one for the Working Journalists and the other for Non-Journalist Newspaper Employees under Sections 9 and 13C of the Act under the Chairmanship of Dr. Justice Narayana Kurup. The Chairman and six of the remaining nine members were common to both the Wage Boards. The remaining three members each representing the Working Journalists and Non-Journalist Newspaper Employees had been nominated by their respective Unions. The Wage Boards were given three years duration to submit their Reports to the Central Government.

5) However, due to sudden change of events, Dr. Justice K. Narayana Kurup, the Chairman of the aforesaid Wage Boards submitted his resignation effective from 31.07.2008 after completing more than one year tenure. Subsequently, Justice Gurbax Rai Majithia, a retired judge of the High Court of Mumbai was appointed as the common Chairman of the two Wage Boards for Working Journalists and other Newspaper Employees who took over the charge on 04.03.2009. Another significant change in the composition of the Wage Boards occurred due to sudden demise of Shri Madan Phadnis representing the All India Newspaper Employees Federation, who was a member of the Wage Board for Non-Journalist Newspaper Employees. In his place, Shri M.C. Narasimhan, as nominated by the same Federation, was substituted as member of the Board for Non-Journalist Newspaper Employees.

6) Owing to the unexpected change of the members constituting the Wage Boards, they could not finalize and submit their reports within the prescribed period of three years as originally notified i.e., by 23.05.2010. As such, their term was then extended up to 31.12.2010. It is this recommendation submitted by the Wage Boards, which was subsequently accepted by the Central Government and notified on 11.11.2011 that is impugned in the given proceedings.

7) In succinct, the petitioners herein, challenged the recommendations of the Wage Boards and the notification dated 11.11.2011 mainly on the following grounds:-

- i) Constitutional validity of the Act and the Amendment Act, 1974.
- ii) Improper Constitution of the Wage Boards
- iii) Irregularity in the procedure adopted by Majithia Wage Boards.
- iv) Majithia Wage Boards overlooked the relevant aspects and considered extraneous factors while drafting the recommendations.

We shall examine and deliberate distinctively on each contested point surfaced by the petitioners herein in the succeeding paragraphs.

Constitutional validity of the Act and Amendment Act, 1974

9) At the outset, almost all the learned counsel for the petitioners, challenged the *vires* of the Act on twin grounds. Firstly, the Act infringes the guaranteed fundamental rights under Articles 14 and 19 of the Constitution. Secondly, the Act has become obsolete with the passage of time.

10) It is submitted by learned counsel for the petitioners that misplaced classification and singling out of a specific business industry being the Newspaper Industry is violative of Article 14 since the Act only regulates the print media and not electronic media. Also, in the era of globalization and liberalization, to shackle one part of the industry with regulations is unreasonable, unfair and arbitrary and, therefore, violative of Articles 19(1)(a) and 19(1)(g).

11) Learned senior counsel for the petitioners besides objecting to the constitutionality of the Wage Boards also placed heavy reliance on the fact that in other industries such as cotton, sugar, tea, coffee, rubber, cement, jute, all the Wage Boards have been abolished over a period of time (sugar being the last in 1989). They further emphasized on the fact that the National Commission on Labour in 2002 also unequivocally recommended that there was no need for a Wage Board to be constituted for any industry.

12) Likewise, it is the stand of the petitioners that due to significant socio-economic changes having taken place in the Indian economy after de- regulation and privatization, the necessity for Wage Boards has eclipsed. In order to establish this, learned counsel referred to the object and purpose of the Act i.e. to ameliorate the conditions of service. According to learned senior counsel, this purpose has been achieved today as journalists are paid a fair wage and also given a compensation package. Resultantly, the requirement for controlling and regulating the conditions of service of newspaper employees that was prevalent in earlier phase (1955 onwards) is no longer required.

13) Precisely, learned counsel for the petitioners stressed on the ensuing four points to substantiate their claim that there is a complete change in the scenario since 1955 when the Press Commission was constituted to go into the conditions of employment of working journalists:

(a) The journalists are an essential and vital part of a newspaper establishment. As an outcome, newspaper establishments require skills, qualification and expertise to ensure the best content as this is necessary for attracting, retaining and increasing viewership which, in turn, requires the full support of journalists.

(b) Through bilateral negotiations and discussions, the petitioners have entered into contracts with a vast majority of journalists and offered them wages, salaries and compensation package to retain top class talent.

(c) The newspaper industry itself has undergone a sea change people sleep with the news (due to the advent of news channels on television). Further, printing technology has changed as a consequence and the newspapers now offer a better quality product. Manpower management has been strengthened to attract the best talent.

(d) There is greater competition from the internet, digital media in news channels and from foreign newspapers, therefore, there is already an obligation on the print media to retain the best talent by providing fine working conditions.

In brief, it was contended that in the present times of economic liberalization, the Act has become obsolete. As a result, Wage Boards have lost their utility and purpose for which they were set up and the 1955 Act have become outdated and have outlived its utility especially with the advent of the electronic media and other avenues.

14) Moreover, learned senior counsel submitted that the track record and report of the Wage Board is another pointer to this effect. Most of the decisions of the Wage Board have been quashed. The recommendations of the first Wage Board were set aside by this Court in *Express Newspaper (P) Ltd. v. Union of India*, 1959 SCR 12 and the previous Manisana Wage Board (Vth Wage Board) was also set aside by the Karnataka High Court and the Delhi High Court on effective grounds. In view of the above assertions and taking into account the ground realities, the petitioners prayed that they must be given a free hand and should not be burdened with an outdated and antiquated statute. Henceforth, they pleaded for abolishment of the Wage Boards and to declare the Act unconstitutional.

15) In support of the above proposition, learned counsel for the petitioners also relied on the decisions of this Court in *John Vallamattom v. Union of India* (2003) 6 SCC 611, *Malpe Vishwanath Acharya v. State of Maharashtra* (1998) 2 SCC 1, and *Indian Handicrafts Emporium v. Union of India* (2003) 7 SCC 589.

16) Mr. Mohan Parasaran, learned Solicitor General and Mr. Colin Gonsalves, learned senior counsel effectively responded to all the contentions raised by the petitioners, by relying on Constitution Bench decisions of this Court and prayed for rejection of their arguments.

17) This is not the first time when the aspect as to the Constitutional Validity of the Act as being ultra vires the Constitution and violative of fundamental rights is being encountered by this Court. It has already been expressly decided by a Constitution Bench of this Court in *Express Newspaper (P) Ltd. v. Union of India* AIR 1958 SC 578 and has been held to be intra vires the Constitution. The relevant portions of the said judgment are extracted hereunder:

Challenge qua Article 19(1)(a):

153. In the present case it is obvious that the only justification for the enactment of the impugned Act is that it imposes reasonable restrictions in the interests of a section of the general public viz. the working journalists and other persons employed in the newspaper establishments. It does not fall within any of the categories specified in Article 19(2) viz. In the interest of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. Article 19(2) being thus out of the question, the only point that falls to be determined by us is whether the provisions of the impugned Act in any way take away or abridge the petitioners, fundamental right of freedom of speech and expression.

154. It was contended before us by the learned Attorney-General that it was only legislation directly dealing with the right mentioned in Article 19(1)(a) that was protected by it. If the legislation was not a direct legislation on the subject, Article 19(1)(a) would have no application, the test being not the effect or result of legislation but its subject-matter.

160. It could therefore hardly be urged that the possible effect of the impact of these measures in conceivable cases would vitiate the legislation as such. All the consequences which have been visualized in this behalf by the petitioners viz. the tendency to curtail circulation and thereby narrow the scope of dissemination of information, fetters on the petitioners freedom to choose the means of exercising the right, likelihood of the independence of the press being undermined by having to seek government aid; the imposition of penalty on the petitioner's right to choose the instruments for exercising the freedom or compelling them to seek alternative media etc, would be remote and depend upon various factors which may or may not come into play. Unless these were the direct or inevitable consequences of the measures enacted in the impugned Act, it would not be possible to strike down the legislation as having that effect and operation. A possible eventuality of this type would not necessarily be the consequence which could be in the contemplation of the legislature while enacting a measure of this type for the benefit of the workmen concerned.

161. Even though the impugned Act enacts measures for the benefit of the working journalists who are employed in newspaper establishments, the working journalists are but the vocal organs and the necessary agencies for the exercise of the right of free speech and expression, and any legislation directed towards the amelioration of their conditions of service must necessarily affect the newspaper establishments and have its repercussions on the freedom of press. The impugned Act can therefore be legitimately characterized as a measure which affects the press, and if the intention or the proximate effect and operation of the Act was such as to bring it within the mischief of Article 19(1)(a) it would certainly be liable to be struck down. The real difficulty, however, in the way of the petitioners is that whatever be the measures enacted for the benefit of the working journalists neither the intention nor the effect and operation of the impugned act is to take away or abridge the right of freedom of speech and expression enjoyed by the petitioners.

162. The gravamen of the complaint of the petitioners against the impugned Act, however, has been the appointment of the Wage Board for fixation of rates of wages for the working journalists and it is contended that apart from creating a class of privileged workers with benefits and rights which were not conferred upon other employees of industrial establishments, the act has left the fixation of rates of wages to an agency invested with arbitrary and uncanalised powers to impose an indeterminate burden on the wage structure of the press, to impose such employer-employee relations as in its discretion it thinks fit and to impose such burden and relations for such time as it thinks proper. This contention will be more appropriately dealt with while considering the alleged infringement of the fundamental right enshrined in Article 19(1)(g). Suffice it to say that so far as Article 19(1)(a) is concerned this contention also has a remote bearing on the same and need not be discussed here at any particular length. Challenge qua Article 19(1)(g) 209. This attack of the petitioners on the constitutionality of the impugned Act under Article 19(1)(g) that it violates the petitioners' fundamental right to carry on business, therefore fails except in regard to Section 5(1)(a)(iii) thereof which being clearly severable from the rest of the provisions, can be struck down as unconstitutional without invalidating the other parts of the impugned Act.

18) In succinct, the Constitution Bench of this Court in the aforesaid case held that the impugned Act, judged by its provisions, was not such a law but was a beneficent legislation intended to regulate the conditions of service of the working journalists and the consequences that were adverted to in that case could not be the direct and inevitable result of it. It also expressed the view that although there could be no doubt that liberty of the press was an essential part of the freedom of speech and expression guaranteed under Article 19(1)(a) and if the law were to single out the press to lay prohibitive burdens, it would fall outside the protection afforded by Article 19(2), the impugned Act which directly affected the press fall outside the categories of protection mentioned in Article 19(2) had not the effect of taking away or abridging the freedom of speech and expression of the petitioners and did not, therefore, infringe Article 19(1)(a) of the Constitution. Nor could it be held to be violative of Article 19(1)(g) of the Constitution in view of the test of reasonableness laid down by this Court.

19) Alternative challenge to the constitutionality of the Act was on the basis that selecting working journalists for giving favored treatment is violative of Article 14 as it is not a reasonable classification as permissible in the aforesaid Article. The Constitution Bench dealt with this aspect in the following terms:

Challenge qua Article 14

210. Re: Art 14.- The question as formulated is that the impugned Act selected the working journalists for favoured treatment by giving them a statutory guarantee of gratuity, hours of work and leave which other persons in similar or comparable employment had not got and in providing for the fixation of their salaries without following the normal procedure envisaged in the Industrial Disputes Act, 1947. The following propositions are advanced:

1. In selecting the Press industry employers from all industrial employers governed by the ordinary law regulating industrial relations under the Industrial Disputes Act, 1947 and Act 1 of 1955 the impugned Act subjects the Press industry employers to discriminatory treatment.
2. Such discrimination lies in
 - (a) singling out newspaper employees for differential treatment;
 - (b) saddling them with a new burden in regard to a section of their workers in matters of gratuities, compensation, hours of work and wages;
 - (c) devising a machinery in the form of a Pay Commission for fixing the wages of working journalists;
 - (d) not prescribing the major criterion of capacity to pay to be taken into consideration;
 - (e) allowing the Board in fixing the wages to adopt any arbitrary procedure even violating the principle of audi alteram partem;
 - (f) permitting the Board the discretion to operate the procedure of the Industrial Disputes Act for some newspapers and any arbitrary procedure for others;
 - (g) making the decision binding only on the employers and not on the employees, and
 - (h) providing for the recovery of money due from the employers in the same manner as an arrear of land revenue.

3. The classification made by the impugned Act is arbitrary and unreasonable, insofar as it removes the newspaper employers vis-à-vis working journalists from the general operation of the Industrial Disputes Act, 1947 and Act 1 of 1955. 212. We have already set out what the Press Commission had to say in regard to the position of the working journalists in our country. A further passage from the Report may also be quoted in this context:

It is essential to realize in this connection that the work of a journalist demands a high degree of general education and some kind of specialized training. Newspapers are a vital instrument for the education of the masses and it is their business to protect the rights of the people, to reflect and guide public opinion and to criticize the wrong done by any individual or organization however high placed. They thus form an essential adjunct to democracy. The

profession must, therefore, be manned by men of high intellectual and moral qualities. The journalists are in a sense creative artists and the public rightly or wrongly, expect from them a general omniscience and a capacity to express opinion on any topic that may arise under the sun. Apart from the nature of their work the conditions under which that work is to be performed, are peculiar to this profession. Journalists have to work at very high pressure and as most of the papers come out in the morning, the journalists are required to work late in the night and round the clock. The edition must go to press by a particular time and all the news that breaks before that hour has got to find its place in that edition. Journalism thus becomes a highly specialized job and to handle it adequately a person should be well-read, have the ability to size up a situation and to arrive quickly at the correct conclusion, and have the capacity to stand the stress and strain of the work involved. His work cannot be measured, as in other industries, by the quantity of the output, for the quality of work is an essential element in measuring the capacity of the journalists. Moreover, insecurity of tenure is a peculiar feature of this profession. This is not to say that no security exists in other professions but circumstances may arise in connection with profession of journalism which may lead to unemployment in this profession, which would not necessarily have that result in other professions. Their security depends to some extent on the whims and caprices of the proprietors. We have come across cases where a change in the ownership of the paper or a change in the editorial policy of the paper has resulted in a considerable change in the editorial staff. In the case of other industries a change in the proprietorship does not normally entail a change in the staff. But as the essential purpose of a newspaper is not only to give news but to educate and guide public opinion, a change in the proprietorship or in the editorial policy of the paper may result and in some cases has resulted in a wholesale change of the staff on the editorial side. These circumstances, which are peculiar to journalism must be borne in mind in framing any scheme for improvement of the conditions of working journalists. (para 512).

213. These were the considerations which weighed with the Press Commission in recommending the working journalists for special treatment as compared with the other employees of newspaper establishments in the matter of amelioration of their conditions of service. 215. The working journalists are thus a group by themselves and could be classified as such apart from the other employees of newspaper establishments and if the legislature embarked upon a legislation for the purpose of ameliorating their conditions of service there was nothing discriminatory about it. They could be singled out thus for preferential treatment against the other employees of newspaper establishments. A classification of this type could not come within the ban of Article 14. The only thing which is prohibited under this article is that persons belonging to a particular group or class should not be treated differently as amongst themselves and no such charge could be levelled against this piece of legislation. If this group of working journalists was specially treated in this manner there is no scope for the objection that that group had a special legislation enacted for its benefit or that a special machinery was created, for fixing the rates of its wages different from the machinery employed for other workmen under the Industrial Disputes Act, 1947. The payment of retrenchment compensation and gratuities, the regulation of their hours of work and the fixation of the rates of their wages as compared with those of other workmen in the newspaper establishments could also be enacted without any such disability and the machinery for fixing their rates of wages by way of

constituting a Wage Board for the purpose could be similarly devised. There was no industrial dispute as such which had arisen or was apprehended to arise as between the employers and the working journalists in general, though it could have possibly arisen as between the employers in a particular newspaper establishment and its own working journalists. What was contemplated by the provisions of the impugned Act, however, was a general fixation of rates of wages of working journalists which would ameliorate the conditions of their service and the constitution of a Wage Board for this purpose was one of the established modes of achieving that object. If, therefore, such a machinery was devised for their benefit, there was nothing objectionable in it and there was no discrimination as between the working journalists and the other employees of newspaper establishments in that behalf.

216. Even considering the Act as a measure of social welfare legislation the State could only make a beginning somewhere without embarking on similar legislations in relation to all other industries and if that was done in this case no charge could be levelled against the State that it was discriminating against one industry as compared with the others. The classification could well be founded on geographical basis or be according to objects or occupations or the like. The only question for consideration would be whether there was a nexus between the basis of classification and the object of the Act sought to be challenged. In our opinion, both the conditions of permissible classification were fulfilled in the present case. The classification was based on an intelligible differentia which distinguished the working journalists from other employees of newspaper establishments and that differentia had a rational relation to the object sought to be achieved viz. the amelioration of the conditions of service of working journalists.

20) The above position has been reiterated by this Court in the form of observations in *Express Publications (Madurai) Ltd. vs. Union of India (2004) 11 SCC 526*. The relevant portion of the said judgment is extracted hereunder:

29. The observations in the judgment were pressed into service in support of the contention that freedom of speech and expression would be adversely affected by continuing the definition of excluded employee in respect of the newspaper industry which has been singled out for harsh treatment. As can be seen from above, observations have been made in a different context. In any case, the decision, far from supporting the contention of the petitioners, in fact, to an extent lends support to the benefit that was given to the employees of the newspaper industry in the year 1956 as a result of the impugned provision. It has to be remembered that in spreading information, the employees of newspaper industry play a dominant role and considering the employees of newspaper industry as a class, this benefit was extended almost at the same time when the Working Journalists Act was enacted. Thus, there can be no question of any adverse effect on the freedom of press. The financial burden on the employer, on facts as herein, cannot be said to be a harsh treatment. The contention that now the petitioners are unable to bear the financial burden which they have been bearing for the last over forty-five years is wholly irrelevant. It is for the petitioners to manage their affairs if they intend to continue with their activity as newspaper establishment.

31. This Court noticed that the journalists are but the vocal organs and the necessary agencies for the exercise of the right of free speech and expression and any legislation directed towards the amelioration of their conditions of service must necessarily affect the newspaper

establishments and have its repercussions on the freedom of press. The impugned Act can, therefore, be legitimately characterised as a measure which affects the press and if the intention or the proximate effect and operation of the Act was such as to bring it within the mischief of Article 19(1)(a), it would certainly be liable to be struck down. The real difficulty, however, in the way of the petitioners is that whatever be the measures enacted for the benefit of the working journalists neither the intention nor the effect and operation of the impugned Act is

to take away or abridge the right of freedom of speech and expression enjoyed by the petitioners. The question of violation of right of freedom of speech and expression as guaranteed under Article 19(1)(a) in the present case on account of additional burden as a result of the impugned provision does not arise.

34. In the light of the aforesaid principles, in *Express Newspaper* the Court considered whether the Act impugned therein violated the fundamental right guaranteed under Article 14. It was observed that in framing the Scheme, various circumstances peculiar to the press had to be taken into consideration. These considerations weighed with the Press Commission in recommending special treatment for working journalists in the matter of amelioration of their conditions of service. The position as prevailing in other countries was also noticed. In a nutshell, the working journalists were held as a group by themselves and could be classified as such. If the legislature embarked upon a legislation for the purpose of ameliorating their conditions of service, there was nothing discriminatory about it. They could be singled out for preferential treatment. It was opined that classification of this type could not come within the ban of Article 14. Considering the position in regard to the alleged discrimination between press industry employers on one hand and the other industrial employers on the other, it was said that even considering the Act as a measure of social welfare legislation, the State could only make a beginning somewhere without embarking on similar legislations in relation to all other industries and if that was done in this case no charge could be levelled against the State that it was discriminating against one industry as compared with the others. The classification could well be founded on geographical basis or be according to objects or occupations or the like. The only question for consideration would be whether there was a nexus between the basis of classification and the object of the Act sought to be achieved. Both the conditions of permissible classification were fulfilled. The classification was held to be based on an intelligible differentia which had a rational relation to the object sought to be achieved viz. the amelioration of the conditions of service of working journalists. The attack on constitutionality of the Act based on Article 14 was negatived.

35. Though challenge in the aforesaid case was to special treatment to working journalists but what is to be seen is, that the press industry was held to be a class by itself. The definition of newspaper employee takes into its fold all the employees who are employed to do any work in, or in relation to, any newspaper establishment. The decision in *Express Newspaper* case amply answers the main contention about the press industry having been singled out, against the petitioners. This decision also holds that to provide social welfare legislation and grant benefit, a beginning had to be made somewhere without embarking on similar legislation in relation to other industries. The fact that even after about half a century similar benefit has not been extended to the employees of any other industry, will not result in invalidation of benefit given

to employees of press industry. It is not for us to decide when, if at all, to extend the benefit to others. In view of the aforesaid, we are unable to accept the contention that the impugned provision is violative of Article 14 on the ground that it singles out newspaper industry by excluding income test only in regard to the said industry.

36. Apart from the fact that it may not be always possible to grant to everyone all benefits in one go at the same time, it seems that the impugned provision and the enacting of the Working Journalists Act was part of a package deal and that probably is the reason for other newspaper establishments not challenging it and the petitioners also challenging it only after lapse of so many years. Further, Sections 2(i), 4 and Schedule I of the Provident Fund Act show how gradually the scope of the Act has been expanded by the Central Government and the Act and Scheme made applicable to various branches of industries. From whatever angle we may examine, the attack on the constitutional validity based on Article 14 cannot be accepted. Challenge qua Amendment Act, 1974.

21) The petitioners herein have also challenged the *vires* of the Amendment Act, 1974 on the ground that extending the benefit of the Act to employees other than working journalists is against the object that was sought to be achieved by the original Act since the benefits to other newspaper employees has no rational nexus between the differentia and the object sought to be achieved. In this regard, as already discussed, challenge as to the singling out of the newspaper industry per se was rejected by the Constitution Bench in *Express Newspaper (P) Ltd. (supra)* and the newspaper industry was held to be a class by itself. All that the 1974 amendment did was to only bring the other employees of the newspaper industry (i.e. non-working journalists) into the ambit of the Act and extend the benefits of the Act to them. Thus, the same is also covered as per the reasoning of the Constitution Bench decision of this Court. Therefore, the challenge as to the Amendment Act, 1974 stands disallowed.

22) Although, the aspect of violation of Article 14 was intricately decided by the Constitution Bench, it is the stand of the petitioners herein that while there may have been some justification for dealing only with newspaper establishments in 1955, however, with the revolution in information technology, there is no justification for confining regulation only to print media as in the existing scenario persons engaged in the same avocation (journalism) would be subject to different restrictions and would be unreasonably hampered in the social and industrial relations with each other. Further, it is submitted by the petitioners that the classification between journalists in newspaper establishments and others does not bear any relationship with the object. Therefore, the continuation of such a provision would create a disadvantaged class i.e. newspaper establishments without there being a rational basis for the same and consequently affecting both the incentive and capacity to achieve the object for which classification is made. After the very lapse of a long period from the date of enactment of the Act and the connected change of circumstances during this period has made the law discriminatory as it is now arbitrarily confined to a selected group out of a large number of other persons similarly situated. Henceforth, it is the stand of the petitioners that the grab of constitutionality that the Act may have possessed earlier has worn out and its constitutionality is open to a successful challenge.

23) While this argument may be as appealing as it sounds, yet we are not inclined to interfere on this point of challenge in order to maintain the equity among parties. It is important that this Court appreciates the realm of Article 14 of the Constitution in the light of the interest of both employers and the employees and not in one-sided manner. The argument of the petitioners that it is violative of Article 14 is one version of the story i.e. employers grievance, whereas this Court must look into the perspective of employees also while determining the issue at hand.

24) For the ensuing two reasons, this Court is opting for not to interfere on this alleged ground of challenge. Firstly, the petitioners cannot espouse the grievance of those employees working in the electronic media for non-inclusion and, more particularly, when those employees are not before this Court. Secondly, the fact that similar benefits are not extended to the employees of other similar industry will not result in invalidation of benefit given to the employees of press industry. Recalling that media industry is still an upcoming sector unlike the press industry, which is as ancient as our independence itself, the scope for potential policies in future cannot be overruled. In view of the same, this ground of challenge is rejected.

25) As regards the second ground of challenge, i.e., the Act over the passage of time has outlived its utility and the object that was sought to be achieved originally has become obsolete especially in view of the fact that Wage Boards for other industries have been abolished, it is our cogent opinion that mere passage of time by itself would not result in the invalidation of the Act and its object. The validity once having been upheld by a Constitution Bench of this Court in *Express Newspapers (P) Ltd. (supra)*, the same cannot be now challenged saying that it has outlived its object and purpose and has been worn out by the passage of time. The principles laid down in *Motor General Traders v. State of Andhra Pradesh* (1984) 1 SCC 222 and *Ratan Arya v. State of Tamil Nadu* (1986) 3 SCC 385 are squarely inapplicable as has been held in the context of identical factual scenario. 26) When this Court was considering the case of a newspaper establishment qua para 82 of the Employees Provident Funds Scheme in *Express Publications (Madurai) Ltd. (supra)*, the said judgment also puts the challenge as to the vires of the Act like the one made by the petitioners in the present case, but beyond pale of any doubt, it consciously reiterates the spirit of law laid down in *Express Newspaper (P) Ltd. (supra)*.

27) The petitioners relied on the Report of the Second National Commission of Labour to contend that the Act has become archaic. In this regard, it is relevant to note that the aforementioned Report is not relevant, as the Government has not accepted the said Report insofar as the Statutory Wage Boards are concerned. Thus, any observation in the said Report as to the non-requirement of Wage Boards generally, cannot be the basis for not complying with the statutory obligations under the Act. Insofar as the 2002 National Commission of Labour Report is concerned, as stated above, the same has not been accepted by the Government of India, in respect of the functioning of the Act.

28) In the light of the aforesaid discussion, we are of the opinion that the challenge as to the vires of the Act on the premise of it being ultra vires the Constitution and violative of fundamental rights is wholly unfounded, baseless and completely untenable.

29) It is true that newspaper industry, with the advent of electronic media, continues to face greater challenges similar to the ones as observed by the Press Commission as noted in the *Express Newspaper (P) Ltd. (supra)* enumerated hereinabove. Thus, the contention of the petitioners that though the newspaper industry may be growing, the growth of the electronic media is relatively exponential, in fact, substantiates the very necessity of why a wage board for working journalists and other newspaper employees of the newspaper industry should exist.

Improper Constitution of the Wage Boards

30) As reiterated hitherto, the Wage Boards constituted under Sections 9 and 13C of the Act are required to be comprised of 10 members i.e. one Chairman, three independent members, three representatives for employers and three representatives for employees. On behalf of the petitioners herein (newspaper management), it was contended that there was a defect in the constitution of the Wage Boards as Mr. K.M. Sahani and Mr. Prasanna Kumar were not independent members thus, it fatally vitiates the constitution and proceedings of the Majithia Wage Boards. On the other hand, it was pointed out by learned Solicitor General for the Union of India and the employees that the constitution of the Wage Boards have been undertaken strictly in accordance with the Act and the Independent Members, so required, under Sections 9(c) and 13C(c) of the Act have been appointed in accordance with the law. Let us examine this point of strife based on the factual matrix.

31) The petitioners main ground of challenge to Mr. K.M. Sahnis independence is that since at the relevant time he was a former Secretary of Ministry of Labour and Employment, Government of India and during his tenure the decision to constitute the Wage Board was taken and, thus, he cannot be expected to be an independent and free from bias. It is seen from the materials placed on record by the Union of India that in order to operationalize the Boards, Shri K.M. Sahni, who had superannuated as Secretary to Government of India on 31.12.2006 was appointed as Member- Secretary on 24.01.2007 for a period of three years or till the duration of the Wage Board, whichever is earlier. Merely because a person was in the employment of the Government, he does not cease to become independent for the purposes of being an independent member of the Committee to recommend the fixing of wages.

32) Similar fact underlying this issue has been the subject-matter of this Court in *State of Andhra Pradesh v. Narayana Velur Beedi Manufacturing Factory* (1973) 4 SCC 178, and it is only necessary to set out the summary thereof given by A.N. Grover, J.:

9. In our judgment the view which has prevailed with the majority of the High Courts must be sustained. The committee or the advisory board can only tender advice which is not binding on the Government while fixing the minimum wages or revising the same as the case may be. Of course, the Government is expected, particularly in the present democratic set-up, to take that advice seriously into consideration and act on it but it is not bound to do so. The language of Section 9 does not contain any indication whatsoever that persons in the employment of the Government would be excluded from the category of independent persons. Those words have essentially been employed in contradistinction to representatives of employer and employees. In other words, apart from the representatives of employers and employees there should be persons who should be independent of them. It does not follow that persons in the service or

employ of the Government were meant to be excluded and they cannot be regarded as independent persons vis-à-vis the representatives of the employers and employees. Apart from this the presence of high government officials who may have actual working knowledge about the problems of employers and employees can afford a good deal of guidance and assistance in formulating the advice which is to be tendered under Section 9 to the appropriate Government. It may be that in certain circumstances such persons who are in the service of the Government may cease to have an independent character if the question arises of fixation of minimum wages in a scheduled employment in which the appropriate Government is directly interested. It would, therefore, depend upon the facts of each particular case whether the persons who have been appointed from out of the class of independent persons can be regarded as independent or not. But the mere fact that they happen to be government officials or government servants will not divest them of the character of independent persons. We are not impressed with the reasoning adopted that a government official will have a bias, or that he may favour the policy which the appropriate Government may be inclined to adopt because when he is a member of an advisory committee or board he is expected to give an impartial and independent advice and not merely carry out what the Government may be inclined to do. Government officials are responsible persons and it cannot be said that they are not capable of taking a detached and impartial view.

33) Consequently, merely because Shri K.M. Sahni was a part of the Government that took the decision to set up the Wage Boards, does not automatically follow that he ceased to be an independent member of the Wage Boards. We are satisfied that Shri K.M. Sahni is an independent member of the Board and cannot be considered to be biased in any manner.

34) The petitioners also allege that Mr. P.N. Prasanna Kumar, as an experienced journalist and having been associated with various journalistic institutions in his long journalistic career, cannot be considered to be an independent member and, therefore, was biased in favour of the employees. Learned Solicitor General has rightly pointed out that only vague and general allegations have been alleged against him and no specific allegations that he acted in a manner that was biased against the employers has been levied by the petitioners.

35) It is well-settled that mere apprehension of bias is not enough and there must be cogent evidence available on record to come to the conclusion. Reference may be made to *Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant* (2001) 1 SCC 182 in the following words:

10. The word bias in popular English parlance stands included within the attributes and broader purview of the word malice, which in common acceptation means and implies spite or ill-will (Strouds Judicial Dictionary, 5th Edn., Vol. 3) and it is now well settled that mere general statements will not be sufficient for the purposes of indication of ill-will. There must be cogent evidence available on record to come to

the conclusion as to whether in fact there was existing a bias which resulted in the miscarriage of justice.

36) This Court, in *State of Punjab v. V.K. Khanna* (2001) 2 SCC 330, has held as follows:

8. The test, therefore, is as to whether there is a mere apprehension of bias or there is a real danger of bias and it is on this score that the surrounding circumstances must and ought to be

collated and necessary conclusion drawn therefrom. In the event, however, the conclusion is otherwise that there is existing a real danger of bias administrative action cannot be sustained. If on the other hand allegations pertain to rather fanciful apprehension in administrative action, question of declaring them to be unsustainable on the basis therefor, would not arise.

37) The contention of the petitioners alleging bias against independent members of the Wage Boards, being based merely on their past status, is entirely baseless in law and amounts to imputing motives. Further, the petitioners have nowhere established or even averred that the independent members are guilty of legal bias as expressed in *Perspective Publications v. State of Maharashtra* (1969) 2 SCR 779, that is, making their recommendations on the basis of wholly extraneous considerations or personal or pecuniary benefit.

38) On perusal of the materials available, we are satisfied that the Wage Boards have functioned in a fully balanced manner. Besides, it is a fact that the petitioners had challenged the constitution of the Wage Board before the High Court of Delhi, admittedly, the High Court had declined to grant interim relief. The said order declining/refusing to grant interim relief attained finality as the petitioners did not choose to challenge it before this Court. Thereafter, the petitioners have participated in the proceedings and acquiesced themselves with the proceedings of the Board. In view of the fact that they have participated in the proceedings without seriously having challenged the constitution as well as the composition, the petitioners cannot now be allowed to challenge the same at this stage. More so, it is also pertinent to take note of the fact that the petitioners herein opted for challenging the independence of the nominated independent members only after the recommendations by the Wage Boards were notified by the Central Government.

39) Hence, the attack of the petitioners on the independence of the appointed independent members by saying that they were not sufficiently neutral, impartial or unbiased towards the petitioners herein, is incorrect in the light of factual matrix and cannot be raised at this point of time when they willfully conceded to the proceedings. Consequently, we are not inclined to accept this ground of challenge.

40) Apart from the challenge to the independence of the members, the petitioners also contended that two separate Wage Boards ought to have been constituted instead of a common wage board. It is relevant to point out that ever since the 1974 amendment only a common wage board was being constituted. The Financial Memorandum accompanying the Working Journalists (Conditions of Service) and Miscellaneous Provisions (Amendment) Bill, 1974 specifically states that the intention is to constitute Wage Boards under the said Section 9 and proposed Section 13C as far as possible at the same time and to have a common Chairman and a common Secretariat for both the Boards. Further, it is brought to our notice that the Palekar Tribunal (1980), Bachawat Wage Board (1989) and Manisana Wage Board (2000) constituted after 1974 amendment were all common Boards/Tribunal for both working journalists and non-journalists. Though the members representing employers were common, they were not incapacitated in any manner as is being contended by the petitioners. They were having two votes as they were representing the employers in both the Boards.

41) In addition, the representatives from the employers side are common in both the Wage Boards as all types of newspaper employees, either working journalists or non-journalists found to be working under common employers. Having common representatives of the employers on the two Wage Boards are expected to be favorable to the employers as they can make a fair assessment of the requirements of the working journalists and non- journalist newspaper employees of the newspaper industry as a whole. However, as the two Wage Boards have separate entities meant for working journalists and non-journalist newspaper employees, there cannot be common representatives who can protect the interest and represent working journalists as well as non-journalist newspaper employees. Therefore, members representing working journalists were nominated to the Wage Board for the working journalists. Similarly, members representing non- journalist newspaper employees were nominated to the Wage Boards for non- journalist newspaper employees. As aforesaid, for administrative convenience, four independent members, including the Chairman were common for both the Wage Boards. In our cogent view, this arrangement in no way affects the interest of the employers and the challenge of the petitioners in this regard is unfounded.

Irregularity in the procedure followed by Majithia Wage Boards

42) Learned counsel for the petitioners pointed out to a series of factual aspects to demonstrate that there existed irregularity in the decision making process by the Majithia Wage Board which was attacked as ultra vires the Act and contrary to procedure adopted by the predecessor Wage Boards. In succinct, the stand of the petitioners is that Majithia Wage Board Report was prepared in a hasty manner and subsequently, the recommendations have been accepted by the Central Government without proper hearing or affording opportunity to all the stakeholders. Whereas the respondent Union of India clearly contended otherwise and submitted that the impugned Wage Boards throughout adopted a fair procedure, which stands the test of natural justice. Besides, it is the stand of the respondents that the representatives of the management were not cooperating but were merely attending the Wage Board proceedings, therefore, the Chairman was not getting adequate aid and help from the representatives of the newspaper owners.

43) Broadly, the petitioners foremost contention is that the Wage Boards have not functioned in accordance with the law inasmuch as no questionnaire was issued to elicit information to determine the capacity to pay and that principles of natural justice were not followed in conducting the proceedings and for arriving at the recommendations, which was the accustomed procedure of previous Wage Boards. At the outset, it is relevant to point out that under Section 11(1) of the Act, Wage Board has special powers to regulate its own procedure. It is not obligatory for the Wage Boards to follow the exact procedure of the earlier Wage Boards and as such there is no requirement in law to follow a strictly laid down procedure in its functioning. Besides, as long as it follows the principles of natural justice and fairness, its functioning cannot be called into question on the ground of irregularity in the procedure. Now, let us examine the submissions of the petitioners in this light.

44) It is brought to our notice that detailed questionnaire was issued on 24.07.2007. The petitioners in their opening arguments contended that no questionnaire was issued. However, the Union of India placed voluminous documents to demonstrate that a detailed questionnaire

was in fact issued on 24.07.2007 and that this questionnaire was commented upon and it was corrected also and further respondents also received replies pursuant to the same. The petitioners in their rejoinder have attempted to make a feeble argument that the said questionnaire was issued by the secretariat and not by the Wage Boards, which is fit to be rejected.

45) It is also brought to our notice that several attempts were made by the Wage Boards to get the relevant information from the employers but many of the petitioners had not given financial data and abstained from attending the Boards proceedings. Records produced show that the questionnaire was sent to all the subscribers listed in the directory of newspaper establishments published by INS for the year 2008-09 and the list supplied by the PTI for sending financial information from 2000-01 to 2009-

10. Regular follow up with the employers was made and series of letters were issued to collect financial information. Apart from the questionnaire, notices inviting representation as per Section 10(1) of the Act were published in 125 newspapers. Further, on 05.07.2010, summons were issued to around one hundred and forty stake holders and they were given final chance to submit the information within fifteen days of the summons. In addition to this, a two page simplified questionnaire was also issued on 02.03.2010.

46) Consequently, the allegation that only 40 establishments have been used as parameters which is

under-representative of the industry is incorrect. In fact, as has been detailed in the Report, the data from newspaper establishments was not forthcoming (*vide* pages 100-101 of Majithia Wage Board Report). With all these efforts, financial information could be collected from only sixty-six establishments and after scrutiny, it was found that financial information received from only forty establishments was useful in developing an overall view of the financial status of the newspaper industry. Therefore, it was only upon much effort and repeated requests that the data in respect of 40 establishments could be collected by the Wage Board. Besides, these 40 establishments are representatives of the different class of newspaper establishments that are carrying on business in the country and in addition detailed submissions by representative groups such as the Indian Newspaper Society (INS) were also considered. Thus, it can certainly be construed that these representative bodies presented an overview of the whole newspaper industry, apart from the information being collected from the individual establishments.

50) The petitioners main ground of challenge vis-à-vis the procedure adopted by the impugned Wage Boards is that they were not given reasonable time to reflect on the issues. However, we have carefully examined all the proceedings of the Wage Boards and we are satisfied that the Wage Boards conducted a series of meetings and gave ample opportunities to the employers. The employers were given opportunity of both written and oral representations to make their point of view known to the Board and consequently the decision making process stands valid. In this respect, we are of the view that the petitioners cannot be allowed to take advantage of their own wrong and impugn the recommendations of the Wage Boards as not being based on their data when they eluded to submit the said data in the first place.

51) In respect of the petitioners argument that the Classification of newspaper establishments and newspaper agencies adopted by the Wage Boards is arbitrary and not supported by the majority, it is brought to our notice that a perusal of the resolution adopted on 21.12.2010 shows that representatives of employees agreed for 11 classifications and representatives of employers opposed the said pattern of classification. Later, the classification of the newspaper establishments was made into eight classes on the basis of Gross Turnover. Therefore, if at all anybody is aggrieved by the recommendation of the Wage Board to adopt eight classifications, it is the employees and not the employers. Further, no prejudice is caused to the employers and they cannot make this as a ground to challenge the report.

52) The petitioners also contended by relying upon two resolutions passed by the Wage Board that the Wage Board was not allowed to function independently and was treated with contempt by the Secretariat of the Wage Board and the officials of the Wage Board. One of the resolutions relied upon by the petitioners dealt with an issue pertaining to raising of exorbitant travel bill. It is brought to our notice that it was in this context that the Chairman and Members of the Wage Board expressed their concern that issues pertaining to the Wage Board should not be directly dealt with by the Ministry and it has to be referred to the Ministry by the Secretariat after obtaining the permission of the Chairman. The other resolution/minutes record the proceedings of the meeting with the Minister for Labour and Employment. These two resolutions cannot be relied upon to contend that the Board was not allowed to function independently and was treated with contempt. These two resolutions have no bearing on the ultimate recommendations made by the Board and, thus, cannot be relied upon by the petitioners to impugn the recommendations themselves.

53) Numerous such incidental contentions vis-à-vis procedure adopted by the Wage Boards were alleged which, in our considered view, is not of such grave nature that it calls for withdrawing the recommendations of Wage Boards. In this light, after having exhaustively gone through the record of proceedings and various written communications, we are fully satisfied that the Wage Boards proceedings had been conducted and carried out in a legitimate approach and no decision of the Wage Board is perceived to having been taken unilaterally or arbitrarily. Rather all decisions were reached in a coherent manner in the presence of all the Wage Board members after having processed various statistics and we find no irregularity in the procedure adopted by the impugned Wage Boards. Majithia Wage Boards overlooked the relevant aspects and considered extraneous factors while drafting the recommendations

54) It is the view of the petitioners that the recommendation of Justice Majithia Wage Boards is defective and faulty and deserves to be rejected at the outset as it overlooked the relevant aspects and considered extraneous factors while drafting the impugned report. The first ground on which the report is alleged to be defective is that the members of the Wage Board failed to consider the crucial element of capacity to pay of the individual newspaper establishments as it wrongly premised its analysis of the capacity to pay of gross revenue while approving the impugned report.

55) In *Express Newspaper (P) Ltd case (supra)*, this Court held that the capacity of the newspaper industry to pay is one of the essential circumstances to be taken into consideration while fixing rates of wages under the Act. In that case, the decision of the Wage Board was set

aside on the ground that it failed to consider the capacity of the industry to pay the revised rates of wages. Consequently, Section 10(2) of the Act was inserted which gives the statutory recognition to the requirement of taking into consideration the capacity of the employer to pay.

56) Chapter XIV, titled Capacity to pay of the Newspaper industry (A Financial Assessment) of the Justice Majithia Report, elaborately discusses on the aspect of capacity to pay. However, it is the stand of the petitioners that although the Report purportedly examines the capacity to pay, such evaluation is directly contrary to the principles and accepted material factors which the Report itself identifies as governing a legally sound consideration of the capacity to pay. The relevant portion of the report in pages 101 to 102 is as under:-

The gross revenue of newspaper establishments comprises revenue through advertisements, circulation and other sources relating to newspaper activities and miscellaneous income accrued from investments, interests, rent etc. The gross revenue can be taken as one of the indicators to judge the health of the newspaper establishments. Strictly speaking several discounted factors are required to be taken in to consideration from the gross revenues to make actual assessments of the capacity of the newspaper establishments. But in absence of such parameters, it was decided to rely broadly on gross revenue.

57) The petitioners major point of reliance is surfaced on the observation in the report which acknowledges that there are other factors along with gross revenue which need to be considered for determining the capacity to pay of the establishments which the report did not ultimately consider thus it will be appropriate to reject the report.

58) On the other hand, it is the stand of the Union of India that in the absence of availability of such parameters for the assessment of capacity to pay of the newspaper establishments, it is judicially accepted methodology to determine the same on the basis of gross revenue and relied on the observations in *Indian Express Newspapers (Pvt.) Ltd. (supra)*:-

16) In view of the amended definition of the newspaper establishment under Section 2(d) which came into operation retrospectively from the inception of the Act and the Explanation added to Section 10(4), and in view further of the fact that in clubbing the units of the establishment together, the Board cannot be said to have acted contrary to the law laid down by this Court in *Express Newspapers* case, the classification of the newspaper establishments on all-India basis for the purpose of fixation of wages is not bad in law. Hence it is not violative of the petitioners rights under Articles 19(1)(a) and 19(1)(g) of the Constitution.

Financial capacity of an all-India newspaper establishment has to be considered on the basis of the gross revenue and the financial capacity of all the units taken together. Hence, it cannot be said that the petitioner-companies as all-India newspaper establishments are not viable whatever the financial incapacity of their individual units. After amendment of Section 2(d) retrospectively read with the addition of the Explanation to Section 10(4), the old provisions can no longer be pressed into service to contend against the grouping of the units of the all-India establishments, into one class.

59) After perusing the relevant documents, we are satisfied that comprehensive and detailed study has been carried out by the Wage Board by collecting all the relevant material information for the purpose of the Wage Revision. The recommendations are arrived at after weighing the

pros and cons of various methods in the process and principles of the Wage Revision in the modern era. It cannot be held that the wage structure recommended by the Majithia Wage Board is unreasonable.

60) The other issue in regard to which there was elaborate submission is the issue pertaining to recommendations of the Wage Board in regard to news agencies. It is the stand of the petitioners that even though this Court had expressly held that news agencies, including PTI, stood on a separate footing from newspapers inter alia because they did not have any advertisement revenue and, hence, the wages will have to be fixed separately and independently for the news agencies, the impugned Wage Boards failed to take note of the said relevant aspect.

61) Learned counsel for the respondent contended by stating that capacity to pay of news agencies was determined on the basis of the capacity to earn of the news agencies in every Wage Board. It was further submitted that the burden of revised wages was met by the news agencies on every occasion by revising the subscription rate. Thereby submitting that the recommendation vis-à-vis the news agencies was a reasoned one.

62) This Court has a limited jurisdiction to look into this aspect. The interference is allowed to a limited extent to examine the question as to whether the Wage Board has considered the capacity to pay of the News Agencies. It would be inapposite for this Court to question the decision of the specialized board on merits especially when the Board was constituted for this sole purpose.

63) The second point of contention of petitioners is of introducing new concepts such as variable pay in an arbitrary manner. Regarding variable pay recommended by the Majithia Wage Board, learned counsel for the petitioners submitted that there is no basis for providing payment of variable pay and equally there is no basis for providing variable pay as a percentage of basic pay which makes the payment of variable pay open-ended. According to them, the recommendation in this regard is totally unreasonable, irrational and places an extra and unnecessary burden on the newspaper establishments. Consequently, it was asserted that there is complete non-application of mind to insert the so-called variable pay concept (similar to Grade Pay of Sixth Pay Commission) in the Majithia Wage Boards recommendation, even though the basic conditions, objectives and anomalies are absent.

64) However, the stand of the respondents is that there is gradation of variable pay and allowances according to the size of the establishments wherein smaller establishments are required to pay at a lower rate compared to larger establishments. It may be pointed out that in the Manisana Wage Board, which is the predecessor to the Majithia Board, did recommend a similar dispensation though it did not specifically call it variable pay. Manisana Wage Board recommended a certain percentage of basic pay for the newspaper employees, which is similar to variable pay in the Majithia Wage Board recommendations. While such dispensation was included in the basic pay in the Manisana Wage Board instead of being shown separately, the Majithia Wage Board categorized basic pay and variable pay separately. Accordingly, the concept of variable pay is not newly introduced, though the terminology may have differed in Manisana and Majithia Wage Boards. The Wage Boards have followed well-settled norms while making recommendations about variable pay. Further, the explanation to Section 2(eee)

which defines wages specifically includes within the term wages new allowances, if any, of any description fixed from time to time. Therefore, the Wage Board was well within its jurisdiction to recommend payment of variable pay.

65) There was also a submission on behalf of the petitioners that Majithia Wage Board has simply copied the recommendations of the Sixth Central Pay Commission, which is not correct. We have carefully scrutinized all the details. It is clear that the recommendations of the Sixth Central Pay Commission have not been blindly imported/relied upon by the Majithia Wage Board. The concept of variable pay contained in the recommendations of the Sixth Central Pay Commission has been incorporated into the Wage Board recommendations only to ensure that the wages of the newspaper employees are at par with those employees working in other Government sectors. Such incorporation was made by the Majithia Wage Board after careful consideration, in order to ensure equitable treatment to employees of newspaper establishments, and it was well within its rights to do so.

66) It is further seen that the Wage Board has recommended grant of 100% neutralization of dearness allowance. Fifth Pay Commission granted the same in 1996. Since then, public sector undertakings, banks and even the private sector are all granting 100% neutralization of dearness allowance. The reference to decisions prior to 1995 is irrelevant.

67) Lastly, the contention of the petitioners that the Wage Boards have not taken into account regional variations in submitting their recommendations is also not correct. It is clear from the report that the Wage Boards have categorized the HRA and Transport Allowance into X, Y and Z category regions, which reflects that the cost on accommodation and transport in different regions in the country was considered. Furthermore, there is gradation of variable pay and allowances according to the size of the establishments wherein smaller establishments are required to pay those at a lower rate compared to larger establishments. Hence, we are satisfied that the Wage Boards followed certain well laid down principles and norms while making recommendations.

68) It is true that the Wage Boards have made some general suggestions for effective implementation of Wage Awards which is given separately in Chapter 21 of the Report of the Majithia Wage Boards of Working Journalists and Non-Journalists Newspaper and News Agency Employees. It is brought to our notice that the Government has not accepted all these suggestions including those pertaining to retirement age, pension, paternity leave, etc. as these are beyond the main objective for which the Wage Boards were constituted. Regarding fixation of pay, assured career development, there have been proposals in the recommendations which are in the manner of providing higher pay scale after completion of certain number of years which cannot be treated as time bound promotion. Similarly, the establishments have also been categorized on the basis of their turnover, thus, taking into consideration the capacity of various establishments to pay.

69) It is useful to refer Section 12 of the Act which deals with the powers of Central Government to enforce recommendations of the Wage Board. It reads as under:

12 - Powers of Central Government to enforce recommendations of the Wage Board

(1) As soon as may be, after the receipt of the recommendations of the Board, the Central Government shall make an order in terms of the recommendations or subject to such modifications, if any, as it thinks fit, being modifications which, in the opinion of the Central Government, do not effect important alterations in the character of the recommendations.

(2) Notwithstanding anything contained in sub-section (1), the Central Government may, if it thinks fit,--

(a) make such modifications in the recommendations, not being modifications of the nature referred to in sub-section (1), as it thinks fit:

Provided that before making any such modifications, the Central Government shall cause notice to be given to all persons likely to be affected thereby in such manner as may be prescribed, and shall take into account any representations which they may make in this behalf in writing; or

(b) refer the recommendations or any part thereof to the Board, in which case, the Central Government shall consider its further recommendations and make an order either in terms of the recommendations or with such modifications of the nature referred to in sub-section (1) as it thinks fit.

(3) Every order made by the Central Government under this section shall be published in the Official Gazette together with the recommendations of the Board relating to the order and the order shall come into operation on the date of publication or on such date, whether prospectively or retrospectively, as may be specified in the order.

70) Thus, it is the prerogative of the Central Government to accept or reject the recommendations of the Wage Boards. There is no scope for hearing the parties once again by the Central Government while accepting or modifying the recommendations, except that the modifications are of such nature which alter the character of the recommendations and such modification is likely to affect the parties. The mere fact that in the present case, the Government has not accepted a few recommendations will not automatically affect the validity of the entire report. Further, the Government has not accepted all those suggestions including those pertaining to retirement age, etc. as these are beyond the mandate for which the Wage Boards were constituted. Regarding fixation of pay, assured career development, there have been proposals in the recommendations which are in the manner of providing higher pay scale after completion of certain number of years which cannot be treated as time bound promotion.

71) Accordingly, we hold that the recommendations of the Wage Boards are valid in law, based on genuine and acceptable considerations and there is no valid ground for interference under Article 32 of the Constitution of India.

72) Consequently, all the writ petitions are dismissed with no order as to costs.

73) In view of our conclusion and dismissal of all the writ petitions, the wages as revised/determined shall be payable from 11.11.2011 when the Government of India notified the recommendations of the Majithia Wage Boards. All the arrears up to March, 2014 shall be paid to all eligible persons in four equal installments within a period of one year from today and continue to pay the revised wages from April, 2014 onwards.

74) In view of the disposal of the writ petitions, the contempt petition is closed.

Shreya Singhal v. Union of India

(2015) 5 SCC 1

R.F. Nariman, J. (for himself and J. Chelameswar, J.): 1. This batch of writ petitions filed under Article 32 of the Constitution of India raises very important and far-reaching questions relatable primarily to the fundamental right of free speech and expression guaranteed by Article 19(1)(a) of the Constitution of India. The immediate cause for concern in these petitions is Section 66A of the Information Technology Act of 2000. This Section was not in the Act as originally enacted, but came into force by virtue of an Amendment Act of 2009 with effect from 27.10.2009. Since all the arguments raised by several counsel for the petitioners deal with the unconstitutionality of this Section it is set out hereinbelow: (refer to the Section).

2. A related challenge is also made to Section 69A introduced by the same amendment which reads as follows:- (refer to the Section).

3. The Statement of Objects and Reasons appended to the Bill which introduced the Amendment Act stated in paragraph 3 that:

“3. A rapid increase in the use of computer and internet has given rise to new forms of crimes like publishing sexually explicit materials in electronic form, video voyeurism and breach of confidentiality and leakage of data by intermediary, e-commerce frauds like personation commonly known as Phishing, identity theft and offensive messages through communication services. So, penal provisions are required to be included in the Information Technology Act, the Indian Penal code, the Indian Evidence Act and the code of Criminal Procedure to prevent such crimes.”

4. The petitioners contend that the very basis of Section 66A - that it has given rise to new forms of crimes - is incorrect, and that Sections 66B to 67C and various Sections of the Indian Penal Code (which will be referred to hereinafter) are good enough to deal with all these crimes.

5. The petitioners' various counsel raised a large number of points as to the constitutionality of Section 66A. According to them, first and foremost Section 66A infringes the fundamental right to free speech and expression and is not saved by any of the eight subjects covered in Article 19(2). According to them, the causing of annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill-will are all outside the purview of Article 19(2). Further, in creating an offence, Section 66A suffers from the vice of vagueness because unlike the offence created by Section 66 of the same Act, none of the aforesaid terms are even attempted to be defined and cannot be defined, the result being that innocent persons are roped in as well as those who are not. Such persons are not told clearly on which side of the line they fall; and it would be open to the authorities to be as arbitrary and whimsical as they like in booking such persons under the said Section. In fact, a large number of innocent persons have been booked and many instances have been given in the form of a note to the Court. The enforcement of the said Section would really be an insidious form of censorship which impairs a core value contained in Article 19(1)(a). In addition, the said Section has a chilling effect on the freedom of speech and expression. Also, the right of viewers is infringed as such chilling effect would not give them the benefit of many shades of grey in terms of various points of view that could be viewed over the internet.

The petitioners also contend that their rights under Articles 14 and 21 are breached inasmuch there is no intelligible differentia between those who use the internet and those who by words spoken or written use other mediums of communication. To punish somebody because he uses a particular medium of communication is itself a discriminatory object and would fall foul of Article 14 in any case.

6. In reply, Mr. Tushar Mehta, learned Additional Solicitor General defended the constitutionality of Section 66A. He argued that the legislature is in the best position to understand and appreciate the needs of the people. The Court will, therefore, interfere with the legislative process only when a statute is clearly violative of the rights conferred on the citizen under Part-III of the Constitution. There is a presumption in favour of the constitutionality of an enactment. Further, the Court would so construe a statute to make it workable and in doing so can read into it or read down the provisions that are impugned. The Constitution does not impose impossible standards of determining validity. Mere possibility of abuse of a provision cannot be a ground to declare a provision invalid. Loose language may have been used in Section 66A to deal with novel methods of disturbing other people's rights by using the internet as a tool to do so. Further, vagueness is not a ground to declare a statute unconstitutional if the statute is otherwise legislatively competent and non-arbitrary. He cited a large number of judgments before us both from this Court and from overseas to buttress his submissions.

Freedom of Speech and Expression

8. The Preamble of the Constitution of India *inter alia* speaks of liberty of thought, expression, belief, faith and worship. It also says that India is a sovereign democratic republic. It cannot be over emphasized that when it comes to democracy, liberty of thought and expression is a cardinal value that is of paramount significance under our constitutional scheme.

9. Various judgments of this Court have referred to the importance of freedom of speech and expression both from the point of view of the liberty of the individual and from the point of view of our democratic form of government. For example, in the early case of *Romesh Thappar v. State of Madras*, [1950] S.C.R. 594 at 602, this Court stated that freedom of speech lay at the foundation of all democratic organizations. In *Sakal Papers (P) Ltd. & Ors. v. Union of India*, [1962] 3 S.C.R. 842 at 866, a Constitution Bench of this Court said freedom of speech and expression of opinion is of paramount importance under a democratic constitution which envisages changes in the composition of legislatures and governments and must be preserved. In a separate concurring judgment Beg, J. said, in *Bennett Coleman & Co. & Ors. v. Union of India & Ors.*, [1973] 2 S.C.R. 757 at 829, that the freedom of speech and of the press is the Ark of the Covenant of Democracy because public criticism is essential to the working of its institutions.

10. Equally, in *S. Khushboo v. Kanniamal & Anr.*, (2010) 5 SCC 600 this Court stated, in paragraph 45 that the importance of freedom of speech and expression though not absolute was necessary as we need to tolerate unpopular views. This right requires the free flow of opinions and ideas essential to sustain the collective life of the citizenry. While an informed citizenry is a pre-condition for meaningful governance, the culture of open dialogue is generally of great societal importance.

Incidentally, the Ark of the Covenant is perhaps the single most important focal point in Judaism.

The original ten commandments which the Lord himself gave to Moses was housed in a wooden chest which was gold plated and called the Ark of the Covenant and carried by the Jews from place to place until it found its final repose in the first temple - that is the temple built by Solomon.

11. This last judgment is important in that it refers to the “market place of ideas” concept that has permeated American Law. This was put in the felicitous words of Justice Holmes in his famous dissent in *Abrams v. United States*, 250 US 616 (1919), thus:

“But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.”

12. Justice Brandeis in his famous concurring judgment in *Whitney v. California*, 71 L. Ed. 1095 said:

“Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law-the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed. Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it.

Advocacy of lawbreaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.” (at page 1105, 1106)

13. This leads us to a discussion of what is the content of the expression “freedom of speech and expression”. There are three concepts which are fundamental in understanding the reach of this most basic of human rights. The first is discussion, the second is advocacy, and the third is incitement. Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in.³ It is at this stage that a law may be made curtailing the speech or expression that leads inexorably to or tends to cause public disorder or tends to cause or tends to affect the sovereignty & integrity of India, the security of the State, friendly relations with foreign States, etc. Why it is important to have these three concepts in mind is because most of the arguments of both petitioners and respondents tended to veer around the expression “public order”.

14. It is at this point that a word needs to be said about the use of American judgments in the context of Article 19(1)(a). In virtually every significant judgment of this Court, reference has been made to judgments from across the Atlantic. Is it safe to do so?

15. It is significant to notice first the differences between the US First Amendment and Article 19(1)(a) read with Article 19(2). The first important difference is the absoluteness of the U.S. first Amendment – Congress shall make no law which abridges the freedom of speech. Second, whereas the U.S. First Amendment speaks of freedom of speech and of the press, without any reference to “expression”, Article 19(1)(a) speaks of freedom of speech and expression without any reference to “the press”. Third, under the US Constitution, speech may be abridged, whereas under our Constitution, reasonable restrictions may be imposed. Fourth, under our Constitution such restrictions have to be in the interest of eight designated subject matters - that is any law seeking to impose a restriction on the freedom of speech can only pass muster if it is proximately related to any of the eight subject matters set out in Article 19(2).

16. Insofar as the first apparent difference is concerned, the U.S. Supreme Court has never given literal effect to the declaration that Congress shall make no law abridging the freedom of speech. The approach of the Court which is succinctly stated in one of the early U.S. Supreme Court Judgments, continues even today. In *Chaplinsky v. New Hampshire*, 86 L. Ed. 1031, Justice Murphy who delivered the opinion of the Court put it thus:-

“Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or

'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' *Cantwell v. Connecticut*, 310 U.S. 296, 309, 310, 60 S.Ct. 900, 906, 84 L.Ed.1213, 128 A.L.R. 1352." (at page 1035)

17. So far as the second apparent difference is concerned, the American Supreme Court has included "expression" as part of freedom of speech and this Court has included "the press" as being covered under Article 19(1)(a), so that, as a matter of judicial interpretation, both the US and India protect the freedom of speech and expression as well as press freedom. Insofar as abridgement and reasonable restrictions are concerned, both the U.S. Supreme Court and this Court have held that a restriction in order to be reasonable must be narrowly tailored or narrowly interpreted so as to abridge or restrict only what is absolutely necessary. It is only when it comes to the eight subject matters that there is a vast difference. In the U.S., if there is a compelling necessity to achieve an important governmental or societal goal, a law abridging freedom of speech may pass muster. But in India, such law cannot pass muster if it is in the interest of the general public. Such law has to be covered by one of the eight subject matters set out under Article 19(2). If it does not, and is outside the pale of 19(2), Indian courts will strike down such law.

18. Viewed from the above perspective, American judgments have great persuasive value on the content of freedom of speech and expression and the tests laid down for its infringement. It is only when it comes to sub-serving the general public interest that there is the world of a difference. This is perhaps why in *Kameshwar Prasad & Ors. v. The State of Bihar & Anr.*, 1962 Supp. (3) S.C.R. 369, this Court held:

"As regards these decisions of the American Courts, it should be borne in mind that though the First Amendment to the Constitution of the United State reading "Congress shall make no law.... abridging the freedom of speech..." appears to confer no power on the Congress to impose any restriction on the exercise of the guaranteed right, still it has always been understood that the freedom guaranteed is subject to the police power – the scope of which however has not been defined with precision or uniformly. It is on the basis of the police power to abridge that freedom that the constitutional validity of laws penalising libels, and those relating to sedition, or to obscene publications etc., has been sustained. The resultant flexibility of the restrictions that could be validly imposed renders the American decisions inapplicable to and without much use for resolving the questions arising under Art. 19(1) (a) or (b) of our Constitution wherein the grounds on which limitations might be placed on the guaranteed right are set out with definiteness and precision." (At page 378)

19. But when it comes to understanding the impact and content of freedom of speech, in *Indian Express Newspapers (Bombay) Private Limited & Ors. v. Union of India & Ors.*, (1985) 2 SCR 287, Venkataramiah, J. stated:

“While examining the constitutionality of a law which is alleged to contravene Article 19 (1) (a) of the Constitution, we cannot, no doubt, be solely guided by the decisions of the Supreme Court of the United States of America. But in order to understand the basic principles of freedom of speech and expression and the need for that freedom in a democratic country, we may take them into consideration. The pattern of Article 19 (1) (a) and of Article 19 (1) (g) of our constitution is different from the pattern of the First Amendment to the American Constitution which is almost absolute in its terms. The rights guaranteed under Article 19 (1) (a) and Article 19 (1) (g) of the Constitution are to be read along with clauses (2) and (6) of Article 19 which carve out areas in respect of which valid legislation can be made.” (at page 324)

20. With these prefatory remarks, we will now go to the other aspects of the challenge made in these writ petitions and argued before us.

A. Article 19(1)(a) –

Section 66A has been challenged on the ground that it casts the net very wide – “all information” that is disseminated over the internet is included within its reach. It will be useful to note that Section 2(v) of Information Technology Act, 2000 defines information as follows:

“2. **Definitions.**—(1) In this Act, unless the context otherwise requires,—

(v) “Information” includes data, message, text, images, sound, voice, codes, computer programmes, software and databases or micro film or computer generated micro fiche.”

Two things will be noticed. The first is that the definition is an inclusive one. Second, the definition does not refer to what the content of information can be. In fact, it refers only to the medium through which such information is disseminated. It is clear, therefore, that the petitioners are correct in saying that the public’s right to know is directly affected by Section 66A. Information of all kinds is roped in – such information may have scientific, literary or artistic value, it may refer to current events, it may be obscene or seditious. That such information may cause annoyance or inconvenience to some is how the offence is made out. It is clear that the right of the people to know – the market place of ideas – which the internet provides to persons of all kinds is what attracts Section 66A. That the information sent has to be annoying, inconvenient, grossly offensive etc., also shows that no distinction is made between mere discussion or advocacy of a particular point of view which may be annoying or inconvenient or grossly offensive to some and incitement by which such words lead to an imminent causal connection with public disorder, security of State etc. The petitioners are right in saying that Section 66A in creating an offence against persons who use the internet and annoy or cause inconvenience to others very clearly affects the freedom of speech and expression of the citizenry of India at large in that such speech or expression is directly curbed by the creation of the offence contained in Section 66A. In this regard, the observations of Justice Jackson in *American Communications Association v. Douds*, 94 L. Ed. 925 are apposite:

“Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the

Government from falling into error. We could justify any censorship only when the censors are better shielded against error than the censored.”

B. Article 19(2)

One challenge to Section 66A made by the petitioners’ counsel is that the offence created by the said Section has no proximate relation with any of the eight subject matters contained in Article 19(2). We may incidentally mention that the State has claimed that the said Section can be supported under the heads of public order, defamation, incitement to an offence and decency or morality.

21. Under our constitutional scheme, as stated earlier, it is not open to the State to curtail freedom of speech to promote the general public interest. In *Sakal Papers (P) Ltd. & Ors. v. Union of India*, [1962] 3 S.C.R. 842, this Court said:

“It may well be within the power of the State to place, in the interest of the general public, restrictions upon the right of a citizen to carry on business but it is not open to the State to achieve this object by directly and immediately curtailing any other freedom of that citizen guaranteed by the Constitution and which is not susceptible of abridgment on the same grounds as are set out in clause (6) of Article 19. Therefore, the right of freedom of speech cannot be taken away with the object of placing restrictions on the business activities of a citizen. Freedom of speech can be restricted only in the interests of the security of the State, friendly relations with foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. It cannot, like the freedom to carry on business, be curtailed in the interest of the general public. If a law directly affecting it is challenged, it is no answer that the restrictions enacted by it are justifiable under clauses (3) to (6). For, the scheme of Article 19 is to enumerate different freedoms separately and then to specify the extent of restrictions to which they may be subjected and the objects for securing which this could be done. A citizen is entitled to enjoy each and every one of the freedoms together and clause (1) does not prefer one freedom to another. That is the plain meaning of this clause. It follows from this that the State cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom. All the greater reason, therefore for holding that the State cannot directly restrict one freedom by placing an otherwise permissible restriction on another freedom.” (at page 863)

22. Before we come to each of these expressions, we must understand what is meant by the expression “in the interests of”. In *The Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia*, [1960] 2 S.C.R. 821, this Court laid down:

“We do not understand the observations of the Chief Justice to mean that any remote or fanciful connection between the impugned Act and the public order would be sufficient to sustain its validity.

The learned Chief Justice was only making a distinction between an Act which expressly and directly purported to maintain public order and one which did not expressly state the said purpose but left it to be implied there from; and between an Act that directly maintained public order and that indirectly brought about the same result. The distinction does not ignore the necessity for intimate connection between the Act and the public order sought to be maintained by the Act.” (at pages 834, 835)

“The restriction made “in the interests of public order” must also have reasonable relation to the object to be achieved, i.e., the public order. If the restriction has no proximate relationship to the achievement of public order, it cannot be said that the restriction is a reasonable restriction within the meaning of the said clause.” (at page 835)

“The decision, in our view, lays down the correct test. The limitation imposed in the interests of public order to be a reasonable restriction, should be one which has a proximate connection or nexus with public order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with the public order.....There is no proximate or even foreseeable connection between such instigation and the public order sought to be protected under section. We cannot accept the argument of the learned Advocate General that instigation of a single individual not to pay tax or dues is a spark which may in the long run ignite a revolutionary movement destroying public order” (at page 836).

Reasonable Restrictions:

23. This Court has laid down what “reasonable restrictions” means in several cases. In *Chintaman Rao v. The State of Madhya Pradesh*, [1950] S.C.R. 759, this Court said:

“The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in article 19(1)(g) and the social control permitted by clause (6) of article 19, it must be held to be wanting in that quality.” (at page 763)

27. It was argued by the learned Additional Solicitor General that a relaxed standard of reasonableness of restriction should apply regard being had to the fact that the medium of speech being the internet differs from other mediums on several grounds. To appreciate the width and scope of his submissions, we are setting out his written submission verbatim:

“(i) the reach of print media is restricted to one state or at the most one country while internet has no boundaries and its reach is global;

(ii) the recipient of the free speech and expression used in a print media can only be literate persons while internet can be accessed by literate and illiterate both since one click is needed to download an objectionable post or a video;

(iii) In case of televisions serials [except live shows] and movies, there is a permitted pre-censorship which ensures right of viewers not to receive any information which is dangerous to or not in conformity with the social interest. While in the case of an internet, no such pre-censorship is possible and each individual is publisher, printer, producer, director and broadcaster of the content without any statutory regulation;

(iv) In case of print media or medium of television and films whatever is truly recorded can only be published or broadcasted I televised I viewed. While in case of an internet, morphing of images, change of voices and many other technologically advance methods to create serious potential social disorder can be applied.

(v) By the medium of internet, rumors having a serious potential of creating a serious social disorder can be spread to trillions of people without any check which is not possible in case of other mediums.

(vi) In case of mediums like print media, television and films, it is broadly not possible to invade privacy of unwilling persons. While in case of an internet, it is very easy to invade upon the privacy of any individual and thereby violating his right under Article 21 of the Constitution of India.

(vii) By its very nature, in the mediums like newspaper, magazine, television or a movie, it is not possible to sexually harass someone, outrage the modesty of anyone, use unacceptable filthy language and evoke communal frenzy which would lead to serious social disorder. While in the case of an internet, it is easily possible to do so by a mere click of a button without any geographical limitations and almost in all cases while ensuring anonymity of the offender.

(viii) By the very nature of the medium, the width and reach of internet is manifold as against newspaper and films. The said mediums have inbuilt limitations i.e. a person will have to buy / borrow a newspaper and / or will have to go to a theater to watch a movie. For television also one needs at least a room where a television is placed and can only watch those channels which he has subscribed and that too only at a time where it is being telecast. While in case of an internet a person abusing the internet, can commit an offence at any place at the time of his choice and maintaining his anonymity in almost all cases.

(ix) In case of other mediums, it is impossible to maintain anonymity as a result of which speech ideal opinions films having serious potential of creating a social disorder never gets generated since its origin is bound to be known. While in case of an internet mostly its abuse takes place under the garb of anonymity which can be unveiled only after thorough investigation.

(x) In case of other mediums like newspapers, television or films, the approach is always institutionalized approach governed by industry specific ethical norms of self conduct. Each newspaper / magazine / movie production house / TV Channel will have their own institutionalized policies in house which would generally obviate any possibility of the medium being abused. As against that use of internet is solely based upon individualistic approach of each individual without any check, balance or regulatory ethical norms for exercising freedom of speech and expression under Article 19[1] [a].

(xi) In the era limited to print media and cinematograph; or even in case of publication through airwaves, the chances of abuse of freedom of expression was less due to inherent infrastructural and logistical constrains. In the case of said mediums, it was almost impossible for an individual to create and publish an abusive content and make it available to trillions of people. Whereas, in the present internet age the said infrastructural and logistical constrains have disappeared as any individual using even a smart mobile phone or a portable computer device can create and publish abusive material on its own, without seeking help of anyone else and make it available to trillions of people by just one click.”

28. As stated, all the above factors may make a distinction between the print and other media as opposed to the internet and the legislature may well, therefore, provide for separate offences so far as free speech over the internet is concerned. There is, therefore, an intelligible differentia having a rational relation to the object sought to be achieved – that there can be creation of

offences which are applied to free speech over the internet alone as opposed to other mediums of communication. Thus, an Article 14 challenge has been repelled by us on this ground later in this judgment. But we do not find anything in the features outlined by the learned Additional Solicitor General to relax the Court's scrutiny of the curbing of the content of free speech over the internet. While it may be possible to narrowly draw a Section creating a new offence, such as Section 69A for instance, relatable only to speech over the internet, yet the validity of such a law will have to be tested on the touchstone of the tests already indicated above.

29. In fact, this aspect was considered in *Secretary Ministry of Information & Broadcasting, Government of India v. Cricket Association of Bengal*, (1995) 2 SCC 161 in para 37, where the following question was posed: (refer to the judgment).

Public Order

30. In Article 19(2) (as it originally stood) this sub-head was conspicuously absent. Because of its absence, challenges made to an order made under Section 7 of the Punjab Maintenance of Public Order Act and to an order made under Section 9 (1)(a) of the Madras Maintenance of Public Order Act were allowed in two early judgments by this Court. Thus in *Romesh Thappar v. State of Madras*, [1950] S.C.R. 594, this Court held that an order made under Section 9(1)(a) of the Madras Maintenance of Public Order Act (XXIII of 1949) was unconstitutional and void in that it could not be justified as a measure connected with security of the State. While dealing with the expression "public order", this Court held that "public order" is an expression which signifies a state of tranquility which prevails amongst the members of a political society as a result of the internal regulations enforced by the Government which they have established.

31. Similarly, in *Brij Bhushan & Anr. v. State of Delhi*, [1950] S.C.R. 605, an order made under Section 7 of the East Punjab Public Safety Act, 1949, was held to be unconstitutional and void for the self-same reason.

32. As an aftermath of these judgments, the Constitution First Amendment added the words "public order" to Article 19(2).

33. In *Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia*, [1960] 2 S.C.R. 821, this Court held that public order is synonymous with public safety and tranquility; it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State. This definition was further refined in *Dr. Ram Manohar Lohia v. State of Bihar & Ors.*, [1966] 1 S.C.R. 709, where this Court held:

"It will thus appear that just as "public order" in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting "security of State", "law and order" also comprehends disorders of less gravity than those affecting "public order". One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State." (at page 746)

35. We have to ask ourselves the question: does a particular act lead to disturbance of the current life of the community or does it merely affect an individual leaving the tranquility of society

undisturbed? Going by this test, it is clear that Section 66A is intended to punish any person who uses the internet to disseminate any information that falls within the sub-clauses of Section 66A. It will be immediately noticed that the recipient of the written word that is sent by the person who is accused of the offence is not of any importance so far as this Section is concerned. (Save and except where under sub-clause (c) the addressee or recipient is deceived or misled about the origin of a particular message.) It is clear, therefore, that the information that is disseminated may be to one individual or several individuals. The Section makes no distinction between mass dissemination and dissemination to one person. Further, the Section does not require that such message should have a clear tendency to disrupt public order. Such message need not have any potential which could disturb the community at large. The nexus between the message and action that may be taken based on the message is conspicuously absent – there is no ingredient in this offence of inciting anybody to do anything which a reasonable man would then say would have the tendency of being an immediate threat to public safety or tranquility. On all these counts, it is clear that the Section has no proximate relationship to public order whatsoever. The example of a guest at a hotel ‘annoying’ girls is telling – this Court has held that mere ‘annoyance’ need not cause disturbance of public order. Under Section 66A, the offence is complete by sending a message for the purpose of causing annoyance, either ‘persistently’ or otherwise without in any manner impacting public order.

Clear and present danger – tendency to affect.

36. It will be remembered that Justice Holmes in *Schenck v. United States*, 63 L. Ed. 470 enunciated the clear and present danger test as follows:

“...The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. *Gompers v. Buck’s Stove & Range Co.*, 221 U. S. 418, 439, 31 Sup. Ct. 492, 55 L. ed. 797, 34 L. R. A. (N. S.) 874. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.” (At page 473, 474)

37. This was further refined in *Abrams v. United States* 250 U.S. 616 (1919), this time in a Holmesian dissent, to be clear and imminent danger. However, in most of the subsequent judgments of the U.S. Supreme Court, the test has been understood to mean to be “clear and present danger”. The test of “clear and present danger” has been used by the U.S. Supreme Court in many varying situations and has been adjusted according to varying fact situations. It appears to have been repeatedly applied, see- *Terminiello v. City of Chicago* 93 L. Ed. 1131 (1949) at page 1134-1135, *Brandenburg v. Ohio* 23 L. Ed. 2d 430 (1969) at 434-435 & 436, *Virginia v. Black* 155 L. Ed. 2d 535 (2003) at page 551, 552 and 5534.

38. We have echoes of it in our law as well *S. Rangarajan v. P. Jagjivan & Ors.*, (1989) 2 SCC 574 at paragraph 45 (refer to the judgment).

“45. The problem of defining the area of freedom of...In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a “spark in a powder keg”.

Defamation

42. Defamation is defined in Section 499 of the Penal Code as follows: (refer to the Section)

Incitement to an offence:

44. Equally, Section 66A has no proximate connection with incitement to commit an offence. Firstly, the information disseminated over the internet need not be information which “incites” anybody at all. Written words may be sent that may be purely in the realm of “discussion” or “advocacy” of a “particular point of view”. Further, the mere causing of annoyance, inconvenience, danger etc., or being grossly offensive or having a menacing character are not offences under the Penal Code at all. They may be ingredients of certain offences under the Penal Code but are not offences in themselves. For these reasons, Section 66A has nothing to do with “incitement to an offence”. As Section 66A severely curtails information that may be sent on the internet based on whether it is grossly offensive, annoying, inconvenient, etc. and being unrelated to any of the eight subject matters under Article 19(2) must, therefore, fall foul of Article 19(1)(a), and not being saved under Article 19(2), is declared as unconstitutional.

Decency or Morality

45. This Court in *Ranjit Udeshi v. State of Maharashtra* [1965] 1 S.C.R. 65 took a rather restrictive view of what would pass muster as not being obscene. The Court followed the test laid down in the old English judgment in *Hicklin’s case* which was whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. Great strides have been made since this decision in the UK, United States as well as in our country. Thus, in *Director General, Directorate General of Doordarshan v. Anand Patwardhan*, 2006 (8) SCC 433, this Court noticed the law in the United States and said that a material may be regarded as obscene if the average person applying contemporary community standards would find that the subject matter taken as a whole appeals to the prurient interest and that taken as a whole it otherwise lacks serious literary artistic, political, educational or scientific value (see Para 31).

46. In a recent judgment of this Court, *Aveek Sarkar v. State of West Bengal*, 2014 (4) SCC 257, this Court referred to English, U.S. and Canadian judgments and moved away from the Hicklin test and applied the contemporary community standards test.

47. What has been said with regard to public order and incitement to an offence equally applies here. Section 66A cannot possibly be said to create an offence which falls within the expression ‘decency’ or ‘morality’ in that what may be grossly offensive or annoying under the Section need not be obscene at all – in fact the word ‘obscene’ is conspicuous by its absence in Section 66A.

48. However, the learned Additional Solicitor General asked us to read into Section 66A each of the subject matters contained in Article 19(2) in order to save the constitutionality of the provision. We are afraid that such an exercise is not possible for the simple reason that when the legislature intended to do so, it provided for some of the subject matters contained in Article 19(2) in Section 69A. We would be doing complete violence to the language of Section 66A if we were to read into it something that was never intended to be read into it. Further, he argued that the statute should be made workable, and the following should be read into Section 66A:

“(i) Information which would appear highly abusive, insulting, pejorative, offensive by reasonable person in general, judged by the standards of an open and just multi-caste, multi-religious, multi racial society;

(ii) Information which is directed to incite or can produce imminent lawless action

(iii) Information which may constitute credible threats of violence to the person or damage;

(iv) Information which stirs the public to anger, invites violent disputes brings about condition of violent unrest and disturbances;

(v) Information which advocates or teaches the duty, necessity or propriety of violence as a means of accomplishing political, social or religious reform and/or justifies commissioning of violent acts with an intent to exemplify glorify such violent means to 50accomplish political, social, economical or religious reforms

(vi) Information which contains fighting or abusive material;

(vii) Information which promotes hate speech i.e. (a)Information which propagates hatred towards individual or a groups, on the basis of race, religion, religion, casteism, ethnicity, (b)Information which is intended to show the supremacy of one particular religion/race/caste by making disparaging, abusive and/or highly inflammatory remarks against religion/race/caste. (c) Information depicting religious deities, holy persons, holy symbols, holy books which are created to insult or to show contempt or lack of reverence for such religious deities, holy persons, holy symbols, holy books or towards something which is considered sacred or inviolable.

(viii) Satirical or iconoclastic cartoon and caricature which fails the test laid down in *Hustler Magazine, Inc. v. Falwell* 485 U.S. 46 (1988)

(ix) Information which glorifies terrorism and use of drugs;

(x) Information which infringes right of privacy of the others and includes acts of cyber bullying, harassment or stalking.

(xi) Information which is obscene and has the tendency to arouse feeling or revealing an overt sexual desire and should be suggestive of deprave mind and designed to excite sexual passion in persons who are likely to see it.

(xii) Context and background test of obscenity. Information which is posted in such a context or background which has a consequential effect of outraging the modesty of the pictured individual.

49. What the learned Additional Solicitor General is asking us to do is not to read down Section 66A – he is asking for a wholesale substitution of the provision which is obviously not possible.

Vagueness

50. Counsel for the petitioners argued that the language used in Section 66A is so vague that neither would an accused person be put on notice as to what exactly is the offence which has been committed nor would the authorities administering the Section be clear as to on which side of a clearly drawn line a particular communication will fall.

51. We were given Collin's dictionary, which defined most of the terms used in Section 66A, as follows:

“Offensive:-

1. Unpleasant or disgusting, as to the senses
2. Causing anger or annoyance; insulting
3. For the purpose of attack rather than defence.

Menace:-

1. To threaten with violence, danger, etc.
2. A threat of the act of threatening
3. Something menacing; a source of danger
4. A nuisance

Annoy:-

1. To irritate or displease
2. To harass with repeated attacks

Annoyance:-

1. The feeling of being annoyed
2. The act of annoying.

Inconvenience

1. The state of quality of being inconvenient
2. Something inconvenient; a hindrance, trouble, or difficulty

Danger:-

1. The state of being vulnerable to injury, loss, or evil risk
2. A person or a thing that may cause injury pain etc.

Obstruct:-

1. To block (a road a passageway, etc.) with an obstacle
2. To make (progress or activity) difficult.
3. To impede or block a clear view of.

Obstruction:- a person or a thing that obstructs.

Insult:-

1. To treat, mention, or speak to rudely; offend; affront
2. To assault; attack
3. An offensive or contemptuous remark or action; affront; slight
4. A person or thing producing the effect of an affront
5. An injury or trauma.”

52. The U.S. Supreme Court has repeatedly held in a series of judgments that where no reasonable standards are laid down to define guilt in a Section which creates an offence, and where no clear guidance is given to either law abiding citizens or to authorities and courts, a Section which creates an offence and which is vague must be struck down as being arbitrary and unreasonable. Thus, in *Musser v. Utah*, 92 L. Ed. 562, a Utah statute which outlawed conspiracy to commit acts injurious to public morals was struck down.

64. Coming to this Court's judgments, in *State of Madhya Pradesh v. Baldeo Prasad*, [1961] 1 S.C.R. 970 an inclusive definition of the word "goonda" was held to be vague and the offence created by Section 4A of the Goondas Act was, therefore, violative of Article 19(1)(d) and (e) of the Constitution.

67. In *A.K. Roy & Ors. v. Union of India & Ors.*, [1982] 2 S.C.R. 272, a part of Section 3 of the National Security Ordinance was read down on the ground that "acting in any manner prejudicial to the maintenance of supplies and services essential to the community" is an expression so vague that it is capable of wanton abuse.

68. Similarly, in *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569 at para 130-131, it was held:

"130. It is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. It is insisted or emphasized that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basic policy matters to policemen and also judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. More so uncertain and undefined words deployed inevitably lead citizens to "steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked.

69. Judged by the standards laid down in the aforesaid judgments, it is quite clear that the expressions used in 66A are completely open-ended and undefined. Section 66 in stark contrast to Section 66A states: (refer to the Section).

70. It will be clear that in all computer related offences that are spoken of by Section 66, *mens rea* is an ingredient and the expression "dishonestly" and "fraudulently" are defined with some degree of specificity, unlike the expressions used in Section 66A.

71. The provisions contained in Sections 66B up to Section 67B also provide for various punishments for offences that are clearly made out.

72. In the Indian Penal Code, a number of the expressions that occur in Section 66A occur in Section 268. (refer to the Section).

73. It is important to notice the distinction between the Sections 268 and 66A. Whereas, in Section 268 the various expressions used are ingredients for the offence of a public nuisance, these ingredients now become offences in themselves when it comes to Section 66A. Further, under Section 268, the person should be guilty of an act or omission which is illegal in nature – legal acts are not within its net. A further ingredient is that injury, danger or annoyance must

be to the public in general. Injury, danger or annoyance are not offences by themselves howsoever made and to whomsoever made. The expression “annoyance” appears also in Sections 294 and 510 of the IPC: (refer to the Sections).

74. If one looks at Section 294, the annoyance that is spoken of is clearly defined - that is, it has to be caused by obscene utterances or acts. Equally, under Section 510, the annoyance that is caused to a person must only be by another person who is in a state of intoxication and who annoys such person only in a public place or in a place for which it is a trespass for him to enter. Such narrowly and closely defined contours of offences made out under the Penal Code are conspicuous by their absence in Section 66A which in stark contrast uses completely open ended, undefined and vague language.

75. Incidentally, none of the expressions used in Section 66A are defined. Even “criminal intimidation” is not defined – and the definition clause of the Information Technology Act, Section 2 does not say that words and expressions that are defined in the Penal Code will apply to this Act.

76. Quite apart from this, as has been pointed out above, every expression used is nebulous in meaning. What may be offensive to one may not be offensive to another. What may cause annoyance or inconvenience to one may not cause annoyance or inconvenience to another. Even the expression “persistently” is completely imprecise – suppose a message is sent thrice, can it be said that it was sent “persistently”? Does a message have to be sent (say) at least eight times, before it can be said that such message is “persistently” sent? There is no demarcating line conveyed by any of these expressions – and that is what renders the Section unconstitutionally vague.

77. However, the learned Additional Solicitor General argued before us that expressions that are used in Section 66A may be incapable of any precise definition but for that reason they are not constitutionally vulnerable. He cited a large number of judgments in support of this submission. None of the cited judgments dealt with a Section creating an offence which is saved despite its being vague and incapable of any precise definition. In fact, most of the judgments cited before us did not deal with criminal law at all.

79. In fact, two English judgments cited by the learned Additional Solicitor General would demonstrate how vague the words used in Section 66A are. In *Director of Public Prosecutions v. Collins*, (2006) 1 WLR 2223, the very expression “grossly offensive” is contained in Section 127(1)(1) of the U.K. Communications Act, 2003. A 61 year old man made a number of telephone calls over two years to the office of a Member of Parliament. In these telephone calls and recorded messages Mr. Collins who held strong views on immigration made a reference to “Wogs”, “Pakis”, “Black bastards” and “Niggers”. Mr. Collins was charged with sending messages which were grossly offensive. The Leicestershire Justices dismissed the case against Mr. Collins on the ground that the telephone calls were offensive but not grossly offensive. A reasonable person would not so find the calls to be grossly offensive. The Queen’s Bench agreed and dismissed the appeal filed by the Director of Public Prosecutions.

...There can be no yardstick of gross offensiveness otherwise than by the application of reasonably enlightened, but not perfectionist, contemporary standards to the particular message

sent in its particular context. The test is whether a message is couched in terms liable to cause gross offence to those to whom it relates.

80. Similarly in *Chambers v. Director of Public Prosecutions*, [2013] 1 W.L.R. 1833, the Queen's Bench was faced with the following facts:

"Following an alert on the Internet social network, Twitter, the defendant became aware that, due to adverse weather conditions, an airport from which he was due to travel nine days later was closed. He responded by posting several "tweets" on Twitter in his own name, including the following: "Crap! Robin Hood Airport is closed. You've got a week and a bit to get your shit together otherwise I am blowing the airport sky high!" None of the defendant's "followers" who read the posting was alarmed by it at the time. Some five days after its posting the defendant's tweet was read by the duty manager responsible for security at the airport on a general Internet search for tweets relating to the airport. Though not believed to be a credible threat the matter was reported to the police. In interview the defendant asserted that the tweet was a joke and not intended to be menacing. The defendant was charged with sending by a public electronic communications network a message of a menacing character contrary to section 127(1)(a) of the Communications Act 2003. He was convicted in a magistrates' court and, on appeal, the Crown Court upheld the conviction, being satisfied that the message was "menacing per se" and that the defendant was, at the very least, aware that his message was of a menacing character."

81. The Crown Court was satisfied that the message in question was "menacing" stating that an ordinary person seeing the tweet would be alarmed and, therefore, such message would be "menacing". The Queen's Bench Division reversed the Crown Court stating:

"31. Before concluding that a message is criminal on the basis that it represents a menace, its precise terms, and any inferences to be drawn from its precise terms, need to be examined in the context in and the means by which the message was sent.

82. These two cases illustrate how judicially trained minds would find a person guilty or not guilty depending upon the Judge's notion of what is "grossly offensive" or "menacing". Quite obviously, a prospective offender of Section 66A and the authorities who are to enforce Section 66A have absolutely no manageable standard by which to book a person for an offence under Section 66A. This being the case, having regard also to the two English precedents cited by the learned Additional Solicitor General, it is clear that Section 66A is unconstitutionally vague. Ultimately, applying the tests referred to in *Chintaman Rao* and *V.G. Row's* case, referred to earlier in the judgment, it is clear that Section 66A arbitrarily, excessively and disproportionately invades the right of free speech and upsets the balance between such right and the reasonable restrictions that may be imposed on such right.

Chilling Effect And Overbreadth

83. Information that may be grossly offensive or which causes annoyance or inconvenience are undefined terms which take into the net a very large amount of protected and innocent speech. A person may discuss or even advocate by means of writing disseminated over the internet information that may be a view or point of view pertaining to governmental, literary, scientific or other matters which may be unpalatable to certain sections of society. It is obvious that an expression of a view on any matter may cause annoyance, inconvenience or may be grossly

offensive to some. A few examples will suffice. A certain section of a particular community may be grossly offended or annoyed by communications over the internet by “liberal views” – such as the emancipation of women or the abolition of the caste system or whether certain members of a non proselytizing religion should be allowed to bring persons within their fold who are otherwise outside the fold. Each one of these things may be grossly offensive, annoying, inconvenient,

insulting or injurious to large sections of particular communities and would fall within the net cast by Section 66A. In point of fact, Section 66A is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Such is the reach of the Section and if it is to withstand the test of constitutionality, the chilling effect on free speech would be total.

84. Incidentally, some of our judgments have recognized this chilling effect of free speech. In *R. Rajagopal v. State of T.N.*, (1994) 6 SCC 632, this Court held: (refer to para.19 of the judgment).

85. Also in *S. Khushboo v. Kanniammal*, (2010) 5 SCC 600, this Court said:

“47. In the present case, the substance of the controversy does not really touch on whether premarital sex is socially acceptable. Instead, the real issue of concern is the disproportionate response to the appellant's remarks. If the complainants vehemently disagreed with the appellant's views, then they should have contested her views through the news media or any other public platform. The law should not be used in a manner that has chilling effects on the “freedom of speech and expression”.

86. That the content of the right under Article 19(1)(a) remains the same whatever the means of communication including internet communication is clearly established by *Reno's* case (supra) and by *The Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal & Anr.*, (1995) SCC 2 161 at Para 78. It is thus clear that not only are the expressions used in Section 66A expressions of inexactitude but they are also over broad and would fall foul of the repeated injunctions of this Court that restrictions on the freedom of speech must be couched in the narrowest possible terms.

90. We, therefore, hold that the Section is unconstitutional also on the ground that it takes within its sweep protected speech and speech that is innocent in nature and is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down on the ground of overbreadth.

Possibility of an act being abused is not a ground to test its validity:

91. The learned Additional Solicitor General cited a large number of judgments on the proposition that the fact that Section 66A is capable of being abused by the persons who administered it is not a ground to test its validity if it is otherwise valid. He further assured us that this Government was committed to free speech and that Section 66A would not be used to curb free speech, but would be used only when excesses are perpetrated by persons on the rights of others. In *The Collector of Customs, Madras v. Nathella Sampathu Chetty & Anr.*, [1962] 3 S.C.R. 786, this Court observed:

“...This Court has held in numerous rulings, to which it is unnecessary to refer, that the possibility of the abuse of the powers under the provisions contained in any statute is no ground for declaring the provision to be unreasonable or void.

92. In this case, it is the converse proposition which would really apply if the learned Additional Solicitor General’s argument is to be accepted. If Section 66A is otherwise invalid, it cannot be saved by an assurance from the learned Additional Solicitor General that it will be administered in a reasonable manner. Governments may come and Governments may go but Section 66A goes on forever. An assurance from the present Government even if carried out faithfully would not bind any successor Government. It must, therefore, be held that Section 66A must be judged on its own merits without any reference to how well it may be administered.

Severability:

93. The argument of the learned Additional Solicitor General on this score is reproduced by us verbatim from one of his written submissions:

“Furthermore it is respectfully submitted that in the event of Hon’ble Court not being satisfied about the constitutional validity of either any expression or a part of the provision, the Doctrine of Severability as enshrined under Article 13 may be resorted to.”

94. The submission is vague: the learned Additional Solicitor General does not indicate which part or parts of Section 66A can possibly be saved. This Court in *Romesh Thappar v. The State of Madras*, [1950] S.C.R. 594 repelled a contention of severability when it came to the courts enforcing the fundamental right under Article 19(1)(a)

95. It has been held by us that Section 66A purports to authorize the imposition of restrictions on the fundamental right contained in Article 19(1)(a) in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action. We have held following K.A. Abbas’ case (Supra) that the possibility of Section 66A being applied for purposes not sanctioned by the Constitution cannot be ruled out. It must, therefore, be held to be wholly unconstitutional and void.

Article 14

97. Counsel for the petitioners have argued that Article 14 is also infringed in that an offence whose ingredients are vague in nature is arbitrary and unreasonable and would result in arbitrary and discriminatory application of the criminal law. Further, there is no intelligible differentia between the medium of print, broadcast, and real live speech as opposed to speech on the internet and, therefore, new categories of criminal offences cannot be made on this ground. Similar offences which are committed on the internet have a three year maximum sentence under Section 66A as opposed to defamation which has a two year maximum sentence. Also, defamation is a non-cognizable offence whereas under Section 66A the offence is cognizable.

98. We have already held that Section 66A creates an offence which is vague and overbroad, and, therefore, unconstitutional under Article 19(1)(a) and not saved by Article 19(2). We have also held that the wider range of circulation over the internet cannot restrict the content of the right under Article 19(1)(a) nor can it justify its denial. However, when we come to discrimination under Article 14, we are unable to agree with counsel for the petitioners that there is no intelligible differentia between the medium of print, broadcast and real live speech

as opposed to speech on the internet. The intelligible differentia is clear – the internet gives any individual a platform which requires very little or no payment through which to air his views. The learned Additional Solicitor General has correctly said that something posted on a site or website travels like lightning and can reach millions of persons all over the world. If the petitioners were right, this Article 14 argument would apply equally to all other offences created by the Information Technology Act which are not the subject matter of challenge in these petitions. We make it clear that there is an intelligible differentia between speech on the internet and other mediums of communication for which separate offences can certainly be created by legislation. We find, therefore, that the challenge on the ground of Article 14 must fail.

Procedural Unreasonableness

99. One other argument must now be considered. According to the petitioners, Section 66A also suffers from the vice of procedural unreasonableness. In that, if, for example, criminal defamation is alleged, the safeguards available under Section 199 Cr.P.C. would not be available for a like offence committed under Section 66A. Such safeguards are that no court shall take cognizance of such an offence except upon a complaint made by some person aggrieved by the offence and that such complaint will have to be made within six months from the date on which the offence is alleged to have been committed. Further, safeguards that are to be found in Sections 95 and 96 of the Cr.P.C. are also absent when it comes to Section 66A. For example, where any newspaper book or document wherever printed appears to contain matter which is obscene, hurts the religious feelings of some community, is seditious in nature, causes enmity or hatred to a certain section of the public, or is against national integration, such book, newspaper or document may be seized but under Section 96 any person having any interest in such newspaper, book or document may within two months from the date of a publication seizing such documents, books or newspapers apply to the High court to set aside such declaration. Such matter is to be heard by a Bench consisting of at least three Judges or in High Courts which consist of less than three Judges, such special Bench as may be composed of all the Judges of that High Court.

100. It is clear that Sections 95 and 96 of the Criminal Procedure Code reveal a certain degree of sensitivity to the fundamental right to free speech and expression. If matter is to be seized on specific grounds which are relatable to the subject matters contained in Article 19(2), it would be open for persons affected by such seizure to get a declaration from a High Court consisting of at least three Judges that in fact publication of the so-called offensive matter does not in fact relate to any of the specified subjects contained in Article 19(2). Further, Section 196 of the Cr.P.C. states: (refer to the Section).

101. Again, for offences in the nature of promoting enmity between different groups on grounds of religion etc. or offences relatable to deliberate and malicious acts intending to outrage religious feelings or statements that create or promote enmity, hatred or ill-will between classes can only be taken cognizance of by courts with the previous sanction of the Central Government or the State Government. This procedural safeguard does not apply even when a similar offence may be committed over the internet where a person is booked under Section 66A instead of the aforesaid Sections. Having struck down Section 66A on substantive grounds, we need not decide the procedural unreasonableness aspect of the Section.

119. In conclusion, we may summarise what has been held by us above:

(a) Section 66A of the Information Technology Act, 2000 is struck down in its entirety being violative of Article 19(1)(a) and not saved under Article 19(2).

(b) Section 69A and the Information Technology (Procedure & Safeguards for Blocking for Access of Information by Public) Rules 2009 are constitutionally valid.

(c) Section 79 is valid subject to Section 79(3)(b) being read down to mean that an intermediary upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts relating to Article 19(2) are going to be committed then fails to expeditiously remove or disable access to such material. Similarly, the Information Technology “Intermediary Guidelines” Rules, 2011 are valid subject to Rule 3 sub-rule (4) being read down in the same manner as indicated in the judgment.

Justice K. S. Puttaswamy (Retd) v. Union of India
(2017) 10 SCC 1

A Bench of three judges of the Supreme Court while considering Constitutional challenge to the Aadhar card scheme of the Union Government noted in its order dated 11-8-2015 that the norms for and compilation of demographic biometric data by the government was questioned on the ground that it violates the right to privacy. The Attorney-general for India states that existence of a fundamental right to privacy is in doubt in view of two decisions, the first *MP Sharma 1954 SC* rendered by a bench of 8 judges and second in *Kharak Singh, 1963 SC 1295* rendered by a bunch of 6 Judges. Each of these decisions in the submission of the Attorney General contain observation that the Indian Constitution does not specifically protect the right to privacy. On the other hand the submission of petitioner was that *MP Sharma case* and *Kharak Singh case* were founded on the principle of expounded in *A K Gopalan AIR 1950 SC*, which construed each provision contained in the chapter fundamental rights as embodying a distinct protection, was held not to be good law by an 11 judge bench in *Rustom Cavasjee Cooper, (1970) 1 SCC*. Hence, the petitioner submitted that the basis of two earlier decisions is not valid. Moreover, it was also urged that the 7 judges bench decision in *Maneka Gandhi, 1978 SCC*, the minority judgment of Subba Rao, J. in *Kharak Singh case* was specifically approved and the decision of the majority was overruled.

On 18-7-2017, a constitution bench presided over by the Chief Justice considered it appropriate that the issue be resolved by a bench of 9 Judges. The order of the Constitution Bench read: “It seems that it has become essential for us to determine whether there is any fundamental right to privacy under the Indian Constitution. The determination of this question would essentially entail whether the decision recorded by the supreme court in *MP Sharma case* by 8 Judges Constitution bench, and also in *Kharak Singh case* by 6 judge constitution bench, that there is no such fundamental right, is the correct expression of the constitutional provision.”

Thus, the following two questions arose for consideration by the present bench:

- 1- Whether there is any fundamental right of privacy under the Constitution and if so, where is it located and what are its Contours?
- What is the ratio decidendi of *MP Sharma* and *Kharak Singh cases* and whether those cases are rightly decided?

The nine-judge Constitution Bench proceeded to hear and decide all aspects of right of privacy as contained in the Constitution of India

D.Y. Chandrachud, J :

What, then, does privacy postulate?

297. What, then, does privacy postulate? Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of

the individual. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy. The body and the mind are inseparable elements of the human personality. The integrity of the body and the sanctity of the mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop. Without the ability to make choices, the inviolability of the personality would be in doubt. Recognizing a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself....

298. Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably intertwined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realisation of the full value of life and liberty... The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised...

The following passages from different opinions reflect the aforesaid proposition:

D.Y. Chandrachud, J. (for Khehar, C.J; Agrawal, J; himself and Nazeer, J):

Natural and Inalienable rights

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. In 1690, *John Lockehad* in his *Second Treatise of Government* observed that the lives, liberties and estates of individuals are as a matter of fundamental natural law, a private preserve. The idea of a private preserve was to create barriers from outside interference. In 1765, *William Blackstone* in his *Commentaries on the Laws of England* spoke of a “natural liberty”. There were, in his view, absolute rights which were vested in the individual by the immutable laws of nature. These absolute rights were divided into rights of personal security, personal liberty and property. The right of personal security involves a legal and uninterrupted enjoyment of life, limbs, body, health and reputation by an individual.

43.The notion that certain rights are inalienable was embodied in the *American Declaration of Independence* (1776) in the following terms:

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain *unalienable rights*, that among these are life, liberty and the pursuit of happiness.”

The term “inalienable rights” was incorporated in the *Declaration of the Rights of Man and of the Citizen* (1789) adopted by the French National Assembly in the following terms:

“For its drafters, to ignore, to forget or to depreciate the rights of man are the sole causes of public misfortune and government corruption. *These rights are natural rights, inalienable and sacred*, the

National Assembly recognizes and proclaims them—it does not grant, concede or establish them—and their conservation is the reason for all political communities; within these rights figures resistance to oppression.”

44. In 1921, *Roscoe Pound*, in his work titled *The Spirit of the Common Law*, explained the meaning of natural rights:

“Natural rights mean simply interests which we think ought to be secured; demands which human beings may make which we think ought to be satisfied. It is perfectly true that neither law nor State creates them. But it is fatal to all sound thinking to treat them as legal conceptions. For legal rights, the devices which law employs to secure such of these interests as it is expedient to recognize, are the work of the law and in that sense the work of the State.” [Roscoe Pound, *The Spirit of the Common Law* (Marshall Jones Company, 1921) at p. 92.]

46. Natural rights are not bestowed by the State. They are inherent in human beings because they are human. They exist equally in the individual irrespective of class or strata, gender or orientation.

Interpretation of the Constitution

259. The interpretation of the Constitution cannot be Frozen by its original understanding. The constitution has evolved and must continuously evolve to meet the aspiration and challenges of the present and the future. Nor can judges foresee every challenge and contingency which may arise in the future. This is particularly of relevance in an age where Technology reshapes our fundamental understanding of Information and knowledge and human relationship that was unknown even in the recent past. Hence as judges interpreting the constitution today the court must leave open the path for succeeding generation to meet the challenges to privacy that may be unknown today.

324. The Constitution must evolve with the felt necessities of time to meet the challenges thrown up in a democratic order governed by the rule of law. The meaning of the Constitution cannot be frozen on the perspectives present when it was adopted. Technological change has given rise to concerns which were not present seven decades ago and the rapid growth of technology may render obsolescent many notions of the present. Hence the interpretation of the Constitution must be resilient and flexible to allow future generations to adapt its content bearing in mind its basic or essential features.

Contours of privacy

248 Privacy has been held to have distinct connotations including (i) spatial control; (ii) decisional autonomy; and (iii) informational control.

Spatial control denotes the creation of private spaces. Decisional autonomy comprehends intimate personal choices such as those governing reproduction as well as choices expressed in public such as faith or modes of dress. Informational control empowers the individual to use privacy as a shield to retain personal control over information pertaining to the person.

Privacy -Concept Connotations/Facets

322. Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy subserves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty.

326. Privacy has both positive and negative content. The negative content restrains the State from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the State to take all necessary measures to protect the privacy of the individual.”

Types of privacy

Chandrachud, J. (for Khehar, C.J., Agrawal, J., himself and Nazcer, J.) (contd.) recognized the following major types of privacy: **(Para 249 and 250)**

1. **Bodily privacy**, which corresponds to physical body privacy. The inability to stop others from harming one’s body or from restricting the freedom of bodily mobility is implicit in this, and it is a form of negative freedom.
2. **Spatial privacy**, intimate relationships and family life are good examples of this, which is mirrored in the privacy of a private space through which access by others can be controlled to the space.
3. **Communicational privacy**, which is demonstrated by the ability to limit access to communications or regulate how information is shared with third parties.
4. **Proprietary privacy**, which is represented by a person’s interest in using the property as a way of keeping certain items, facts, or information private from others.
5. **Intellectual privacy**, which is characterised by a person’s desire for their own peace of mind and the freedom to form their own thoughts and beliefs.
6. **Decisional privacy**, indicated by the capacity to make intimate choices, which are largely sexual or reproductive choices or those involving intimate relationships.
7. **Associational privacy**, which is characterised by the ability of the individual to choose who she wishes to interact with
8. **Behavioural privacy**, which acknowledges a person’s privacy interests even when they engage in activities that are visible to the public. According to the theory of behavioural privacy, even when access is provided to others, the person has the right to control the scope of access and maintain some degree of privacy from unauthorised intrusion.
9. **Informational privacy**, which demonstrates a desire to limit who has access to information and restrict the spread of information about oneself.

Chelameswar, J. (concurring)

375. The right to privacy is certainly one of the core freedoms which is to be defended. It is part of liberty within the meaning of that expression in Article 21

Right to privacy- limitations

377. It goes without saying that no legal right can be absolute. Every right has limitations. This aspect of the matter is conceded at the Bar. Therefore, even a fundamental right to privacy has limitations. The limitations are to be identified on case-to-case basis depending upon the nature of the privacy interest claimed. There are different standards of review to test infractions of fundamental rights. While the concept of reasonableness overarches Part III, it operates differently across Articles (even if only slightly differently across some of them). Having emphatically interpreted the Constitution's liberty guarantee to contain a fundamental right to privacy, it is necessary for me to outline the manner in which such a right to privacy can be limited. I only do this to indicate the direction of the debate as the nature of limitation is not at issue here.

378. To begin with, the options canvassed for limiting the right to privacy include an Article 14 type reasonableness enquiry [A challenge under Article 14 can be made if there is an unreasonable classification and/or if the impugned measure is arbitrary. The classification is unreasonable if there is no intelligible differentia justifying the classification and if the classification has no rational nexus with the objective sought to be achieved. Arbitrariness, which was first explained at para 85 of *E.P. Royappa v. State of T.N.*, (1974) 4 SCC 3 : 1974 SCC (L&S) 165 : AIR 1974 SC 555, is very simply the lack of any reasoning.] ; limitation as per the express provisions of Article 19; a just, fair and reasonable basis (that is, substantive due process) for limitation per Article 21; and finally, a just, fair and reasonable standard per Article 21 plus the amorphous standard of “compelling State interest”. The last of these four options is the highest standard of scrutiny [A tiered level of scrutiny was indicated in what came to be known as the most famous footnote in constitutional law, that is, fn 4 in *United States v. Carolene Products Co.*, 1938 SCC OnLine US SC 93 : 82 L Ed 1234 : 304 US 144 (1938). Depending on the graveness of the right at stake, the court adopts a correspondingly rigorous standard of scrutiny.] that a court can adopt. It is from this menu that a standard of review for limiting the right to privacy needs to be chosen.

379. At the very outset, if a privacy claim specifically flows only from one of the expressly enumerated provisions under Article 19, then the standard of review would be as expressly provided under Article 19. However, the possibility of a privacy claim being entirely traceable to rights other than Article 21 is bleak. Without discounting that possibility, it needs to be noted that Article 21 is the bedrock of the privacy guarantee. If the spirit of liberty permeates every claim of privacy, it is difficult, if not impossible, to imagine that any standard of limitation other than the one under Article 21 applies. It is for this reason that I will restrict the available options to the latter two from the above described four.

380. The just, fair and reasonable standard of review under Article 21 needs no elaboration. It has also most commonly been used in cases dealing with a privacy claim hitherto. [*District Registrar and Collector v. Canara Bank*, (2005) 1 SCC 496 : AIR 2005 SC 186] , [*State of Maharashtra v. Bharat Shanti Lal Shah*, (2008) 13 SCC 5] *Gobind* [*Gobind v. State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468] resorted to the compelling State interest standard in addition to the Article 21 reasonableness enquiry. From the United States, where the terminology of “compelling State interest” originated, a strict standard of scrutiny comprises two things—a “compelling State interest” and a requirement of “narrow tailoring” (narrow tailoring means that the law must be narrowly framed to achieve the objective). As a term, “compelling State interest” does not have definite contours in the US. Hence, it is critical that this standard be adopted with some clarity as to when and in what types of privacy claims it is to be used. Only in privacy claims

which deserve the strictest scrutiny is the standard of compelling State interest to be used. As for others, the just, fair and reasonable standard under Article 21 will apply. When the compelling State interest standard is to be employed, must depend upon the context of concrete cases. However, this discussion sets the ground rules within which a limitation for the right to privacy is to be found.”

S.A. Bobde, J. (Concurring)

415. Therefore, privacy is the necessary condition precedent to the enjoyment of any of the guarantees in Part III. As a result, when it is claimed by rights bearers before constitutional courts, a right to privacy may be situated not only in Article 21, but also simultaneously in any of the other guarantees in Part III. In the current state of things, Articles 19(1), 20(3), 25, 28 and 29 are all rights helped up and made meaningful by the exercise of privacy. This is not an exhaustive list. Future developments in technology and social ordering may well reveal that there are yet more constitutional sites in which a privacy right inheres that are not at present evident to us.

521. In the Indian context, a fundamental right to privacy would cover at least the following three aspects:

- Privacy that involves the person i.e. when there is some invasion by the State of a person's rights relating to his physical body, such as the right to move freely;
- Informational privacy which does not deal with a person's body but deals with a person's mind, and therefore recognises that an individual may have control over the dissemination of material that is personal to him. Unauthorised use of such information may, therefore lead to infringement of this right; and
- The privacy of choice, which protects an individual's autonomy over fundamental personal choices.

For instance, we can ground physical privacy or privacy relating to the body in Articles 19(1)(d) and (e) read with Article 21; ground personal information privacy under Article 21; and the privacy of choice in Articles 19(1)(a) to (c), 20(3), 21 and 25. The argument based on “privacy” being a vague and nebulous concept need not, therefore, detain us.

R.F. Nariman, J. (Concurring)

No absolute right- Restrictions

Legitimate State Interests

14 As far as citizen-state relations are concerned, the Constitution was framed to balance the rights of the individual against legitimate State interests. Being transformative, it has to be interpreted to meet the needs of a changing society. As the interpreter of the Constitution, it is the duty of this Court to be vigilant against State action that threatens to upset the fine balance between the power of the state and rights of citizens and to safeguard the liberties that are inherent in our citizens.

Recognizing that the right to privacy is not absolute, the judgment recognizes that legitimate state interests may be a valid ground for the curtailment of the right subject to the tests laid down for the protection of rights.

526. But this is not to say that such a right is absolute. This right is subject to reasonable regulations made by the State to protect legitimate State interests or public interest. However, when it comes to restrictions on this right, the drill of various articles to which the right relates must be scrupulously followed. For example, if the restraint on privacy is over fundamental personal choices that an individual is to make, State action can be restrained under Article 21 read with Article 14 if it is arbitrary and unreasonable; and under Article 21 read with Article 19(1)

(a) only if it relates to the subjects mentioned in Article 19(2) and the tests laid down by this Court for such legislation or subordinate legislation to pass muster under the said article. Each of the tests evolved by this Court, qua legislation or executive action, under Article 21 read with Article 14; or Article 21 read with Article 19(1)(a) in the aforesaid examples must be met in order that State action pass muster. In the ultimate analysis, the balancing act that is to be carried out between individual, societal and State interests must be left to the training and expertise of the judicial mind.

Right to privacy- Inalienability

532. The learned counsel for the petitioners also referred to another important aspect of the right to privacy. According to the learned counsel for the petitioner this right is a natural law right which is inalienable. Indeed, the reference order itself, in para 12, refers to this aspect of the fundamental right contained. It was, therefore, argued before us that given the international conventions referred to hereinabove and the fact that this right inheres in every individual by virtue of his being a human being, such right is not conferred by the Constitution but is only recognised and given the status of being fundamental. There is no doubt that the petitioners are correct in this submission.

Sapre, J. (Concurring)

Right to privacy natural right

557. “Right to privacy of any individual” is essentially a natural right, which inherit in every human being by birth...It is indeed inseparable and inalienable from human beings.

Right to privacy is a fundamental right of a guarantee under part III of the constitution. However it is not an absolute right but it is subject to certain reasonable restriction, The state is entitled to impose on the basis of social, moral and compelling Public Interest in accordance with law. Similarly, the ‘right to privacy’ has multiple faces and therefore has to go through a process of case to case development as and when any citizen raises his grievances complaining of infringement in accordance with law. (Para 567 and 568).

Kaul, J. (Concurring)

618. Rohinton F. Nariman, and Dr D.Y. Chandrachud, JJ., have emphasised the importance of the protection of privacy to ensure protection of liberty and dignity. I agree with them and seek to refer to some legal observations in this regard:

625. Every individual should have a right to be able to exercise control over his/her own life and image as portrayed to the world and to control commercial use of his/her identity. This also means that an individual

may be permitted to prevent others from using his image, name and other aspects of his/her personal life and identity for commercial purposes without his/her consent. [The Second Circuit's decision in *Haelan Laboratories Inc. v. Topps Chewing Gum Inc.*, 202 F 2d 866 (2d Cir 1953) penned by Jerome Frank, J. defined the right to publicity as “the right to grant the exclusive privilege of publishing his picture”.]”

646. If the individual permits someone to enter the house it does not mean that others can enter the house. The only check and balance is that it should not harm the other individual or affect his or her rights. This applies both to the physical form and to technology. In an era where there are wide, varied, social and cultural norms and more so in a country like ours which prides itself on its diversity, privacy is one of the most important rights to be protected both against State and non-State actors and be recognised as a fundamental right. How it thereafter works out in its interplay with other fundamental rights and when such restrictions would become necessary would depend on the factual matrix of each case. That it may give rise to more litigation can hardly be the reason not to recognise this important, natural, primordial right as a fundamental right.”

Principle of proportionality and legitimacy

638. The concerns expressed on behalf of the petitioners arising from the possibility of the State infringing the right to privacy can be met by the test suggested for limiting the discretion of the State:

(i) The action must be sanctioned by law; (ii) The proposed action must be necessary in a democratic society for a legitimate aim; (iii) The extent of such interference must be proportionate to the need for such interference; (iv) There must be procedural guarantees against abuse of such interference.”

Order of the Court

652. The references is disposed of in the following terms

652.1. The decisions of *M.P. Sharma*, which holds that the right to privacy is not protected by constitution stand overruled;

652.2 The decisions of in *Kharak Singh* to the extent that it holds that the right to privacy is not protected by the Constitution overruled;

652.3 The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 of the Constitution guaranteed by part III of the Constitution of India;

652.4 Subsequent to *Kharak Singh* which have enunciated the position in paragraph 65 2.3 above lay down the correct position in law.

PRIVACY
R. Rajagopal v. State of T.N
1994 SCC (6) 632

B.P. Jeevan Reddy, J. (for himself and S.C. Sen, J.): This petition raises a question concerning the freedom of press vis-A-vis the right to privacy of the citizens of this country. It also raises the question as to the parameters of the right of the press to criticise and comment on the acts and conduct of public officials.

2. The first petitioner is the editor, printer and publisher of a Tamil weekly magazine *Nakkheeran*, published from Madras. The second petitioner is the associate editor of the magazine. They are seeking issuance of an appropriate writ, order or direction under Article 32 of the Constitution, restraining the respondents, viz., (1) State of Tamil Nadu represented by the Secretary, Home Department, (2) Inspector General of Prisons, Madras and (3) Superintendent of Prisons (Central Prison), Salem, Tamil Nadu from taking any action as contemplated in the second respondent's communication dated 15-6-1994 and further restraining them from interfering with the publication of the autobiography of the condemned prisoner, *Auto Shankar*, in their magazine. Certain other reliefs are prayed for in the writ petition but they are not pressed before us.

3. Shankar @ Gauri Shankar @ *Auto Shankar* was charged and tried for as many as six murders. He was convicted and sentenced to death by the learned Sessions Judge, Chenglepat on 31-5-1991 which was confirmed by the Madras High Court on 17-7-1992. His appeal to this Court was dismissed on 5-4-1994. It is stated that his mercy petition to the President of India is pending consideration.

4. The petitioners have come forward with the following case: *Auto Shankar* wrote his autobiography running into 300 pages while confined in Chenglepat sub-jail during the year 1991. The autobiography was handed over by him to his wife, Smt Jagdishwari, with the knowledge and approval of the jail authorities, for being delivered to his advocate, Shri Chandrasekharan. The prisoner requested his advocate to ensure that his autobiography is published in the petitioners' magazine, *Nakkheeran*. The petitioners agreed to the same. *Auto Shankar* affirmed this desire in several letters written to his advocate and the first petitioner. The autobiography sets out the close nexus between the prisoner and several IAS, IPS and other officers, some of whom were indeed his partners in several crimes. The presence of several such officers at the house-warming ceremony of *Auto Shankar's* house is proved by the video cassette and several photographs taken on the occasion. Before commencing the serial publication of the autobiography in their magazine, the petitioners announced in the issue dated 21-5-1994 that very soon the magazine would be coming out with the sensational life history of *Auto Shankar*. This announcement sent shock waves among several police and prison officials who were afraid that their links with the condemned prisoner would be exposed. They forced the said prisoner, by applying third degree methods, to write letters addressed to the second respondent (Inspector General of Prisons) and the first petitioner requesting that his life story should not be published in the magazine.

Certain correspondence ensued between the petitioners and the prison authorities in this connection. Ultimately, the Inspector General of Prisons (R-2) wrote the impugned letter dated 15-6-1994 to the first petitioner. The letter states that the petitioner's assertion that *Auto Shankar* had written his autobiography while confined in jail in the year 1991 is false. It is equally false that the said autobiography was handed over by the said prisoner to his wife with the knowledge and approval of the prison authorities. The prisoner has himself denied the writing of any such book. It is equally false that any power of attorney was executed by the said prisoner in favour of his advocate, Shri Chandrasekharan in connection with the publication of the alleged book. If a prisoner has to execute a power of attorney in favour of another, it has to be done in the presence of the prison officials as required by the prison rules; the prison records do not bear out execution of any such power of attorney. The letter concludes:

“From the above facts, it is clearly established that the serial in your magazine under the caption ‘Shadowed Truth’ or ‘*Auto Shankar*’s dying declaration’ is not really written by Gauri Shankar but it is written by someone else in his name. Writing an article in a magazine in the name of a condemned prisoner is against prison rules and your claim that the power of attorney is given by the prisoner is unlawful. In view of all those it is alleged that your serial supposed to have written by *Auto Shankar* is (false?) since with an ulterior motive for this above act there will arise a situation that we may take legal action against you for blackmailing. Hence, I request you to stop publishing the said serial forthwith.”

5. The petitioners submit that the contents of the impugned letter are untrue. The argument of jeopardy to prisoner's interest is a hollow one. The petitioners have a right to publish the said book in their magazine as desired by the prisoner himself. Indeed, the petitioners have published parts of the said autobiography in three issues of their magazine dated 11-6-1994, 18-6-1994 and 22-6-1994 but stopped further publication in view of the threatening tone of the letter dated 15-6-1994. The petitioners have reasons to believe that the police authorities may swoop down upon their printing press, seize the issues of the magazine besides damaging the press and their properties, with a view to terrorise them. On a previous occasion when the petitioners' magazine published, on 16-8-1991, an investigative report of tapping of telephones of opposition leaders by the State Government, the then editor and publisher were arrested, paraded, jailed and subjected to the third degree methods. There have been several instances when the petitioners' press was raided and substantial damage done to their press and properties. The petitioners are apprehensive that the police officials may again do the same since they are afraid of their links with the condemned prisoner being exposed by the publication of the said autobiography. The petitioners assert the freedom of press guaranteed by Article 19(1)(a), which, according to them, entitles them to publish the said autobiography. It is submitted that the condemned prisoner has also the undoubted right to have his life story published and that he cannot be prevented from doing so. It is also stated in the writ petition that before approaching this Court by way of this writ petition, they had approached the Madras High Court for similar reliefs but that the office of the High Court had raised certain objections to the maintainability of the writ petition. A learned Single Judge of the High Court, it is stated, heard the petitioners in connection with the said objections but no orders were passed thereon till the filing of the writ petition.

6. Respondents 2 and 3 have filed a counter-affidavit, sworn to by Shri T.S. Panchapakesan, Inspector General of Prisons, State of Tamil Nadu. At the outset, it is submitted that the writ petition filed by the petitioners in the High Court was dismissed by the learned Single Judge on 28-6-1994 holding inter alia that the question whether the said prisoner had indeed written his autobiography and authorised the petitioners to publish the same is a disputed question of fact. This was so held in view of the failure of the learned counsel for the petitioners to produce the alleged letters written by the prisoner to his counsel, or to the petitioners, authorising them to publish his autobiography. It is submitted that the letter dated 15-6-1994 was addressed to the first petitioner inasmuch as “there was a genuine doubt regarding the authorship of the autobiography alleged to have been written by the condemned prisoner while he was in prison and which purportedly reached his wife. Besides, it was also not clear whether the said prisoner had as a matter of fact authorized the petitioner to publish the said autobiography. In the context of such a disputed claim both as to authenticity as well as the authority to publish the said autobiography, the said communication was addressed to the petitioners herein, since the petitioners have threatened to publish derogatory and scurrilous statements purporting to (be?) based on material which are to be found in the disputed autobiography,” It is submitted that the allegation that a number of IAS, IPS and other officers patronised the condemned prisoner in his nefarious activities is baseless. “It is only in the context of such a situation coupled with the fact that the petitioner might under the guise of such an autobiography tarnish the image of the persons holding responsible positions in public institution that the communication dated 15-6-1994 was sent to him”, say the respondents. They also denied that they subjected the said prisoner to third degree methods to pressurise him into writing letters denying the authorisation to the petitioners to publish his life story.

7. Neither *Auto Shankar* nor his wife nor his counsel are made parties to this writ petition. We do not have their version on the disputed question of fact, viz., whether *Auto Shankar* has indeed written his autobiography and/or whether he had requested or authorised the petitioners to publish the same in their magazine. In this writ petition under Article 32 of the Constitution, we cannot go into such a disputed question of fact. We shall, therefore, proceed on the assumption that the said prisoner has neither written his autobiography nor has he authorised the petitioners to publish the same in their magazine, as asserted by the writ petitioners. We must, however, make it clear that ours is only an assumption for the purpose of this writ petition and not a finding of fact. The said disputed question may have to be gone into, as and when necessary, before an appropriate court or forum, as the case may be.

8. On the pleadings in this petition, following questions arise:

(1) Whether a citizen of this country can prevent another person from writing his life story or biography? Does such unauthorised writing infringe the citizen's right to privacy? Whether the freedom of press guaranteed by Article 19(1)(a) entitles the press to publish such unauthorized account of a citizen's life and activities and if so to what extent and in what circumstances? What are the remedies open to a citizen of this country in case of infringement of his right to privacy and further in case such writing amounts to defamation?

(2) (a) Whether the Government can maintain an action for its defamation?

(b) Whether the Government has any legal authority to impose prior restraint on the press to prevent publication of material defamatory of its officials? and

(c) Whether the public officials, who apprehend that they or their colleagues may be defamed, can impose a prior restraint upon the press to prevent such publication?

(3) Whether the prison officials can prevent the publication of the life story of a prisoner on the ground that the prisoner being incarcerated and thus not being in a position to adopt legal remedies to protect his rights, they are entitled to act on his behalf?

9. The right to privacy as an independent and distinctive concept originated in the field of Tort law, under which a new cause of action for damages resulting from unlawful invasion of privacy was recognised. This right has two aspects which are but two faces of the same coin (1) the general law of privacy which affords a tort action for damages resulting from an unlawful invasion of privacy and (2) the constitutional recognition given to the right to privacy which protects personal privacy against unlawful governmental invasion. The first aspect of this right must be said to have been violated where, for example, a person's name or likeness is used, without his consent, for advertising or non-advertising purposes or for that matter, his life story is written whether laudatory or otherwise and published without his consent as explained hereinafter. In recent times, however, this right has acquired a constitutional status. We shall proceed to explain how? Right to privacy is not enumerated as a fundamental right in our Constitution but has been inferred from Article 21. The first decision of this Court dealing with this aspect is *Kharak Singh v. State of U.P.* A more elaborate appraisal of this right took place in a later decision in *Gobind v. State of M.P* 1 (1964) 1 SCR 332: AIR 1963 SC 1295 : (1963) 2 Cri LJ 329, wherein Mathew, J. speaking for himself, Krishna Iyer and Goswami, JJ. traced the origins of this right and also pointed out how the said right has been dealt with by the United States Supreme Court in two of its well known decisions in *Griswold v. Connecticut*³ and *Roe v. Wade*⁴. After referring to *Kharak Singh* and the said American decisions, the learned Judge stated the law in the following words: (SCC pp. 155-57, paras 22-29) "... privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test."

* * * privacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values. Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child-rearing. This cataloger approach -to the question is obviously not as instructive as it does not give analytical picture of the distinctive characteristics of the right of privacy. Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty.

As Ely says:

There is nothing to prevent one from using the word 'privacy' to mean the freedom to live one's life without governmental interference. But the Court obviously does not so use the term. Nor could it, for such a right is at stake in every case. There are two possible theories for protecting privacy of home. The first is that activities in the home harm others only to the extent that they cause offence resulting from the mere thought that individuals might be engaging in such activities and that such 'harm' is not constitutionally protectable by the State. The second is that individuals need a place of sanctuary where they can be free from societal control. The importance of such a sanctuary is that individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted 2 (1975) 2 SCC 148 : 1975 SCC (Cri) 468 3 381 US 479 14 L Ed 2d 510 (1965) 4 410 US 113 35 L Ed 2d 147 (1973) 5 See *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale LJ 920, 932 as themselves, an image that may reflect the values of their peers rather than the realities of their natures.⁶ The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.

The European Convention on Human Rights, which came into force on 3-9-1953, represents a valiant attempt to tackle the new problem. Article 8 of the Convention is worth citing:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is

in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

Since the right to privacy has been the subject-matter of several decisions in the United States, it would be appropriate to briefly refer to some of the important decisions in that country.

10. The right to privacy was first referred to as a right and elaborated in the celebrated article of Warren and Brandies (later Mr Justice Brandies) entitled "The right to privacy" published in 4 Harvard Law Review 193, in the year 1890.

11. Though the expression "right to privacy" was first referred to in *Olmstead v. United States*, it came to be fully discussed in *Time, Inc. v. Hill*. The facts of the case are these: On a particular day in the year 1952, three escaped convicts intruded into the house of James Hill and held him and members of his family hostage for nineteen hours, whereafter they released them unharmed. The police immediately went after the culprits, two of whom were shot dead. The incident became prime news in the local newspapers and the members of the press started swarming the Hill's home for an account of what happened during the hold-up. The case of the family was that they were not ill-treated by the intruders but the members of the press were not impressed. Unable to stop the siege of the press correspondents, the family shifted to a far-away place. Life magazine sent its men to the former home of Hill family where they reenacted the

entire incident, and photographed it, showing inter alia that the members of the 6 See 26 Stanford Law Rev. 1161, 1187 7 See Privacy and Human Rights, Ed. AH Robertson, p. 176 8 8 277 US 438 72 L Ed 944 (1927) 9 385 US 374 17 L Ed 2d 456 (1967) family were ill-treated by the intruders. When Life published the story, Hill brought a suit against Time Inc., publishers of Life magazine, for invasion of his privacy. The New York Supreme Court found that the whole story was “a piece of commercial fiction” and not a true depiction of the event and accordingly confirmed the award of damages. However, when the matter was taken to United States Supreme Court, it applied the rule evolved by it in *New York Times Co. v. Sullivan* and set aside the award of damages holding that the jury was not properly instructed in law. It directed a retrial. Brennan, J. held:

“We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with the knowledge of its falsity or in reckless” (emphasis added) We create grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in press news articles with a person’s name, picture or portrait, particularly as related to non-defamatory matter.

* * * Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society.

* * * That books, newspapers and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded.....

12. The next relevant decision is in *Cox Broadcasting Corpn. v. Cohn* A Georgia law prohibited and punished the publication of the name of a rape victim. The appellant, a reporter of a newspaper obtained the name of the rape victim from the records of the court and published it. The father of the victim sued for damages. White, J. recognised that “in this sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society” but chose to decide the case on the narrow question whether the press can be said to have violated the said statute or the right to privacy of the victim by publishing her name, having obtained it from public records. The learned Judge held that the press cannot be said to have violated the Georgia law or the right to privacy if it obtains the name of the rape victim from the public records and publishes it. The learned Judge held that the freedom of press to publish the information contained in the public records is 10 376 US 254: 11 L Ed 2d 686 (1964) 11 420 US 469: 43 L Ed 2d 328 (1975) of critical importance to the system of Government prevailing in that country and that, may be, in such matters “citizenry is the final judge of the proper conduct of public business”.

13. Before proceeding further, we may mention that the two decisions of this Court referred to above (*Kharak Singh* and *Gobind*) as well as the two decisions of the United States Supreme Court, *Griswold* and *Roe v. Wade* referred to in *Gobind*, are cases of governmental invasion of privacy. *Kharak Singh* was a case where the petitioner was put under surveillance as defined in Regulation 236 of the U.P. Police Regulations. It involved secret picketing of the house or

approaches to the house of the suspect, domiciliary visits at night, periodical enquiries by police officers into repute, habits, association, income or occupation, reporting by police constables on the movements of the person etc. The regulation was challenged as violative of the fundamental rights guaranteed to the petitioner. A Special Bench of seven teamed Judges held, by a majority, that the regulation was unobjectionable except to the extent it authorised domiciliary visits by police officers. Though right to privacy was referred to, the decision turned on the meaning and content of “personal liberty” and “life” in Article 21. *Gobind* was also a case of surveillance under M.R Police Regulations. *Kharak Singh* was followed even while at the same time elaborating the right to privacy, as set out hereinbefore.

14. *Griswold* was concerned with a law made by the State of Connecticut which provided a punishment to “any person who uses any drug, medicinal article or instrument for the purpose of preventing conception..... The appellant was running a centre at which information, instruction and medical advice was given to married persons as to the means of preventing conception. They prescribed contraceptives for the purpose. The appellant was prosecuted under the aforesaid law, which led the appellant to challenge the constitutional validity of the law on the grounds of First and Fourteenth Amendments. Douglas, J., who delivered the main opinion, examined the earlier cases of that court and observed:

“... specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help to give them life and substance.... Various guarantees create zones of privacy. The present case, then concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon the relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a “governmental purpose to control or prevent activities constitutionally subject to State regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms”. *NAACP v. Alabama*. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship. We deal with a right of privacy older than the Bill of Rights older than our political parties, older than our schools system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.”

15. *Roe v. Wade* concerned the right of an unmarried pregnant woman to terminate her pregnancy by abortion. The relevant Texas law prohibited abortions except with respect to those procured or admitted by medical advice for the purpose of saving the life of the mother. The constitutionality of, the said law was questioned on the ground that the said law improperly invaded the right and the choice of a pregnant woman to terminate her pregnancy and therefore violative of ‘liberty’ guaranteed under Fourteenth Amendment and the right to privacy

recognised in *Griswold*³. Blackmun, J. who delivered the majority opinion, upheld the right to privacy in the following words:

“The Constitution does not explicitly mention any right of privacy. In a line of decisions, however,... the Court has recognised that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment,... in the penumbras of the Bill of Rights,... in the Ninth Amendment.... or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment..... These decisions make it clear that only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’, *Palko v. Connecticut*, are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia*; procreation, *Skinner v. Oklahoma*; contraception; *Eisenstadt v. Baird*; family relationships, *Prince v. Massachusetts*; and child-rearing and education, *Pierce v. Society of Sisters*, *Meyer v. Nebraska*. This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon State action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. Though this decision received a few knocks in the recent decision in *Planned Parenthood v. Casey*, the central holding of this decision has been left untouched indeed affirmed.

16. We may now refer to the celebrated decision in *New York Times v. Sullivan*, referred to and followed in *Time Inc. v. Hill*. The following are the facts: In the year 1960, the New York Times carried a full page paid advertisement sponsored by the “Committee to Defend Martin Luther King and the Struggle for Freedom in the South”, which asserted or implied that law-enforcement officials in Montgomery, Alabama, had improperly arrested and harassed Dr King and other civil rights demonstrators on various occasions. Respondent, who was the elected Police Commissioner of Montgomery, brought an action for libel against the Times and several of the individual signatories to the advertisement. It was found that some of the assertions contained in the advertisement were inaccurate. The Alabama courts found the defendants guilty and awarded damages in a sum of \$ 500,000, which was affirmed by the Alabama Supreme Court. According to the relevant Alabama law, a publication was “libelous per se” if the words “tend to injure a person ... in his reputation” or to “bring (him) into public contempt”. The question raised before the United States Supreme Court was whether the said enactment abridged the freedom of speech and of the press guaranteed by the First and Fourteenth Amendments. In the leading opinion delivered by Brennan, J., the learned Judge referred in the first instance to the earlier decisions of that court emphasising the importance of freedom of speech and of the press and observed:

“Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth whether administered by judges, juries, or administrative officials and especially one that puts the burden of proving the truth on the speaker.

* * * A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions and to do so on pain of libel judgments virtually unlimited in amount- leads to... “self-censorship”. Allowance of the defense of truth, with the burden of proving it on the

defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars.... Under such a rule, would-be critics of official 20 120 L Ed 2d 683 (1992) conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone' The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments. The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (emphasis added)

17. Black, J. who was joined by Douglas, J. concurred in the opinion but on a slightly different ground. He affirmed his belief that "the First and Fourteenth Amendments not merely 'delimit' a State's power to award damages to 'public officials against critics of their official conduct' but completely prohibit a State from exercising such a power".

18. The principle of the said decision has been held applicable to "public figures" as well. This is for the reason that public figures like public officials often play an influential role in ordering society. It has been held that as a class the public figures have, as the public officials have, access to mass media communication both to influence the policy and to counter-criticism of their views and activities. On this basis, it has been held that the citizen has a legitimate and substantial interest in the conduct of such persons and that the freedom of press extends to engaging in uninhibited debate about the involvement of public figures in public issues and events.

19. The principle of Sullivan was carried forward and this is relevant to the second question arising in this case - in *Derbyshire County Council v. Times Newspapers Ltd.*, a decision rendered by the House of Lords. The plaintiff, a local authority brought an action for damages for libel against the defendants in respect of two articles published in Sunday Times questioning the propriety of investments made for its superannuation fund. The articles were headed "Revealed: Socialist tycoon deals with Labour Chief" and "Bizarre deals of a council leader and the media tycoon". A preliminary issue was raised whether the plaintiff has a cause of action against the defendant. The trial Judge held that such an action was maintainable but on appeal the Court of Appeal held to the contrary. When the matter reached the House of Lords, it affirmed the decision of the Court of Appeal but on a different ground. Lord Keith delivered the judgment agreed to by all other learned Law Lords. In his opinion, Lord Keith recalled that in *Attorney General v. Guardian Newspapers Ltd. (No. 2)* popularly known as "*Spycatcher case*", the House of Lords had opined that "there are rights available to private citizens which institutions of... Government are not in a position to exercise unless they can show that it is in the public interest to do so". It was also held therein that not only was there no public interest in allowing governmental institutions to sue for libel, it was "contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech" and further that action for defamation or threat of such action "inevitably have an inhibiting effect on freedom of speech". The learned Law Lord referred to the decision of the United States

Supreme Court in *New York Times v. Sullivan* and certain other decisions of American Courts and observed and this is significant for our purposes-

“while these decisions were related most directly to the provisions of the American Constitution concerned with securing freedom of speech, the public interest considerations which underlaid them are no less valid in this country. What has been described as ‘the chilling effect’ induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available.” Accordingly, it was held that the action was not maintainable in law.

20. Reference in this connection may also be made to the decision of the Judicial Committee of the Privy Council in *Leonard Hector v. Attorney General of Antigua and Barbuda* which arose under Section 33-B of the Public Order Act, 1972 (Antigua and Barbuda). It provided that any person who printed or distributed any false statement which was “likely to cause fear or alarm in or to the public or to disturb the public peace or to undermine public confidence in the conduct of public affairs” shall be guilty of an offence. The appellant, the editor of a newspaper, was prosecuted under the said provision. He took the plea that the said provision contravened Section 12(1) of the Constitution of Antigua and Barbuda which provided that no person shall be hindered in the enjoyment of freedom of expression. At the same time, sub-section (4) of Section 12 stated that nothing contained in or done under the authority of law was to be held inconsistent with or in contravention of sub-section 12(1) to the extent that the law in question made provisions reasonably required in the interest of public order. [These provisions roughly correspond to Articles 19(1)(a) and 19(2) respectively.] The Privy Council upheld the appellant's plea and declared Section 12(1) ultra vires the Constitution. It held that Section 33-B is wide enough to cover not only false statements which are likely to affect public order but also those false statements which are not likely to affect public order. On that account, it was declared to be unconstitutional. The criminal proceedings against the appellant was accordingly quashed. In the course of his speech, Lord Bridge of Harwich observed thus:

“In a free democratic society it is almost too obvious to need stating that those who hold office in Government and who are responsible for 23 (1990) 2 AC 312: (1990) 2 All ER 103 :(1990) 2 WLR 606, PC public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism leveled at those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office. In the light of these considerations their Lordships cannot help viewing a statutory provision which criminalities statements likely to undermine public confidence in the conduct of public affairs with the utmost suspicion.”

21. The question is how far the principles emerging from the United States and English decisions are relevant under our constitutional system. So far as the freedom of press is concerned, it flows from the freedom of speech and expression guaranteed by Article 19(1)(a). But the said right is subject to reasonable restrictions placed thereon by an existing law or a law made after the commencement of the Constitution in the interests of or in relation to the several matters set out therein. Decency and defamation are two of the grounds mentioned in clause

(2). Law of torts providing for damages for invasion of the right to privacy and defamation and Sections 499/500 IPC are the existing laws saved under clause (2). But what is called for today in the present times is a proper balancing of the freedom of press and said laws consistent with the democratic way of life ordained by the Constitution. Over the last few decades, press and electronic media have emerged as major factors in our nation's life. They are still expanding and in the process becoming more inquisitive. Our system of Government demands as do the systems of Government of the United States of America and United Kingdom constant vigilance over exercise of governmental power by the press and the media among others. It is essential for a good Government. At the same time, we must remember that our society may not share the degree of public awareness obtaining in United Kingdom or United States. The sweep of the First Amendment to the United States Constitution and the freedom of speech and expression under our Constitution is not identical though similar in their major premises. All this may call for some modification of the principles emerging from the English and United States decisions in their application to our legal system. The broad principles set out hereinafter are evolved keeping in mind the above considerations. But before we set out those principles, a few more aspects need to be dealt with.

22. We may now consider whether the State or its officials have the authority in law to impose a prior restraint upon publication of material defamatory of the State or of the officials, as the case may be? We think not. No law empowering them to do so is brought to our notice. As observed in *New York Times v. United States*, popularly known as the Pentagon papers case, "any system of prior restraints of (freedom of) expression comes to this 24 (1971) 403 US 713 : 29 L Ed 2d 822 (197 1) Court bearing a heavy presumption against its constitutional validity" and that in such cases, the Government "carries a heavy burden of showing justification for the imposition of such a restraint". We must accordingly hold that no such prior restraint or prohibition of publication can be imposed by the respondents upon the proposed publication of the alleged autobiography of "*Auto Shankar*" by the petitioners. This cannot be done either by the State or by its officials. In other words, neither the Government nor the officials who apprehend that they may be defamed, have the right to impose a prior restraint upon the publication of the alleged autobiography of *Auto Shankar*. The remedy of public officials/public figures, if any, will arise only after the publication and will be governed by the principles indicated herein.

23. We must make it clear that we do not express any opinion about the right of the State or its officials to prosecute the petitioners under Sections 499/500 IPC. This is for the reason that even if they are entitled to do so, there is no law under which they can prevent the publication of a material on the ground that such material is likely to be defamatory of them.

24. It is not stated in the counter-affidavit that *Auto Shankar* had requested or authorised the prison officials or the Inspector General of Prisons, as the case may be, to adopt appropriate proceedings to protect his right to privacy. If so, the respondents cannot take upon themselves the obligation of protecting his right to privacy. No prison rule is brought to our notice which empowers the prison officials to do so. Moreover, the occasion for any such action arises only after the publication and not before, as indicated hereinabove.

25. Lastly, we must deal with the objection raised by the respondent as to the maintainability of the present writ petition. It is submitted that having filed a writ petition for similar reliefs in

the Madras High Court, which was dismissed as not maintainable under a considered order, the petitioners could not have approached this Court under Article 32 of the Constitution. The petitioners, however, did disclose the above fact but they stated that on the date of their filing the writ petition, no orders were pronounced by the Madras High Court. It appears that the writ petition was filed at about the time the learned Single Judge of the Madras High Court pronounced the orders on the office objections. Having regard to the facts and circumstances of the case, we are not inclined to throw out the writ petition on the said ground. The present writ petition can also be and is hereby treated as a special leave petition against the orders of the learned Single Judge of the High Court.

26. We may now summarise the broad principles flowing from the above discussion:

(1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a “right to be let alone”. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

(2) The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2) an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media.

(3) There is yet another exception to the rule in (1) above - indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen, as explained in (1) and (2) above. It needs no reiteration that judiciary, which is protected by the power to punish for contempt of court and Parliament and legislatures protected as their privileges are by Articles 105 and 104 respectively of the Constitution of India, represent exceptions to this rule.

(4) So far as the Government, local authority and other organs and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them.

(5) Rules 3 and 4 do not, however, mean that Official Secrets Act, 1923, or any similar enactment or provision having the force of law does not bind the press or media.

(6) There is no law empowering the State or its officials to prohibit, or to impose a prior restraint upon the press/media.

27. We may hasten to add that the principles above mentioned are only the broad principles. They are neither exhaustive nor all-comprehending; indeed no such enunciation is possible or advisable. As rightly pointed out by Mathew, J., this right has to go through a case-by-case development. The concepts dealt with herein are still in the process of evolution.

28. In all this discussion, we may clarify, we have not gone into the impact of Article 19(1)(a) read with clause (2) thereof on Sections 499 and 500 of the Indian Penal Code. That may have to await a proper case.

29. Applying the above principles, it must be held that the petitioners have a right to publish, what they allege to be the life story/autobiography of *Auto Shankar* insofar as it appears from the public records, even without his consent or authorisation. But if they go beyond that and publish his life story, they may be invading his right to privacy and will be liable for the consequences in accordance with law. Similarly, the State or its officials cannot prevent or restrain the said publication. The remedy of the affected public officials/public figures, if any, is after the publication, as explained hereinabove.

30. The writ petition is accordingly allowed in the above terms. No costs.

DEFAMATION

Swatanter Kumar v. The Indian Express Ltd.,

207 (2014) DLT 221

Manmohan Singh, J.:1. The plaintiff has filed the abovementioned suit for permanent injunction and damages against six defendants, namely, (i) The Indian Express Ltd. through Editor-in-Chief and Publisher, (ii) Mr. Maneesh Chibber, Reporter, The Indian Express Ltd., (iii) Bennett, Coleman and Company Ltd., The Managing Director & The Editor-in-Chief of 'Times Now', (iv) Global Broadcast News (GBN) through Managing Director, Editor-in-Chief of 'CNN-IBN' and Turner International through Managing Director, (v) Ms. Intern through defendant No.2, and (vi) Union of India through the Secretary, Ministry of Information and Broadcasting.

2. The plaintiff has prayed for the relief of permanent injunction against the defendant Nos.1 to 5, its associates, sister concerns, its agents, representatives, correspondents, officers, employees and/or any other person, entity, in print or electronic media or via internet or otherwise from publishing, republishing, carrying out any further reports or articles or any other matter telecasts or repeat telecasts or programs, or debates or any discussion or reporting of any kind, directly or indirectly, pertaining to the purported complaint dated 30th November, 2013 and also prayed for a decree of damages against the said defendant Nos.1 to 5, jointly and severally, at least for an amount of 5 crores or for any higher amount and sought leave of this Court in this regard.

3. Admittedly, the plaintiff has been an eminent lawyer for 23 years before being elevated to the position of a Judge of this Court. The plaintiff then served as a Judge in the High Court of Punjab and Haryana at Chandigarh and thereafter returned as a Judge of this Court, before being elevated to the position of Chief Justice of the Bombay High Court. The plaintiff was elevated to the Hon'ble Supreme Court of India on 18th December, 2009 and resigned on 19th December, 2012 to take over as the Chairperson of the National Green Tribunal, a position that he presently holds. The plaintiff has served as a Judge for over 23 years in his career.

4. The plaintiff is stated to have approached this Court as a consequence to the breach of his fundamental and personal rights, due to the alleged defamatory and malicious acts of defendant Nos.1 to 5.

5. Defendant No.5, details relating to whose identity are not disclosed and who is now stated to have become a lawyer, is stated to have sent an affidavit dated 30th November, 2013 to the Hon'ble Chief Justice of India making certain allegations against the plaintiff. Defendant No.5 claims to have interned under the plaintiff in the Hon'ble Supreme Court of India, however, the plaintiff on the basis of the information received regarding the name of the defendant No.5 from defendant No.2, mentioned that defendant No.5 was neither an intern nominated by the Supreme Court nor by the plaintiff himself. With a view to safeguarding her dignity and maintaining her privacy, the identity of the said defendant Nos.5 at this stage, is being kept confidential and this defendant is not being named and is being referred to as the

“intern”. However, for the sake of disclosure to this Court, the plaintiff has filed the name of the defendant No.5 in a sealed envelope.

6. Defendant No.1 is a prominent national daily having high circulation both in India and abroad. The defendant No.2 is the author of the alleged defamatory news items published by the defendant No.1 on 10th January 2014, 11th January 2014 and 13th January 2014. The defendant Nos.3 and 4 are broadcasters who telecast news and current affairs on their TV channels; defendant No.3 is the owner of the TV channel "Times Now" while the defendant No.4 is a partnership entity between Global Broadcast News and Turner International which owns and operates the TV channel “CNN-IBN”.

7. The defendant No.6 is the Union of India through the Secretary, Ministry of Information and Broadcasting, Government of India, which has regulatory control over the print, electronic and internet media of this country. The defendant No.6 has been arrayed as a necessary party to the present suit in order to enable this Court to do comprehensive adjudication and pass all effective direction(s), judgment(s) and decree(s).

8. On 10th January 2014, a news item written by defendant No.2 was published in the defendant No.1 Newspaper. The said news item pertained to an alleged complaint made by an individual (Defendant No.5) against a retired Judge of the Hon'ble Supreme Court, with the headline “Another intern alleges sexual harassment by another SC Judge”.

9. It is the case of the plaintiff that no attempt of any verification of the allegations or the authenticity of the alleged complaint was undertaken by said defendants before publishing the news item because, even as per the news report, the defendant Nos.1 and 2, at the time of going to the Press, did not have the alleged affidavit dated 30th November 2013 in their possession. The plaintiff states that the incidents that have been alleged by defendant No.5 did not take place and that the alleged complaint is baseless, fraudulent and motivated.

10. At about 7.00 p.m., the same evening, on the show called ‘The News Hour’, the channel of the defendant No.3 (Times Now) was conducting a debate as to whether the name of the judge with regard to the complaint that had been filed by an intern ought to be disclosed or not. The defendant No.3 also sought to publicize its programme, by publishing and asking the following questions on its page at www.facebook.com as well as on the channel itself, prior to the telecast to the said show. The captions/tickers running on the show were:

“If a sitting Supreme Court Judge has sexually harassed his intern, should his name be made public?”

“If Justice AK Ganguly's name was made public, should the Judge's name be made public in this case as well?”

11. It is stated by the plaintiff that on the evening of 10 th January 2014, the defendant No.2, called the plaintiff on his mobile and asked the plaintiff for his comments on his news item published earlier that day. On the plaintiff's asking defendant No.2 as to why the defendant No.2 was asking for the plaintiff's comments on the said article, the defendant No.2 informed the plaintiff that the said news item dated 10th January 2014 pertained to him and at that point,

defendant No.2 also informed the plaintiff about the name of the alleged complainant, being defendant No.5.

12. The plaintiff is stated to have then requested defendant No.2 to refrain from publishing the allegation as it may have serious consequences. However, defendant Nos.1 & 2 published a news item on 11th January 2014 with the headline:

“Justice S Kumar... put his right arm around me, kissed me on my left shoulder... I was shocked”.

The plaintiff is stated to have later learnt that in fact, the said news item was published on the website of defendant No.1 at 11.20 p.m. on 10th January, 2014 itself along with his photograph.

13. It is averred that defendant No.3 conducted a public poll soliciting opinions on whether its channel should disclose the name of the said retired Supreme Court Judge. While the aforesaid show of defendant No.3 was being watched live, defendant No.4 in a telecast on 10th January 2014 at around 9-10 p.m. in a show anchored by Mr.Rajdeep Sardesai, allegedly with a view to steal a march over the defendant No.3's TRPs and allegedly in order to create sensation, proceeded to name the plaintiff as the Supreme Court Judge against whom allegations of sexual misconduct had been made.

14. In the meanwhile, the anchor and Editor-in-Chief of defendant No.3, Mr.Arnab Goswami, in a follow-up debate aired later in the evening, announced the name of the plaintiff and also repeatedly displayed the photograph of the plaintiff during the show. The said reporting was done by defendant No.3 without seeking any prior comments from the plaintiff.

15. It is specifically alleged in the plaint that it is not known how the defendant Nos.1 to 4 learnt the name of the plaintiff as on 10th January 2014, since the copy of the purported complaint, which was circulated by defendant No.1 to the media, and a copy whereof has now come into the possession of the plaintiff, has the names of the persons allegedly involved being blackened out.

16. It is the case of the plaintiff that he learnt from the news item dated 11th January 2014 published by the defendant Nos.1 & 2 that the purported complaint is dated 30th November, 2013 and that there is no explanation as to why the same was not published for two months and why no verification was undertaken by the said defendants or anyone else, from 30th November, 2013, prior to the publication on 10th January, 2014 and 11th January, 2014, especially when the institution sought to be maligned is the highest Court of the country.

It is also the case of the plaintiff that the reckless and irresponsible action of the defendant Nos.1 to 4, seeking to increase their circulation and TRPs at the cost of the reputation of the plaintiff and his public office have caused grave and irreparable injury to the reputation of the plaintiff and degraded the dignity of the Institution of Justice. It is stated that the defendant No.5 caused the publication of her false complaint to the media both print as well as electronic. The said acts of defendant Nos.1 to 5 are stated to have lowered the esteem of the plaintiff in the estimation of the public at large and his colleagues, staff, peers, and members of his social circle.

17. It is further the case of the plaintiff that the aforesaid acts and omissions are also violative of all the norms and canons of responsible journalism. Such conduct has been actuated by malice, against the plaintiff in particular and generally against the justice dispensation system. The acts of the said defendants as well as of defendant No.5 tantamount to blatant scandal mongering and are per se defamatory as they seek to denigrate both the plaintiff and harm his impeccable reputation in the public estimation. The defendants have failed to abide by the minimum moral standards of ethics and there is a complete failure to comply with the etiquette and ethical standards expected from them.

18. It is believed by the plaintiff that the purported affidavit dated 30th November, 2013 has been circulated by an officer of defendant No.6, the Union of India, to the persons in the media. A copy of the said affidavit, as circulated to the media, found its way into the hands of a friend of the plaintiff who handed over a copy of the same to the plaintiff on 11th January 2014. The name of the alleged complainant, being defendant No.5 and the person against whom the allegations have been made were blackened out and therefore, it was impossible for the plaintiff to either identify the name of the complainant or ascertain the name of the person against whom the alleged complaint was made. The plaintiff states that it is intriguing as to how defendant Nos.1 to 4 discovered the name of the plaintiff.

19. It is further the case of the plaintiff that the defendants without any sensitivity named the plaintiff and without having any regard for the dignity and the privacy of the plaintiff and his family as well as the Institutions of Justice with which the plaintiff's name is associated, the defendants withheld from disclosing the name of the defendant No.5 who has claimed to have made such allegations against the plaintiff. The plaintiff's right to dignity, reputation, fair name and privacy are at par with the right of the defendant No.5 and cannot be violated.

20. The plaintiff has denied each and every allegation made in the alleged affidavit/complaint dated 30th November, 2013 of defendant No.5. The said allegations are stated to be false, scandalous and a product of a conspiracy between defendant No.5 and other influential persons who have vested interest in destabilizing the Institution of justice disposal. The plaintiff states that the allegations have been made up by defendant No.5 with the intention of defaming the plaintiff and lowering his estimation in the eyes of those who, directly or indirectly, become privy to the purported affidavit in which the same are contained. Defendant No.5 is guilty of vicious and gross libel.

21. It is stated by the plaintiff that despite service of a legal notice dated 11th January, 2014 on defendant Nos.1 to 4, the said defendants have, to further their commercial interests, lent credence to the false allegations in the alleged affidavit, by telecasting various programmes wherein the said allegations have been repeated. The media has resorted to blatant scandal mongering and continue to place defamatory content in the public domain. It is the case of the plaintiff that once besmirched by an unfounded allegation in a national newspaper and its telecast by electronic media, a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. The repeated telecast of the unfound, false and manipulated contents of the affidavit dated 30th November, 2013 publicise the said false allegations of the defendant No.5. In this manner, the media also continues to lower the plaintiff in the estimation of the society.

22. The plaintiff has also stated that there are a large numbers of newspapers in various languages in India. There are also several news and general entertainment channels and online websites. Due to the advent of internet and mass media, it is impossible for the plaintiff to determine as well as to implead all the newspapers and TV channels as well as entities reporting/carrying publishing defamatory material against the plaintiff. Defendant No.6 has regulatory control over the said entities/persons. The plaintiff prays that an injunction order be passed against the said other persons also who are not made party hereto, including defendant Nos.1 to 5.

23. It is submitted that grave prejudice and irreparable injury will be caused to the plaintiff if the defendants are not immediately restrained from defamatory material against the plaintiff and that the balance of convenience is in favour of the plaintiff and against the defendants and the plaintiff has a strong prima facie case and there is every likelihood of the suit being decreed in terms of the prayers made therein.

24. The plaintiff has also filed 13 affidavits of such persons who have either interned or worked with the plaintiff from time to time. In a sample affidavit of Mr.Shobit Phutela son of Sh.Sant Parkash, who is a 5th year student at the National University of Juridical Sciences, Kolkata, it is deposed by him that he had interned with the plaintiff from 17 th April, 2011 to 15th June, 2011 and during this period, he had assisted the plaintiff with research, preparation of judgments, making of case notes and reading of case briefs and also assisted the plaintiff with the preliminary organization of the "International Seminar on Global Environment and Disaster Management: Law and Society". The work involved inviting speakers, calling for papers, printing of invitations, making phone calls, writing of speeches and designing the brochure, etc. The deponent has further deposed that during the time of his internship, apart from him, there were other people, namely, Ms.Deepti Jayakrishnan (Law Clerk), Ms.Nithya Anand (Intern who later became the Law Clerk with the plaintiff) and Mr.Sudhanshu (Intern) involved in the organization of the abovementioned conference. He also deposed that during the course of his internship, the complainant/defendant No.5 also joined the office but worked only for 2-3 days. She helped in the preliminary organizational work for the aforementioned Conference, though such help was short-lived. He deposed that during the period of his internship, no such incident, as alleged by defendant No.5, took place or was brought to anyone's notice in the office, including him. The reason quoted by defendant No.5 for quitting her internship was her mother's ailment and that she had to leave because there was no one at home to take care of her mother. The deponent further deposed that after his internship got over, he met the defendant No.5 in the College (Calcutta) and even at that time, she did not inform him of the alleged incident. On the last day of his internship, the plaintiff invited him to attend the Conference at New Delhi on 22 nd July- 24th July which he attended and did whatever organizational work that was required of him. He further deposed that he became aware of such an allegation only after reading the newspaper report published in "The Indian Express". This news came to him as a shock and he believes that such an incident could not have transpired. He also deposed that after reading the newspaper, the image and reputation of the plaintiff has been tarnished in his estimation and also in the estimation of the relatives, friends, and public at large who have constantly been supportive and have reposed their faith in the hard work and dedication of the plaintiff.

25. The plaintiff has pressed for interim orders against the defendant Nos.1 to 4 as per the prayers made in the interim application. 26. Mr.Mukul Rohatgi, learned Senior counsel appearing on behalf of the plaintiff along with other Senior Advocates appearing for the Bar have made their submissions which can be outlined in the following manner:

a) Mr.Rohatgi argued that the plaintiff has his hard earned reputation and integrity before the legal fraternity as well as in the society at large as he is still holding the responsible position as a presiding officer of the significant tribunal. It has been argued that the defendant Nos.1 to 4 by their irresponsible acts cannot simply proceed to injure the reputation of the plaintiff and damage the same by creating an adverse publicity merely on the basis of the allegation levelled against him by some intern/defendant No.5 against which the enquiry is yet to be commenced and completed. Mr.Rohatgi, learned Senior counsel has argued that allowing the defendants to continue to flash the name and photograph of the plaintiff in the print media or on internet or on news channels and continue to connect him with such allegations, creating adverse atmosphere in the public would definitely damage his reputation in the society and such damage is irreversible in nature which has to be prevented. As per Mr.Rohatgi, learned Senior counsel such damage is actionable and the same is required to be prevented by way of prohibitory orders of the Court.

b) As per Mr.Rohatgi, learned Senior counsel the freedom of press as envisaged under Article 19(1) of the Constitution of India is not absolute right and the same is subject to the reasonable restrictions provided under Article 19(2) of the Constitution. It has been argued by Mr.Rohatgi learned Senior counsel that excessive adverse publicity beyond fair reporting not merely injures the reputation of the person but also affects the fair administration of justice and in such cases, the inherent power vests with the superior Courts including High Court to interdict and pass interim orders including the postponement of the publications as per the well settled law.

c) Mr.Rohatgi, learned Senior counsel while drawing aid from the previous submission has argued that the defendant No.5/intern had sought remedy from the Supreme Court wherein the Hon'ble Supreme Court has agreed to hear the matter on 14th February, 2014 and also appointed Mr.F.S.Nariman and Mr.K.K.Venugopal, learned Senior Advocates to assist the Court as Amicus Curiae and even sought

Attorney General's assistance in order to set up a mechanism to probe allegations in view of the guidelines in Vishaka vs. State of Rajasthan, (1997) 6 SCC 241 formed in Supreme Court. As per Mr.Rohatgi, once the remedy has been preferred by the intern, the defendant Nos.1 to 4 should not conduct the adverse publicity by showing or projecting the plaintiff as culprit by prejudging him on the basis of the mere allegation which will result in an adverse atmosphere amongst the public and the likelihood of the plaintiff getting fair trial and justice would be seriously prejudiced. It has been argued that in the instant case, there is real and tangible danger of the interference with administration of justice. It has been argued that in the absence of any fact finding or any cogent and clear back up evidence, the media trial affecting the Court trial cannot be allowed by giving juicy news in order to create sensation in the minds of the public.

d) Mr.Rohatgi, learned Senior counsel has read over the news articles from the documents file including the headlines of the news articles which contain the wordings or allegations from the affidavit filed by the Intern and the said headlines as per Mr.Rohatgi are aimed at creating hype in the public mind and prejudicially affect the reputation of the plaintiff and institution of justice. The said titles include the titles: (i) “Justice S Kumar... put his right arm around me, kissed me on my left shoulder... I was shocked”, (ii) “Sex taint on another former S.C. Judge” and (iii) “Ex-Judge Claims Green Plot in Sex Slur”, published in “Mail Today” on 15th January, 2014. As per Mr.Rohatgi, learned Senior counsel such kind of news is not fair journalism or responsible acts but is aimed at earning profits at the cost of someone's hard earned reputation. It has been argued that such publications without any enquiry or verification with evidence coupled with belated allegations should not be spread in the manner done by the defendants No.1 to 4.

e) Mr.Rohatgi, learned Senior counsel has argued that the defendants have played with the reputation of the plaintiff by deliberately disclosing the name on the open channels and showing the photographs time and again so that the confidence of the public in the institution of justice as well as the reputation of the plaintiff in the minds of the public is impaired. It has been argued that whatever damage has been caused by the defendants is subject matter of the suit but the defendants should be prevented from further repeating such acts of causing such prejudice to the reputation of the plaintiff.

f) Mr.Rohatgi has argued that the plaintiff has his right to maintain dignity, right to live dignified life, right to preserve reputation and they are all facets of right to life as provided under Article 21 and also parts of basic human rights which are fundamental rights and legally enforceable rights. It has been argued that the plaintiff can therefore invoke the inherent jurisdiction of this Court by seeking injunction orders against the publications of the articles which may prejudicially affect the reputation of the plaintiff causing irreversible damage to him. It has been argued that such invocation of the inherent jurisdiction is available to the plaintiff by informing the Court that there is real and imminent danger of the plaintiff not getting fair trial or it may cause interference in the course of the justice by creating undue pressure on account of the public pressure by way of publication. He has also questioned the issue of delay in filing the complaint by defendant No.5/Intern after the gap of two and a half years.

27. Mr.Rohatgi, learned Senior counsel in order to substantiate his submissions has relied upon the judgment passed by the Apex Court in the case of *Sahara India Real Estate Corporation Limited and Others v. Securities and Exchange Board of India & Another*, (2012) 10 SCC 603 wherein the Supreme Court has laid down principles governing the passing of the prior restraint order against the publication in some exceptional cases and discussed in detailed the exceptions involved.

28. Mr.Rohatgi, learned Senior counsel also relied upon the judgment passed by the Supreme Court in the case of *Reliance Petrochemicals Ltd v. Proprietors Of Indian Express*, (1988) 4 SCC 592 wherein the Supreme Court had laid down the test governing the grant of the prohibitory orders against the publication in the context of interference with the administration of justice which is a real and imminent danger that there would be such interference with the administration of the justice.

29. Mr. Rohatgi, learned Senior counsel has further handed over several other judgments cited at the bar but mainly summed up his case on the basis of the submissions recorded above as well as the decisions quoted above. It has been prayed that the plaintiff has no objection towards the defendant Nos. 1 to 4 doing fair reporting of the happenings as facts but this Court should pass interim orders restraining the defendant Nos. 1 to 4 from publicising the plaintiff's name, picture with the allegations of the defendant No. 5 in the form of headlines which may create an impression that the plaintiff has done something unwelcomed when the facts are still verifiable or subjected to the scrutiny and the same are without any accompanying evidence. He has alleged that fair reporting is always permissible and the defendants are entitled to inform the public the correct facts and information, Court orders and events of Court proceedings as a news item. However, the media itself cannot form its own opinion and pre-judge the matter and pronounce the judgment before the public without the matter is examined and decided by the Court and particularly, without any back up by cogent evidence, otherwise it would amount to what is called as "Media Trial". It is submitted that the media even under the law is not entitled to distort the facts for the purpose of juicy news. If they do it, they are held responsible to suffer damages. He states that the present case is a fittest case of this nature.

30. Per Contra, Mr. Dinesh Dwivedi and Mr. Ashwini Matta, learned Senior counsel appearing on behalf of defendant No. 3 have made their submissions which can be outlined in the following manner:

(i) Learned Senior counsel argued that the freedom of the press which is part of the freedom of the expression is hallmark of any democracy and is part of the fundamental right under Article 19(1) of the Constitution of India. It has been argued that the defendant Nos. 1 to 4 are merely publishing the write ups on the basis of the affidavit supplied by the defendant No. 5 and are not making any such wild and reckless allegations as alleged by the plaintiff.

(ii) Learned Senior counsel has argued that the defendants are indulging in fair reporting. It has been argued that the defendants Nos. 1 to 4 have not expressed anything out of their own but the defendants have merely reproduced the contents of the affidavit written by the defendant No. 5 in her complaint to the Supreme Court. It has been argued that the plaintiff is unnecessarily alleging the defendant Nos. 1 to 4 as guilty of irresponsible journalism. It has been argued that the public debate or discussion on public platform on issues of the public interests is part of free and fair democracy. It has been argued that if the defendants Nos. 1 to 4 have done public debate on television or written articles in the newspapers describing the allegations of the defendant No. 5 against the plaintiffs, the defendants did no wrong and have merely expressed and exercised their freedom of press.

(iii) Learned Senior counsel argued that there is no danger of the plaintiff's not getting fair trial or any obstructions in the administration of justice and thus, the plaintiff's apprehensions are totally out of the context and should not be acceded to by the Court.

(iv) Learned Senior counsel argued that the present suit for injunction is not maintainable in as much as the publications have already been made and thus the plaintiff cannot approach this Court belatedly and even in future, the defendant No. 3 would telecast its programmes in fair reporting.

(v) Learned counsel appearing for defendant No.4, upon instructions, made the statement that without prejudice, his client, i.e. defendant No.4 shall not conduct the telecast of the programme like earlier telecasted on 10th January, 2014 in respect of the plaintiff. By making all these submissions, learned counsel for the defendants have argued that this Court should not pass any injunction against the defendants and allow them to file the written statements and replies to the injunction application.

31. I have gone through the plaint, injunction application as well as the documents filed therewith. I have also given careful consideration to the submissions advanced by the learned counsel for the parties at the bar. I shall now briefly discuss the plaintiff's entitlement to the interim injunction at this stage.

32. It is correct that freedom of expression in press and media is the part of Article 19(1) of the Constitution of India where by all the citizens have a right to express their view. However, the said right of the expression is also not absolute but is subjected to the reasonable restrictions imposed by the Parliament or State in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of Court, defamation or incitement to an offence. The said position is clear from the plain reading of the Article 19(1) and (2) of the Constitution of India.

33. The Courts have time and again emphasized that the media and press should not be unnecessarily restricted in their speech as the same may amount to curtailment of expression of the ideas and free discussion in the public on the basis of which the democratic country functions. The Courts should thus refrain from making any prior restraints on the publications in order to curtail such freedom.

34. In *Express Newspapers (Private) Ltd. & Anr. v. The Union of India & Ors.*, 1959 S.C.R. 12, the Supreme Court held that freedom of speech and expression includes within its scope the freedom of the Press. The Supreme Court referred to the earlier decisions in *Romesh Thappar vs. State of Madras*, AIR 1950 SC 124 and *Brij Bhushan v. State of Delhi*, AIR 1950 SC 129. *Romesh Thappar's case (supra)* related to a ban on the entry and circulation of Thappar's journal in the State of Madras under the provisions of the Madras Maintenance of Public Order Act, 1949. Patanjali Sastri, J. speaking for the Court said in *Romesh Thappar's case (supra)* that "...there can be no doubt that the freedom of speech and expression includes freedom of propagation of ideas and that freedom is ensured by the freedom of circulation. Liberty of circulation is as essential to that freedom as the liberty of publication. Indeed, without circulation publication would be of little value." In *Brij Bhushan's case (supra)*, Patanjali Sastri, J. speaking for the majority judgment again said that "...every free man has undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press." Bhagwati, J. in the *Express Newspaper's case (supra)* speaking for the Court said that the freedom of speech and expression includes freedom of propagation of ideas which freedom is ensured by the freedom of circulation and that the liberty of the press is an essential part of the right to freedom of speech and expression and that the liberty of the press consists in allowing no previous restraint upon publication. (*Emphasis Supplied*)

35. In another case of *Express Newspapers Pvt. Ltd. & Ors v. Union Of India*, AIR 1986 SC 872, the Supreme Court speaking through A.P. Sen, J. emphasized that though the freedom of press is an inalienable right, but the same is not absolute and is subject to Article 19 (2) as uncontrolled right to speech leads to anarchism. The Supreme Court observed thus:

“I would only like to stress that the freedom of thought and expression, and the freedom of the press are not only valuable freedoms in themselves but are basic to a democratic form of Government which proceeds on the theory that problems of the Government can be solved by the free exchange of thought and by public discussion of the various issues facing the nation. It is necessary to emphasize and one must not forget that the vital importance of freedom of speech and expression involves the freedom to dissent to a free democracy like ours. Democracy relies on the freedom of the press. It is the inalienable right of everyone to comment freely upon any matter of public importance. This right is one of the pillars of individual liberty- freedom of speech, which our Court has always unfailingly guarded. I wish to add that however precious and cherished the freedom of speech is under Art.19(1)(a), this freedom is not absolute and unlimited at all times and under all circumstances but is subject to the restrictions contained in Art. 19(2). That must be so because unrestricted freedom of speech and expression which includes the freedom of the press and is wholly free from restraints, amounts to uncontrolled licence which would lead to disorder and anarchy and it would be hazardous to ignore the vital importance of our social and national interest in public order and security of the State.” (*Emphasis Supplied*)

36. As it seen above, the right to press and its freedom to express the ideas in public has always been the integral part of healthy democracy and the prior restraint on the publication was considered to be acceptable under the earlier line of authorities. The Courts have always indicated that the fine balance is required to made so that the said liberty of press should not be uncontrolled or regulated by laws including the laws relating to public order, contempt etc and the same is subject to reasonable restrictions as per the Article 19 (2) of the Constitution of India.

37. The position of law as to no prior restraint on the publication has been revisited by the Supreme Court in a number of cases including the case of *Reliance Petrochemicals Ltd v. Proprietors of Indian Express*, AIR 1989 SC 190 wherein Sabyasachi Mukherjee, J. speaking for the Supreme Court observed that the Court can pass interim orders restraining the publication if the Court finds that there exists a real and imminent danger that the continuance of the publication would result in interference with the administration of justice. As per Mukherjee, J., it was observed thus:

“Mr. Baig drew our attention to page 282 of the said report where Justice Frankfurter.....

.....A free Press is vital to a democratic society for its freedom gives it power.” (refer to Relaince Judgment for the paras.)

38. The Supreme Court on facts of the case of *Reliance Petrochemicals (supra)* proceeded to apply the test of real and imminent danger and proceeded to vacate the injunction due to the

reason that as per the Court no such real and imminent danger exists due to the change of circumstances. This is evident from the reading the concluding paragraphs of the judgment wherein it was observed thus:

“In the peculiar facts of this case now that the subscription to debentures has closed and, indeed, the debentures have the obligation of Press to keep people informed, that the injunction should not continue any further.” (refer to *Reliance* judgment for the paras. indicated).

39. From the reading of the afore noted observations of the Supreme Court in *Reliance Petrochemicals' case (supra)*, it is clear that the Supreme Court has applied the test of the real and imminent danger in order to infer as to whether the proposed publication would lead to interference in the course of justice for the purposes of grant and non grant of the interim injunction or prior restraint against the publication.

40. Recently, the Supreme Court again in the case of *Sahara India (supra)* reconsidered the position in law relating to passing of the prior restraint order against the proposed publication and has proceeded to lay down the guidelines as to under what circumstances the prior restraint order can be passed, what are factors, which fall for consideration prior to the passing of such interim order and other aspects necessarily required to be satisfied for the grant of the interim order or postponement of the publication.

41. In *Sahara India's case (supra)*, the Supreme Court has made certain significant findings and it is pertinent to discuss the judgment of *Sahara India (supra)* in detail due to the reason that it has been relied upon heavily by the plaintiff and it is as per the tests laid down in *Sahara India (supra)* that the case of the parties is required to be tested by this Court. Firstly, in *Sahara India (supra)*, the Supreme Court has held that the prior restraint of publication is not constitutionally impermissible. It has been observed thus:

“At this stage, we wish to clarify that the reliance on the above judgments is only to show that “prior restraint” per se has not been rejected as constitutionally impermissible. At this stage, we may point out that in the present IAs we are dealing with the concept of “prior restraint” per se and not with cases of misuse of powers of pre- censorship which were corrected by the Courts [see *Binod Rao v. Minocher Rustom Masani*, reported in 78 Bom LR 125 and *C. Vaidya v. D'Penha*, decided by Gujarat High Court in Sp. CA 141 of 1976 on 22.03.1976 (unreported)]” (*Emphasis Supplied*)

42. Thereafter, the Supreme Court in *Sahara India (supra)* proceeded to quote the judgment of the *Reliance Petrochemicals (supra)* and proceeded to observe that the prior restraint against publication is vested in the form of inherent powers of the superior Courts including High Court under the provisions of Section 151 of the Code of Civil Procedure wherein the Court can proceed to pass such restraint orders if the administration of justice so warrants approving the judgment of *Naresh Shridhar Mirajkar v. State of Maharashtra*, AIR 1967 SC 1. It has also been held by the Supreme Court that the right to open justice which is free and unprejudiced is a basic right that has to be balanced vis-a-vis the right to press and expression of ideas which is the facet of the right to speech and expression.

43. In the case of *Surya Prakash Khatri v. Madhu Trehan*, 2001 (92) DLT 665, the Full Bench of this Court in para 23 of the judgment has held as under:

23. It is thus needless to emphasise that a free and healthy press is indispensable to the functioning of a true democracy. In a democratic set up there has to be an active and intelligent participation of the people in all spheres and affairs of their community as well as the State. It is their right to be kept informed about current political, social, economic and cultural life as well as the burning topics and important issues of the day in order to enable them to consider and form broad opinion about the same and the way in which they are being managed, tackled and administered by the Government and its functionaries. To achieve this objective the people need a clear and truthful account of events, so that they may form their own opinion and offer their own comments and viewpoints on such matters and issues and select their further course of action. The primary function, therefore, of the press is to provide comprehensive and objective information of all aspects of the country's political, social, economic and cultural life. It has an educative and mobilising role to play. It plays an important role in moulding public opinion and can be an instrument of social change. It may be pointed out here that Mahatma Gandhi in his autobiography has stated that one of the objectives of the newspaper is to understand the proper feelings of the people and give expression to it; another is to arouse among the people certain desirable sentiments; and the third is to fearlessly express popular defects. It therefore turns out that the press should have the right to present anything which it thinks fit for publication. But it has to be remembered that this freedom of press is not absolute, unlimited and unfettered at all times and in all circumstances as giving an unrestricted freedom of speech and expression would amount to an uncontrolled license. If it were wholly free even from reasonable restraints it would lead to disorder and anarchy. The freedom is not to be misunderstood as to be a press free to disregard its duty to be responsible. In fact, the element of responsibility must be present in the conscience of the journalists. In an organized society, the rights of the press have to be recognised with its duties and responsibilities towards the society. Public order, decency, morality and such other things must be safeguarded. The protective cover of press freedom must not be thrown open for wrong doings. If a newspaper publishes what is improper, mischievously false or illegal and abuses its liberty it must be punished by Court of law. (See. *In re Harijai Singh and another*, AIR 1997 SC 73). The editor of a newspaper or a journal has a greater responsibility to guard against untruthful news and publications for the simple reasons that his utterances have a far greater circulation and impact than the utterances of an individual and by reason of their appearing in print, they are likely to be believed by the ignorant. That being so, certain restrictions are essential even for preservation of the freedom of the press itself. To quote from the report of Mons Lopez to the Economic and Social Council of the United Nations" If it is true that human progress is impossible without freedom, then it is no less true that ordinary human progress is impossible without a measure of regulation and discipline. It is the duty of a true and responsible journalist to strive to inform the people with accurate and impartial presentation of news and their views after dispassionate evaluation of the facts and information

received by them and to be published as a news item. The presentation of the news should be truthful, objective and comprehensive without any false and distorted expression.”

44. Thus, the principle of open justice is not absolute. There can be exceptions in the interest of administration of justice. In *Mirajkar's case (supra)*, the High Court ordered that the deposition of the defence witness should not be reported in the newspapers. This order of the High Court was challenged in the Supreme Court under Article 32 of the Constitution of India. The Supreme Court held that apart from Section 151 of the Code of Civil Procedure, the High Court had the inherent power to restrain the press from reporting where the administration of justice so demanded. The Court held *vide* para 30 that evidence of the witness need not receive excessive publicity as fear of such publicity may prevent the witness from speaking the truth. That, such orders prohibiting publication for a temporary period during the course of trial are permissible under the inherent powers of the Court whenever the Court is satisfied that interest of justice so requires. As to whether such a temporary prohibition of publication of Court proceedings in the media under the inherent powers of the Court can be said to offend the rights under Article 19(1)(a) [which includes freedom of the press to make such publication], this Court held that an order of a Court passed to protect the interest of justice and the administration of justice could not be treated as violative of Article 19(1)(a) of the Constitution of India.

45. “The judgments in *Reliance Petrochemicals Ltd.* and *Mirajkar* were delivered in civil cases. However, in *Mirajkar*, this Court held that all Courts which have inherent powers, i.e., the Supreme Court, the High Courts and Civil Courts can issue prior restraint orders or proceedings, prohibitory orders in exceptional circumstances temporarily prohibiting publications of Court proceedings to be made in the media and that such powers do not violate Article 19(1)(a). Further, it is important to note, that, one of the Heads on which Article 19(1)(a) rights can be restricted is in relation to “contempt of Court” under Article 19(2). Article 19(2) preserves common law of contempt as an “existing law”.

In fact, the Contempt of Courts Act, 1971 embodies the common law of contempt. At this stage, it is suffice to state that the Constitution framers were fully aware of the Institution of Contempt under the common law which they have preserved as “existing law” under Article 19(2) read with Article 129 and Article 215 of Constitution. The reason being that contempt is an offence sui generis. The Constitution framers were aware that the law of contempt is only one of the ways in which administration of justice is protected, preserved and furthered. That, it is an important adjunct to the criminal process and provides a sanction. Other civil Courts have the power under Section 151 of Code of Civil Procedure to pass orders prohibiting publication of Court proceedings. In *Mirajkar*, this Court referred to the principles governing Courts of Record under Article 215 [see para 60]. It was held that the High Court is a Superior Court of Record and that under Article 215 it has all the powers of such a Court including the power to punish contempt of itself. At this stage, the word "including" in Article 129/Article 215 is to be noted. It may be noted that each of the Articles is in two parts. The first part declares that the Supreme Court or the High Court “shall be a Court of Record and shall have all the powers of such a Court”. The second part says "includes the powers to punish for contempt". These Articles save the pre-existing powers of the Courts as Courts of record and that the power

includes the power to punish for contempt [see *Delhi Judicial Service Association v. State of Gujarat* [(1991) 4 SCC 406] and *Supreme Court Bar Association v. Union of India* [(1998) 4 SCC 409]. As such, a declaration has been made in the Constitution that the said powers cannot be taken away by any law made by the Parliament except to the limited extent mentioned in Article 142(2) in the matter of investigation or punishment of any contempt of itself. If one reads Article 19(2) which refers to law in relation to Contempt of Court with the first part of Article 129 and Article 215, it becomes clear that the power is conferred on the High Court and the Supreme Court to see that “the administration of justice is not perverted, prejudiced, obstructed or interfered with”. (*Emphasis Supplied*)

46. From the mere reading of the excerpts from the judgment of *Sahara India (supra)*, it is can be said that the High Court has ample powers under its inherent powers to restraint the publication in media in the event it arrives at the finding that the said publication may result in interference with the administration of justice or would be against the principle of fair trial or open justice. Although the afore-noted observations seem to suggest that the Court can restrain the publication of the news relating to Court proceedings or postpone the same in order obtain the fair trial. The later part of the judgment in *Sahara India (supra)* suggest that the order of the prior restraint is a preventive order and the said order may proceed to restrain any publication which may cause obstruction of the justice which include intrusion in right to have open justice unbiased by any public opinion expressed in publication. Thus, the interference with the course of justice as a term is not merely confined to the restraint order only on the publications relating to pending Court proceedings. But also, any publication which would give excessive adverse publicity to the accused or alleged victim which may likely to hamper the fair trial in future is also covered within the ambit and sweep of the enquiry of the Court as to what may constitute the interference with the course of the justice. This can be seen if one reads the following paragraphs of the judgment in *Sahara India (Supra)* wherein it has been observed thus:

“To see that the administration of justice is not prejudiced or perverted clearly includes power of the Supreme Court/High Court to prohibit temporarily, statements being made in the media which would prejudice or obstruct or interfere with the administration of justice in a given case pending in the Supreme Court or the High Court or even in the subordinate Courts. In view of the judgment of this Court in *A.K. Gopalan v. Noordeen* [(1969) 2 SCC 734], such statements which could be prohibited temporarily would include statements in the media which would prejudice the right to a fair trial of a suspect or accused under Article 21 from the time when the criminal proceedings in a subordinate Court are imminent or where suspect is arrested.” (*Emphasis supplied*) “Presumption of innocence is held to be a human right. [See : *Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra* (2005) 5 SCC 294]. If in a given case the appropriate Court finds infringement of such presumption by excessive prejudicial publicity by the newspapers (in general), then under inherent powers, the Courts of Record *suo motu* or on being approached or on report being filed before it by subordinate Court can under its inherent powers under Article 129 or Article 215 pass orders of postponement of publication for a limited period if the applicant is able to demonstrate substantial risk of prejudice to the pending trial and provided he is able to

displace the presumption of open Justice and to that extent the burden will be on the applicant who seeks such postponement of offending publication.” (*Emphasis Supplied*)

47. Thereafter the Supreme Court in *Sahara India (supra)* further proceeded to lay down that the applicant who seeks the interim injunction or postponement of the publication must discharge the onus as to show that the publication would seriously impair his right to open justice. It has been observed that the temporary restraint orders on publication are necessarily required to be passed for a limited period. This has been observed by Supreme Court in the following words:

“The very object behind empowering the Courts to devise such methods is to see that the administration of justice is not perverted, prejudiced, obstructed or interfered with. At the same time, there is a presumption of Open Justice under the common law. Therefore, Courts have evolved mechanisms such as postponement of publicity to balance presumption of innocence, which is now recognized as a human right in *Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra (supra) vis-à-vis* presumption of Open Justice. Such an order of postponement has to be passed only when other alternative measures such as change of venue or postponement of trial are not available. In passing such orders of postponement, Courts have to keep in mind the principle of proportionality and the test of necessity. The applicant who seeks order of postponement of publicity must displace the presumption of Open Justice and only in such cases the higher Courts shall pass the orders of postponement under Article 129/Article 215 of the Constitution.” (*Emphasis supplied*)

48. The Supreme Court in *Sahara India (supra)* proceeded to observe that the superior Courts would assume jurisdiction not merely in cases, where there is an actual contempt committed by the media but also order of restraint to prevent the future committal of the contempt. It has been observed by the Supreme Court that in an exceptional cases where the publicity is so excessive that in a given case when it appears to the fair reporting but the prejudice is such that may result in fair trial, then the Court has no option short of the prevention of the publication even if some kind of fairness is ascribed to the publication. In the words of the Supreme Court, it has been observed thus:

“As stated above, sometimes, fair and accurate reporting of the trial (say a murder trial) would nonetheless give rise to substantial risk of prejudice not in the pending trial but in the later or connected trials. In such cases, there is no other practical means short of postponement orders that is capable of avoiding such risk of prejudice to the later or connected trials. Thus, postponement order not only safeguards fairness of the later or connected trials, it prevents possible contempt by the Media.” (*Emphasis Supplied*)

49. Upon fair reading of the afore-noted paragraph of the *Sahara India (supra)*, it is clear that it is the question of degree of prejudice and its nexus with fetching the fair justice or open justice which is a potent factor which is required to be examined and tested by the Courts at the time of passing of the injunction restraining or postponing the publication. The line between fairness and unfairness is sometimes blurred but if the same is likely to prejudice the accused

and project him as culprit which may cause irreversible damage to a person, the Court can step in and assume jurisdiction for future prevention of such damage so that the administration of the justice is not impaired.

50. It is seen that the Supreme Court has given only one instance of murder trial where such excessive adverse publicity even if be it fair may compel the Court to interdict and pass postponement order. It is only one such example where the degree of prejudice is so higher and the same may affect the fair trial and impact in administration of justice. Similar can be other cases where such degree of the prejudice exists due to the excessive publicity which may put the party in such an irreversible position by creating a public opinion which may create impediments in getting fair trial or interferes in the administration of the justice due to dominant adverse public opinion.

Prima facie, I find that such degree of prejudice exists in the cases of persons who are seen with the eyes of public confidence and public faith like judges of the Supreme Court or the other superior Courts of justice. The said confidence reinforces the faith in the minds of the public about the fairness and credibility attached the institution of the justice. If some allegations are casted against any member of the Judiciary of the Apex Court current or retired relating to his service in his office as a judge of the Apex Court, the publicity relating to the same has to be handled with care and caution as the excessive adverse publicity relating to the said instance may not merely because a damage to the person himself (as it jeopardizes his repute which he has earned for several years as serving officer of the institute) and put question mark on the integrity of the person, but it also could damage the public good due to the reason that the confidence of the public reposed in higher judiciary much less the Apex body as a last hope for getting justice is seriously prejudiced. The said loss of faith in turn results in bad repute for the person and the institution of justice as a whole. Thus, the degree of prejudice in such case not merely creates an adverse public opinion but also casts doubts on the institution as a whole. The person who is accused of such allegations is seen with extreme suspicion and the same also creates a kind of pressure of adverse public opinion which may affect his likelihood of getting fair trial or may lead to interference in the course of the justice.

51. The Supreme Court in the case of Sahara India (supra) also proceeded to observe that the postponement of publication orders can be passed by the Court after seeing the publication and no general orders restraining future publications can be made but the Court will adopt a judicious approach while making the orders of postponements after the considering the material available on record. In the words of the Supreme Court, it was observed thus:

“The principle underlying postponement orders is that it prevents possible contempt. Of course, before passing postponement orders, Courts should look at the content of the offending publication (as alleged) and its effect. Such postponement orders operate on actual publication. Such orders direct postponement of the publication for a limited period. Thus, if one reads Article 19(2), Article 129/ Article 215 and Article 142(2), it is clear that Courts of Record “have all the powers including power to punish” which means that Courts of Record have the power to postpone publicity in appropriate cases as a preventive measure without disturbing its content. Such measures protect the Media from getting prosecuted or punished for committing contempt and at the same

time such neutralizing devices or techniques evolved by the Courts effectuate a balance between conflicting public interests. It is well settled that precedents of this Court under Article 141 and the Comparative Constitutional law helps Courts not only to understand the provisions of the Indian Constitution it also helps the Constitutional Courts to evolve principles which as stated by Ronald Dworkin are propositions describing rights [in terms of its content and contours] (See “Taking Rights Seriously” by Ronald Dworkin, 5th Reprint 2010). The postponement orders is, as stated above, a neutralizing device evolved by the Courts to balance interests of equal weightage, viz., freedom of expression vis-a-vis freedom of trial, in the context of the law of contempt” (*Emphasis Supplied*)

52. It has been further observed by the Supreme Court that the Court while seeking to pass postponement order should examine the content of the publication on case to case to basis in order to form an opinion. It was observed thus:

“What constitutes an offending publication would depend on the decision of the Court on case to case basis. Hence, guidelines on reporting cannot be framed across the Board. The shadow of “law of contempt” hangs over our jurisprudence. This Court is duty bound to clear that shadow under Article 141. The phrase "in relation to contempt of Court" under Article 19(2) does not in the least describe the true nature of the offence which consists in interfering with administration of justice; in impeding and perverting the course of justice. That is all which is done by this judgment” (*Emphasis Supplied*) “We do not wish to enumerate categories of publication amounting to contempt as the Court(s) has to examine the content and the context on case to case basis” (*Emphasis Supplied*)

53. In the present case, it is an admitted position that the alleged incident is of May, 2011 and that the complaint was filed before Hon'ble Chief Justice of India in November, 2013. The allegations made in the complaint have neither been examined or tested in any Court of law nor have they been proved. No civil or criminal case has been filed by defendant No.5 nor any cogent evidence has been produced along with the complaint.

54. It is also not clear from the material placed on the record, how the TV channels/media have received the copy of the complaint, name of the plaintiff and his photograph and who has provided all such details. These certainly are serious matters which are required to be inquired at the appropriate time in view of the nature of the present case.

55. It is also true that the freedom of press cannot be extended beyond reporting of facts. The plaintiff admittedly has an illustrious career spending over 43 years and has earned name in bar and bench and has an impeccable reputation and is well-known for his integrity and high moral values. He has a reputation in India as well as outside India. In his career over 23 years as a Judge, the plaintiff has dealt with many important cases and has always protected and preserved the interests of justice.

56. Assuming for the sake of example that a false complaint is filed against the retired judge of high judiciary after his death by raising similar nature of allegations after the retirement of about 10 or 20 years. One would fail to understand that after his death who would protect his

interest and defend the case in Court of law when he had in his career given landmark judgments and had a great name and reputation in bar and bench. These questions are to be examined by the Court when the fresh cases are considered.

57. In view of the recent stringent provisions incorporated in the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, which provides for a mechanism of dealing with the cases of sexual harassment, this Court is of the opinion that strict view would have to be applied equally to both the sides, i.e. complainant as well as alleged accused specially in cases where the complaint is filed after the lapse of long period. Thus, this Court is also of the view that there should be a limitation of time for the purpose of filing of such complaints, otherwise no one would know when the complaint ought to have been filed and decided. Thus, a balanced approach has to be taken, particularly, in these types of matters.

58. In the present case, assuming the complaint filed by the defendant No.5 is found to be false after inquiry, then who would ultimately compensate and return the repute and sufferings of the plaintiff and mental torture caused to him and his family members.

59. It is thus a question of fact which has to be examined on case to case basis as to what constitutes the offending publication which may result in future obstruction of justice after examining the content of the publication and its likely effect on the public. Applying the said test to the instant case, It can be seen that there are some allegations against the plaintiff about his alleged involvement in the sexual harassment against which the remedial measures have been taken by the defendant No.5 by approaching the Supreme Court to set up a mechanism in view of guidelines set out in *Vishaka's case (supra)*. It is further pertinent to mention that the occurrence of the alleged incident is stated to be 2 and a half year prior to the filing of the said complaint. It is the grievance of the plaintiff as per the material available on record wherein on the basis of mere stray allegation verification of which is required to be tested in the Court, the defendants are excessively publicizing the same by the titles which connects the plaintiff with that of the said allegations alongside the photographs and his name which creates an impression as if the plaintiff is actually involved in the incident in order to create adverse public opinion. The said titles include document filed at page No.6 in the documents file which reads that "Justice S Kumar..... put his right arm around me, kissed on my left shoulder.... I was shocked" in the beginning of the national daily newspaper along with the photograph and the name prominently written on the same in order to connect plaintiff with such imputations which are still at the stage of mere allegations levelled at the belated stage. Similar news articles are pointed in the documents filed at page No.8 and 10 which use the expressions like "sex taint on another SC judge" and "Supreme Court urged to probe charge against former Judge". I have examined the contents of the said publications at the relevant pages No.6, 8 and 10. I have already observed that continuous adverse publicity of the persons who are seen from the eyes of public confidence and faith is destructive of their reputation as well as the public good in the form of the loss of confidence in the institution itself. It may also result in creating an atmosphere in the form of public opinion wherein a person may not be able to put forward his defence properly and his likelihood of getting fair trial would be seriously impaired. Prima facie, I find that the publications at page No.6, 8 and 10 connect the plaintiff with the such allegations in the manner which creates a trial by media kind of situation by creating a sensation amongst the public by highlighting and underscoring mere allegations on the front pages of

daily routine news and thus the same or similar nature of publications are required to be postponed.

60. It has been observed by the Supreme Court in *Sahara India (supra)* that the order by the Court may include the direction not to disclose the identity of the victim, witness of complaint or of alike nature. The Court observed thus:

“In the light of the law enunciated hereinabove, anyone, be he an accused or an aggrieved person, who genuinely apprehends on the basis of the content of the publication and its effect, an infringement of his/ her rights under Article 21 to a fair trial and all that it comprehends, would be entitled to approach an appropriate writ Court and seek an order of postponement of the offending publication/ broadcast or postponement of reporting of certain phases of the trial (including identity of the victim or the witness or the complainant), and that the Court may grant such preventive relief, on a balancing of the right to a fair trial and Article 19(1)(a) rights, bearing in mind the abovementioned principles of necessity and proportionality and keeping in mind that such orders of postponement should be for short duration and should be applied only in cases of real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. Such neutralizing device (balancing test) would not be an unreasonable restriction and on the contrary would fall within the proper constitutional framework.” (*Emphasis supplied*)

61. In view of the observations of the Supreme Court, it is clear that the order in the cases preventing the publication may include directions not to disclose the identity of the person or postpone the publication amongst other directions. In the instant case, the identity of the plaintiff is already disclosed prior to approaching this Court, however, the plaintiff states that the photograph of the plaintiff is repeated shown in the national dailies and televised news on day to day basis with an attempt to create an adverse public image. Prima facie I find that besides postponing the publications, the order or directions restraining the defendant not to publish the photograph of the plaintiff time and again till the time any fact finding is made by the relevant authorities is also necessary so that the adverse publicity against him can be avoided.

62. I have already examined in the preceding paragraph of this order the argument that even if some amount of fairness is attached to the publication, still the Court can proceed to prevent the same on the basis of the excessive prejudice. Suffice it to say, no conclusive finding as to fairness or unfairness can be arrived at this juncture. Upon the fair reading of material available on record, it prima facie appears that the same can prejudicially affect the public mind and there is real and tangible risk of the plaintiff in not getting fair trial or open justice as contemplated by the common law as per the dictum laid down by the Supreme Court of India in *Sahara India (supra)*.

63. In view of the aforementioned discussion, I find that the plaintiff has been able to make out a strong prima facie case on the basis of the disclosure of the material available on record especially copies of newspapers at page Nos.6, 8, 10 of the documents and the CDs which clearly show that the defendants have published the write ups and telecasted by highlighting

the allegations on the front page in order to create sensation amongst public and made it apparent by creating the impression that the plaintiff in all probability is involved in such incident. The balance of the convenience is also in favour of the plaintiff as the degree of the prejudice is far more excessive than that of the defendants. The irreparable loss shall ensue to the plaintiff at this stage and not to the defendants if such publications and telecast of TV news of such nature on similar lines are not postponed. The interim order is also passed against any other person, entity, in print or electronic media or internet in view of the settled law in the case of *ESPN Software India Private Limited v. M/s Tudu Enterprises and Others* in CS(OS) No.384/2011 dated 18th February, 2011 and *Indian Performing Right Society Ltd. v. Badal Dhar Chowdhry and Ors.*, 2010 (43) PTC 332 (Del.).

64. Accordingly, the defendants, their agents, assigns or any of them acting on their behalf and/or any other person, entity, in print or electronic media or internet are:

a) Restrained from further publishing the write ups as mentioned in page Nos.6, 7, 10 of the documents file or publishing any article or write up and telecast which highlights the allegations against the plaintiff in the form of headlines connecting or associating plaintiff with those allegations, particularly, without disclosing in the headlines of article that they are mere allegations against the plaintiff or any other similar nature of articles, write up and telecast.

b) The directions made in para (a) restrains the defendants from publication either in print media or in electronic form or in any manner publishing the said news in televised form. The defendants shall delete the offending content as mentioned in para (a) from internet or other electronic media and shall take necessary steps within 24 hours from today.

c) The defendants are further restrained from publishing the photographs of the plaintiff either in print media or electronic media or Internet or on TV channels which may suggest connection of the plaintiff with the said allegations made by defendant No.5 and remove his photographs from internet or all other electronic media as well as upload defamatory articles.

65. The said interim directions as mentioned in paras (a) to (c) of postponement of publications shall remain in force till the next of date of hearing which is a temporary measure as per *Sahara India* (supra) and the same are subject to further monitoring by this Court from time to time.

66. The observations made in this order are prima facie in nature and will not preclude the defendants to report the Court cases and happenings as facts which are covered ambit of fair reporting on the basis of true, correct and verified information.

Sting Operation by Media Serving a Public Cause
R.K. Anand v. Registrar, Delhi High Court
(2009) 8 SCC 106

Aftab Alam, J. (for himself and B.N. Agrawal and G.S. Singhvi, JJ.): 1. The present is a fall out from a criminal trial arising from a hit and run accident on a cold winter morning in Delhi in which a car travelling at reckless speed crashed through a police check post and crushed to death six people, including three policemen. Facing the trial, as the main accused, was a young person called Sanjeev Nanda coming from a very wealthy business family. According to the prosecution, the accident was caused by Sanjeev Nanda who, in an inebriated state, was driving a black BMW car at very high speed. The trial, commonly called as the BMW case, was meandering endlessly even after eight years of the accident and in the year 2007, it was not proceeding very satisfactorily at all from the point of view of the prosecution. The status of the main accused coupled with the flip-flop of the prosecution witnesses evoked considerable media attention and public interest. To the people who watch TV and read newspapers it was yet another case that was destined to end up in a fiasco. It was in this background that a well-known English language news channel called New Delhi Television (NDTV) telecast a programme on May 30, 2007 in which one Sunil Kulkarni was shown meeting with IU Khan, the Special Public Prosecutor and RK Anand, the Senior Defence Counsel (and two others) and negotiating for his sell out in favour of the defence for a very high price. Kulkarni was at one time considered the most valuable witness for the prosecution but afterwards, at an early stage in the trial, he was dropped by the prosecution as one of its witnesses. Nearly eight years later, the trial court had summoned him to appear and give his testimony as a court witness. The telecast came a few weeks after the court order and even as his evidence in the trial was going on. According to NDTV, the programme was based on a clandestine operation carried out by means of a concealed camera with Kulkarni acting as the mole. What appeared in the telecast was outrageous and tended to confirm the cynical but widely held belief that in this country the rich and the mighty enjoyed some kind of corrupt and extra-constitutional immunity that put them beyond the reach of the criminal justice system. Shocked by the programme the Delhi High Court *suo moto* initiated a proceeding [Writ Petition (Criminal) No.796 of 2007]. It called for from the news channel all the materials on which the telecast was based and after examining those materials issued show cause notices to RK Anand, IU Khan and Bhagwan Sharma, an associate advocate with RK Anand why they should not be convicted and punished for committing criminal contempt of court as defined under section 2 (c) of the Contempt of Courts Act. (In the sting operations there was another person called Lovely who was apparently sent to meet Kulkarni as an emissary of RK Anand. But he died in a freak accident even before the stage of issuance of notice in the proceeding before the High Court). On considering their show cause and after hearing the parties the High Court expressed its displeasure over the role of Bhagwan Sharma but acquitted him of the charge of contempt of court. As regards RK Anand and IU Khan, however, the High Court found and held that their acts squarely fell within the definition of contempt under clauses

(ii) & (iii) of section 2(c) of the Contempt of Courts Act. It, accordingly, held them guilty of committing contempt of Court vide judgment and order dated August 21, 2008 and in exercise of power under Article 215 of the Constitution of India prohibited them, by way of punishment, from appearing in the Delhi High Court and the courts subordinate to it for a period of four months from the date of the judgment. It, however, left them free to carry on their other professional work, e.g., 'consultations, advises, conferences, opinion etc'. It also held that RK Anand and IU Khan had forfeited their right to be designated as Senior Advocates and recommended to the Full Court to divest them of the honour. In addition to this the High Court also sentenced them to fine of rupees two thousand each.

2. These two appeals by RK Anand and IU Khan respectively are filed under section 19 (1) of the Contempt of Courts Act against the judgment and order passed by the Delhi High Court.

MEDIA INTERVENTION:

13. [...]

16. On April 28, 2007 Kulkarni along with one Deepak Verma of NDTV went to meet IU Khan in the Patiala House court premises. For the mission Poonam Agarwal 'wired' Kulkarni, that is to say, she equipped him with a concealed camera and a small electronic device that comprised of a tiny black button-shaped lens attached to his shirt front connected through a wire to a small recorder with a microchip hidden at his backside. Before sending off Kulkarni she switched on the camera and waited outside the court premises in a vehicle. Deepak Verma from the TV channel was sent along to ensure that everything went according to plan. He was carrying another concealed camera and the recording device in his handbag. Kulkarni and Deepak Verma were able to meet IU Khan while he was sitting in the chamber of another lawyer. Kulkarni entered into a conversation with IU Khan inside the crowded chamber (the details of the conversation we will examine later on at its proper place in the judgment). The conversation between the two that took place inside the chamber was recorded on the microchips of both the devices, one worn by Kulkarni and the other carried by Deepak Verma in his bag. After a while, on Kulkarni's request, both IU Khan and Kulkarni came out of the chamber and some conversation between the two took place outside the chamber. The recording on the microchip of Kulkarni's camera was copied onto magnetic tapes and from there to compact discs (CDs). The microchip in Kulkarni's camera used on April 28, 2007 was later reformatted for other uses. Thus, admittedly that part of the conversation between Kulkarni and IU Khan that took place on April 28, 2007 outside the chamber is available only on CD and the microchip on which the original recording was made is no longer available. The second operation was carried out on May 6, 2007 when Kulkarni met RK Anand in the VIP lounge at the domestic terminal of IGI Airport. The recording of the meeting was made on the microchip of the concealed camera carried by Kulkarni.

17. On May 8, 2007 the third sting operation was carried out when Kulkarni got into the back seat of RK Anand's car that was standing outside the Delhi High Court premises. RK Anand was sitting on the back seat of the car from before. The recording shows Kulkarni and RK Anand in conversation as they travelled together in the car from Delhi High Court to South Extension.

18. In the evening of the same day the fourth and final sting operation was carried out in South Extension Part II market where Kulkarni met one Bhagwan Sharma, Advocate and another person called Lovely. Bhagwan Sharma is one of the juniors working with RK Anand and Lovely appears to be his handyman who was sent to negotiate with Kulkarni on behalf of RK Anand.

19. According to Poonam Agarwal, in all these operation she was only at a little distance from the scene and was keeping Kulkarni, as far as possible, within her sight.

20. According to NDTV, in all these operations a total of five microchips were used. Four out of those five chips are available with them in completely untouched and unaltered condition. One microchip that was used in the camera of Kulkarni on April 28, 2007, as noted above, was reformatted after its contents were transferred onto a CD.

21. On May 13, 2007 NDTV recorded an interview by Kulkarni in its studio in which Kulkarni is shown saying that after watching the NDTV programme (on the BMW case) he got in touch with the people from the channel and told them that the prosecution and the defence in the case were in league and he knew how witnesses in the case were bought over by the accused and their lawyers. He also told NDTV that he could expose them through a sting operation. He further said that he carried out the sting operation with the help of NDTV. He first met IU Khan who referred him to RK Anand. He then met some people sent by RK Anand, including someone whose name was 'Lovely or something like that'. As to his objective he said quite righteously that he did the sting operation 'in the interest of the judiciary'. In answer to one of the questions by the interviewer he replied rather grandly that he would ask the court to provide him security by the NSG and he would try to go and depose as soon as security was provided to him. In the second part of the interview the interviewer asked him about the accident and in that regard he said briefly and in substance what he had earlier stated before the police and the magistrate.

THE TELECAST:

25. Based on the sting operations NDTV telecast a programme called India 60 Minutes (BMW Special) on May 30, 2007 at 8.00 p.m. It was followed at 9.00 pm, normally reserved for news, as 'BMW Special'. From a purely journalistic point of view it was a brilliant programme designed to have the greatest impact on the viewers. The programmes commenced with the anchors (Ms. Sonia Singh in the first and Ms. Barkha Dutt in the second telecast) making some crisp and hard hitting introductory remarks on the way the BMW case was proceeding which, according to the two anchors, was typical of the country's legal system. The introductory remarks were followed by some clips from the sting recordings and comments by the anchors, interspersed with comments on what was shown in the programme by a host of well known legal experts.

26. It is highly significant for our purpose that both the telecasts also showed live interviews with RK Anand. According to the channel's reporter, who was posted at RK Anand's residence with a mobile unit, he initially declined to come on the camera or to make any comments on the programme saying that he would speak only the following day in the court at the hearing of the case. According to the reporter, in course of the telecast Sanjeev Nanda also arrived at the residence

of RK Anand and joined him in his office. He too refused to make any comments on the ongoing telecast. But later on RK Anand came twice on the TV and spoke with the two anchors giving his comments on what was being shown in the telecasts. We shall presently examine whether the programmes aired to the viewers were truly and faithfully based on the sting operations or whether in the process of editing for preparing the programmes any slant was given, prejudicial to the two appellants. This is of course subject to the premise that the Court has no reason to suspect the original materials on which the programme was based and it is fully satisfied in regard to the integrity and authenticity of the recordings made in the sting operations. That is to say, the recordings of the sting operations were true and pure and those were not fake, fabricated, doctored or morphed.

27. In regard to the telecast it needs to be noted that though the sting operations were complete on May 8, 2007 and all the materials on which the telecast would be based were available with the TV channel, the programme came on air much later on May 30. The reason for withholding the telecast was touched upon by the anchors who said in their introductory remarks that after the sting operations were complete and just before his testimony began in court Kulkarni withdrew his consent for telecasting the programmes. Nevertheless, after taking legal opinion on the matter NDTV was going ahead with the airing of programme in larger public interest. Towards the end of the nine o'clock programme the anchor had a live discussion with Poonam Agarwal in which she elaborated upon the reason for withholding the telecast for about three weeks. Concerning Kulkarni, Poonam Agarwal said that he was the main person behind the stings and the sting operation was planned at his initiative. He had approached her and said to her that he wished to bring out into the open the nexus between the prosecution and the defence in the BMW case. He had also said to her that in connection with the case he was under tremendous pressure from both sides. But after the stings were complete he changed his stand and would not agree to the telecast of the programme based on the stings. In the discussion between the anchor and Poonam Agarwal it also came to light that initially NDTV had seen Kulkarni as one of the victims of the system but later on he appeared in highly dubious light. The anchor said that they had no means to know if he had received any money from any side. Poonam Agarwal who had the occasion to closely see him in course of the sting operations gave instances to say that he appeared to her duplicitous, shifty and completely unreliable.

28. NDTV took the interview of RK Anand even as the first telecasts were on and thus what he had to say on what was being shown on the TV was fully integrated in the eight o'clock and nine o'clock programmes on May 30. IU Khan was interviewed on the following morning when a reporter from the TV channel met him at his residence with a mobile transmission unit. The interview was live telecast from around eight to twenty three past eight on the morning of May 31. But that was the only time his interview was telecast in full. In the programmes telecast later on, one or two sentences from his interview were used by the anchor to make her comments.

29. In his interview IU Khan basically maintained that from the clandestine recording of his conversation with Kulkarni, pieces, were used out of context and selectively for making the

programme and what he spoke to Kulkarni was deliberately misinterpreted to derive completely wrong inferences. He further maintained that in his meeting with Kulkarni he had said nothing wrong much less anything to interfere with the court's proceeding in the pending BMW case.

Impact of the telecast:

30. On the same day IU Khan withdrew from the BMW case as Special Public Prosecutor. Before his withdrawal, however, he produced before the trial court a letter that finds mention in the trial court order passed on that date, written in the hand of Kulkarni stating that he collected the summons issued to him by the court from SHO, Lodhi Colony Police Station on the advice of IU Khan.

31. The trial court viewed the telecast by NDTV very seriously and issued notice to its Managing Director directing to produce 'the entire unedited original record of the sting operation as well as the names of the employees/reporters of NDTV who were part of the said sting operation' by the following day.

32. The further cross-examination of Kulkarni was deferred to another date on the request of the counsel replacing IU Khan as Special Public Prosecutor.

33. On June 1, 2007, RK Anand had a legal notice sent to NDTV, its Chairman, Directors and a host of other staff asking them to stop any further telecasts of their BMW programme and to tender an unconditional apology to him failing which he would take legal action against them inter alia for damages amounting to rupees fifty crores. NDTV gave its reply to the legal notice on July 20, 2007. No further action was taken by RK Anand in pursuance of the notice.

SOME OF THE ISSUES ARISING IN THE CASE:

59. The two appeals give rise to the following questions:

1. Whether the conviction of the two appellants for committing criminal contempt of court is justified and sustainable?
2. Whether the procedure adopted by the High Court in the contempt proceedings was fair and reasonable, causing no prejudice to the two appellants?
3. Whether it was open to the High Court to prohibit the appellants from appearing before the High Court and the courts sub-ordinate to it for a specified period as one of the punishments for criminal contempt of court?
4. Whether in the facts and circumstances of the case the punishments awarded to the appellants can be said to be adequate and commensurate to their misdeeds?

Apart from the above, some other important issues arise from the facts of the case that need to be addressed by us. These are:

5. The role of NDTV in carrying out sting operations and telecasting the programme based on the sting materials in regard to a criminal trial that was going on before the court.
6. The declining professional standards among lawyers, and

7. The root-cause behind the whole affair; the way the BMW trial was allowed to go directionless.

Nature of Contempt Proceeding:

78. Learned counsel (for *Appellant RK Anand*) pointed out that at the threshold of the proceeding, started *suo moto*, the High Court, instead of taking the microchips used for the sting operations in its custody directed NDTV 'to preserve the original material including the CDs/Video' pertaining to the sting operations and to submit to the Court copies and transcripts made from those chips. Thus the microchips remained all along with NDTV, allowing it all the time and opportunity to make any alterations and changes in the sting recordings (even assuming there were such recording in the first place!) to suit its purpose. The petition filed by RK Anand for directing NDTV to submit the original microchips before the Court and to give him copies made in Court directly from those chips remained lying on the record unattended till it was rejected by the final judgment and order passed in the case. Another petition requesting to send the microchips for forensic examination also met with the same fate.

79. Mr. Ahmed further submitted that the procedure followed by the High Court was so flawed that even the number of chips used for the different sting operations remained indeterminate. The trial court order dated June 1, 2007 referred to three chips produced on behalf of NDTV. The written statement of Poonam Agarwal made before the High Court on June 6, 2007 mentioned four chips and finally their number became five in her affidavit dated October 1, 2007.

80. He further submitted that the audio and the video recording on the basis of which the NDTV telecast was based and that was produced before the High Court was done by Kulkarni and it was he who was the maker of those materials. The Court never got Kulkarni brought before it either for the formal proof of the electronic materials or for cross-examination by the contemnors. The finding of the High Court was thus based on materials of which neither the authenticity was proved nor the veracity of which was tested by cross-examination. He further submitted that the affidavit of the NDTV reporter (Poonam Agarwal) doesn't cure this basic flaw in the proceedings. The recordings were not done by the TV channel's reporter: her participation in the process was only to the extent that she 'wired' Kulkarni and received from him the recorded materials. What she received from Kulkarni was also not identified, much less formally proved before the High Court. According to Mr. Ahmed, therefore, the finding of the High Court was wholly untenable and fit to be set aside.

SUBMISSIONS CONSIDERED:

81. The legal principles advanced by Mr. Ahmed are unexceptionable but the way he tried to apply those principles to the present case appear to us to be completely misplaced.

82. Here, we must make it clear that we are dealing with a proceeding under the Contempt of Courts Act. Now, it is one thing to say that the standard of proof in a contempt proceeding is no less rigorous than a criminal trial but it is something entirely different to insist that the manner of proof for the two proceedings must also be the same. It is now well settled and so also the High Court has held that the proceeding of contempt of court is *sui generis*. In other words, it is not strictly controlled by the provisions of the CrPC and the Indian Evidence Act. What, however, applies to

a proceeding of contempt of court are the principles of natural justice and those principles apply to the contempt proceeding with greater rigour than any other proceeding. This means that the Court must follow a procedure that is fair and objective; that should cause no prejudice to the person facing the charge of contempt of court and that should allow him/her the fullest opportunity to defend himself/herself. (See *In Re Vinay Mishra* (1995) 2 SCC 584, *Daroga Singh and Ors. v. B.K. Pandey* (2004) 5 SCC 26).

Submissions on behalf of IU Khan:

114. Mr. P. P. Rao, learned Senior Advocate appearing for IU Khan mainly submitted that even if the sting recording is accepted as true, on the basis of the exchange that took place between his client and Kulkarni it cannot be said that he acted in a way or colluded in any action aimed at interfering or tending to interfere with the prosecution of the accused in the BMW case or interfering or tending to interfere with or obstructing or tending to obstruct the administration of justice in any other manner. He further submitted that the findings of the High Court were based on assumptions that were not only completely unfounded but in respect of which the appellant was given no opportunity to defend himself. The High Court held the appellant guilty of committing criminal contempt of court referring to and relying upon certain alleged facts and circumstances that did not form part of the notice and in regard to which he was given no opportunity to defend himself. Mr. Rao submitted that along with the notice issued by the High Court the appellant was not given all the materials concerning his case and he was thus handicapped in submitting his show cause. He further submitted that the High Court erroneously placed the case of his client at par with RK Anand and convicted him because RK Anand was found guilty even though the two cases were completely different. Mr. Rao was also highly critical of the TV channel. He questioned the propriety of the sting operation and the telecast of the sting programme concerning a pending trial and involving a court witness without any information to, much less permission by the trial court or even the High Court or its Chief Justice. Mr. Rao submitted that when Kulkarni first approached Poonam Agarwal she thought it imperative to first obtain the approval of her superiors before embarking upon the project, but it did not occur to anyone, including her superiors in the TV channel to obtain the permission or to even inform at least the Chief Justice of the Delhi High Court before taking up the operation fraught with highly sinister implications. Mr. Rao also assailed the judgment coming under appeal on a number of other grounds.

SUBMISSIONS CONSIDERED:

115. We have carefully gone through all the materials concerning IU Khan. We have perused the transcript of the exchange between Kulkarni and IU Khan and have also viewed the full recording of the sting several times since the full transcript of the recording is not available on the record.

IU Khan's conduct quite improper:

117. Coming back to the exchange between IU Khan and Kulkarni, we accept that the transcript of the exchange does not present the accurate picture; listening to the live voices of the two (and others present in the chamber) on the CD gives a more realistic idea of the meeting. We grant everything

that can be said in favour of IU Khan. The meeting took place without any prior appointment from him. Kulkarni was able to reach him, unlike RK Anand, without his permission or consent. IU Khan did not seem to be overly enthused at the appearance of Kulkarni. Accosted by Kulkarni, he spoke to him out of civility and mostly responded only to his questions and comments. There were others present in the chamber with whom he was equally engaged in conversation. He also greeted someone else who came into the chamber far more cheerfully than Kulkarni. But the undeniable fact remains that he was talking to him all the time about the BMW trial and the related proceedings. Instead of simply telling him to receive the summons and appear before the court as directed, IU Khan gave reassurances to Kulkarni telling him about the revision filed in the High Court against the trial court's order. He advised him to relax saying that since he had dropped him (as a prosecution witness) the court was no one to ask for his statement. The part of the exchange that took place outside the chamber was worse. Inside the chamber, at one stage, IU Khan seemed even dismissive of Kulkarni but on coming out he appeared quite anxious to fix up another meeting with him at his residence giving promising good Scotch whisky as inducement. IU Khan would be the first person to deny any friendship or even a long acquaintanceship with Kulkarni. The only common factor between them was the BMW case in which one was the prosecutor and the other was a prosecution witness, later dropped from the list of witnesses. A lawyer, howsoever, affable and sociable by disposition, if he has the slightest respect for professional ethics, would not allow himself such degree of familiarity with the witness of a criminal trial that he might be prosecuting and would not indulge with him into the kind of exchange as admittedly took place between IU Khan and Kulkarni. We are also not prepared to believe that in his conversation with Kulkarni, IU Khan did not mean what he was saying and he was simply trying to somehow get rid of Kulkarni. The video of the sting recordings leaves no room for doubt that IU Khan was freely discussing the proceeding of BMW case with Kulkarni and was not at all averse to another meeting with him rather he was looking forward to it. We, therefore, fully endorse the High Court finding that the conduct of IU Khan was inappropriate for a lawyer in general and a prosecutor in particular.

CRIMINAL CONTEMPT???

118. But there is a wide gap between professional misconduct and criminal contempt of court and we now proceed to examine whether on the basis of materials on record the charge of criminal contempt of court can be sustained against IU Khan.

119. The High Court held that there was an extraordinary degree of familiarity between IU Khan, Kulkarni and RK Anand and each of them knew that the other two were equally familiar with each other. So far as BMW trial is concerned Kulkarni was a link between IU Khan and RK Anand. IU Khan, by reason of his familiarity both with RK Anand and Kulkarni would also know about the game that was afoot for the subversion of the trial. He failed to inform the prosecution and the court about it and his omission to do so was likely to have a very serious impact on the trial. He was, therefore, guilty of actually interfering with due course of judicial proceeding, in the BMW case.

120. In the two sting recordings concerning RK Anand there are ample references to IU Khan to suggest a high degree of familiarity between the three. But in the sting on IU Khan the only words

used by him that might connect him to RK Anand through Kulkarni are 'Bade Saheb'. If 'Bade Saheb' referred to RK Anand, the involvement of IU Khan needs no further proof. The question, however, is whether that finding can be safely arrived at.

126. The High Court rejected IU Khan's explanation that what he meant by 'Bade Saheb' was some senior officer in the police headquarter. According to IU Khan, Kulkarni was in the habit of directly approaching the superior police officers and he would refer to them by that expression. In support of the plea in his reply affidavit (paragraph 12) IU Khan stated as follows:

"Even during the course of his deposition in court Mr. S. Kulkarni had used the expression "Bade Sahab" while referring to the higher police officers. The Ld. trial court also translated the same in English while recording the statement as "higher police officers". In the cross-examination Mr. S. Kulkarni has stated "I had voluntarily gone to the higher police officers of the police headquarter"."

The High Court rejected the aforesaid plea observing as follows;

"It was further submitted that during the recording of Mr. Kulkarni's evidence on an earlier occasion, a reference to Bade Saheb was made more than once. "Bade Saheb" was then translated and recorded in the deposition to mean senior police officers. Learned counsel for Mr. Khan, however, did not produce any material to support the last submission".

127. Mr. P. P. Rao submitted that the approach of the High Court was quite unfair. The proceeding before the High Court was not in the nature of a suit or a criminal trial. In response to the notice issued by the Court the appellant had made a positive statement in his reply affidavit. The statement was not formally traversed by anyone. There was, therefore, no reason for the appellant to assume that he would be required to produce evidence in support of the statement. In case the High Court felt the need for some evidence in support of the averment it should have at least made it known to the appellant. But the High Court without giving any inkling to the appellant rejected the plea in the final judgment. The appellant was thus clearly denied a proper opportunity to defend himself. We find that the submission is not without substance. The proceeding before the High Court was under the Contempt of Courts Act and the High Court was not following any well-known and well established format. In that situation it was only fair to give notice to the proceedees to substantiate the pleas taken in the reply affidavit by leading proper evidence. It must, therefore be held that the High Court rejected a material plea raised on behalf of the IU Khan without giving him any opportunity to substantiate it.

128. Further, as noticed above, the High Court, for arriving at the finding that there was a high degree of familiarity among IU Khan, Kulkarni and RK Anand has repeatedly used the transcripts of the meetings between Kulkarni and RK Anand. It is indeed true that in the exchanges between Kulkarni and RK Anand there are many references to IU Khan. That may give rise of a strong suspicion, of a common connection between the three. But having regard to the charge of criminal contempt any suspicion howsoever strong cannot take the place of proof and we don't feel it wholly prudent to rely upon the exchanges between Kulkarni and RK Anand to record a finding against IU Khan.

129. Further, according to the High Court, the essence of culpability of IU Khan was his omission to inform the prosecution and the Court “that one of its witnesses was more than an acquaintance of defence lawyer”.

130. Mr. P. P. Rao submitted that the High Court convicted the appellant for something in regard to which he was never given an opportunity to defend himself. From the notice issued by the High Court it was impossible to discern that the charge of criminal contempt would be eventually fastened on him for his failure to inform the court and the prosecution about the way Kulkarni’s was being manipulated by the defence. Mr. Rao further submitted that the reason assigned by the Court to hold the appellant guilty was based purely on assumption. The appellant was given no opportunity to show that, as a matter of fact, after Kulkarni met him at the Patiala House on April 28, 2007 he had informed the concerned authorities that after being summoned by the court Kulkarni was back to his old tricks. He further submitted that the appellant, given the opportunity, could also show that the decision to not examine him as one of the prosecution witnesses was taken by the concerned authorities in consultation with him. We find substance in Mr. Rao's submission.

131. In our considered view, on the basis of materials on record the charge of criminal contempt cannot be held to be satisfactorily established against IU Khan. In our opinion he is entitled to the benefit of doubt.

PROCEDURE FOLLOWED BY THE HIGH COURT:

132. A lot has been argued about the procedure followed by the High Court in dealing with the matter. On behalf of RK Anand it was strongly contended that by only asking for the copies of the original sting recordings and allowing the original microchips and the magnetic tapes to be retained in the custody of NDTV the High Court committed a serious and fatal lapse. Mr. Gopal Subramaniam also took the view that though the final judgment passed by the High Court was faultless, it was nevertheless an error on its part to leave the original sting recordings in the safe custody of the TV channel. On principle and as a matter of proper procedure, the Court, at the first instance, ought to have taken in its custody all the original electronic materials concerning the stings.

133. At first the direction of the High Court leaving the microchips containing the original sting recordings and the magnetic tapes with the TV channel indeed appears to be somewhat strange and uncommon but a moment's thought would show the rationale behind it. If the recordings on the microchips were fake from the start or if the microchips were morphed before notice was issued to the TV channel, those would come to the court in that condition and in that case the question whether the microchips were genuine or fake/morphed would be another issue. But once the High Court obtained their copies there was no possibility of any tampering with the microchips from that stage. Moreover, the High Court might have felt that the TV channel with its well equipped studio/laboratory would be a much better place for the handling and conservation of such electronic articles than the High Court Registry. On the facts of the case, therefore, there was no lapse on the part of the High Court in leaving the microchips in the safe custody of the TV channel and in any event it does not have any bearing on the final decision of the case.

134. However, what we find completely inexplicable is why, at least at the beginning of the proceeding, the High Court did not put NDTV, along with the two appellants, in the array of contemnors. Looking back at the matter (now that we have on the record before us the appellants' affidavits in reply to the notice issued by the High Court as well as their first response to the telecast in the form of their live interviews), we are in the position to say that since the contents of the sting recordings were admitted there was no need for the proof of integrity and correctness of the electronic materials. But at the time the High Court issued notices to the two appellants (and two others) the position was completely different. At that stage the issue of integrity, authenticity and reliability of the sting recordings was wide open. The appellants might have taken the stand that not only the sting recordings but their respective responses shown by the TV channel were fake and doctored. In such an event the TV channel would have been required to be subjected to the strictest proof of the electronic materials on which its programmes were based and, in case it failed to establish their genuineness and correctness, it would have been equally guilty, if not more, of serious contempt of court and other criminal offences. By all reckoning, at the time of initiation of the proceeding, the place of NDTV was along with the appellants facing the charge of contempt. Such a course would have put the proceeding on a more even keel and given it a more balanced appearance. Then perhaps there would have been no scope for the grievance that the High Court put the TV channel on the complainant's seat. And then perhaps the TV Channel too would have conducted itself in a more careful manner and the lapses as indicated above in the case of IU Khan might not have occurred.

THE QUESTION OF SENTENCE:

148. Having regard to the misdeeds of which RK Anand has been found guilty, the punishment given to him by the High Court can only be regarded as nominal. We feel that the leniency shown by the High Court in meting out the punishment was quite misplaced. And the view is greatly reinforced if one looks at the contemnor's conduct before the High Court. As we shall see presently, before the High Court the contemnor took a defiant stand and constantly tried to obstruct the proceedings.

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164. Both Mr. Salve and Mr. Subramaniam strongly submitted that the appellant had plainly no respect for the court or the court proceedings. Mr. Salve submitted that the recusal application was a brazen attempt to browbeat the High Court and in that attempt the appellant succeeded to a large extent since the prohibition to appear before the courts for a period of only four months could only be considered as a token punishment having regard to the gravity of his conduct. Mr. Subramaniam also felt strongly about the recusal application but before taking up the issue he fairly tried to give another opportunity to the appellant stating that perhaps even now the appellant might wish to withdraw the grounds in the SLP challenging the order passed by the High Court on the recusal application. The appellant was given ample time to consider the suggestion but later on enquiry Mr. Altaf Ahmed stated that he had not pressed those grounds in course of his submissions

exercising his discretion as the Counsel but he had no instructions to get those grounds deleted from the SLP.

165. The action of the appellant in trying to suborn the court witness in a criminal trial was reprehensible enough but his conduct before the High Court aggravates the matter manifold. He does not show any remorse for his gross misdemeanour and instead tries to take on the High Court by defying its authority. We are in agreement with Mr. Salve and Mr. Subramaniam that punishment given to him by the High Court was wholly inadequate and incommensurate to the seriousness of his actions and conduct. We, accordingly, propose to issue a notice to him for enhancement of punishment. We also hold that by his actions and conduct the appellant has established himself as a person who needs to be kept away from the portals of the court for a longer time. The notice would therefore require him to show-cause why the punishment awarded to him should not be enhanced as provided under section 12 of the Contempt of Courts Act. He would additionally show-cause why he should not be debarred from appearing in courts for a longer period. The second part of the notice would also cure the defect in the High Court order in debarring the appellant from appearing in courts without giving any specific notice in that regard as held in the earlier part of the judgment.

THE ROLE OF NDTV:

167. NDTV came under heavy attack from practically all sides for carrying out the stings and airing the programme based on it. On behalf of RK Anand the sting programme was called malicious and motivated, aimed at defaming him personally. Mr. P P Rao appearing for IU Khan questioned the propriety of the stings and the repeated telecast of the sting programme concerning a pending trial and involving a court witness. Mr. Rao submitted that before taking up the sting operations, fraught with highly sinister implications, the TV channel should have informed the trial court and obtained its permission. If for any reason it was not possible to inform the trial judge then permission for the stings should have been taken from the Chief Justice of the Delhi High Court. Also, it was the duty of that TV channel to place the sting materials before the court before telecasting any programme on that basis.

168. Mr. Gopal Subramaniam submitted that this case raised the important issue regarding the nature and extent of the right of the media to deal with a pending trial. He submitted that a sting operation was, by its nature, based on deception and hence, overriding public interest alone might justify its publication/telecast. Further, since the operation was based on deception the onus would be heavy on the person behind the sting and publication/telecast of the sting materials to establish his/her bona fide, apart from the genuineness and truthfulness of the sting materials. In regard to sting operations bona fide could not be assumed. In this case, therefore, it was the duty of the High Court to inquire into and satisfy itself whether the sting operation was a genuine exercise by the TV channel to expose the attempted subversion of the trial. He further submitted that the affidavit of Poonam Agarwal was not sufficient to arrive at the conclusion that the action of the TV channel was genuine and bona fide and the matter required further enquiry. Mr. Subramaniam further submitted that the act of publication/telecast and the contents of publication/telecast, though

interlinked, were still needed to be viewed separately and whether or not a publication or telecast was justified would, to a large extent, depend, as much on the contents of the publication/telecast, as the act of publication/telecast itself. He further submitted that, in the facts of the case, the sting operation was in public interest and there was nothing objectionable there. But the same cannot be said of the telecast. The date on which the programme was telecast (May 30, 2007- when Kulkarni's cross-examination was still pending), the "slant" given to the episode by the NDTV presenters, and the way opinions were solicited from eminent lawyers, left much to be explained by the TV channel. Learned Counsel submitted that a question may arise whether NDTV was justified in telecasting the programme based on the sting when they were not in a position to vouch for Kulkarni's character. He, however, submitted that the TV channel must at least be given credit for transparency - it made a public disclosure, in the same telecast, that (a) Kulkarni had withdrawn his consent for the telecast;

(b) it did not know if any money had in fact changed hands, and (c) it could not vouch for Kulkarni's character. It also gave the contemnors a chance to state their version of the story. In conclusion Mr Subramaniam submitted that it would be difficult to conclude that NDTV was guilty of contempt or of conducting a media trial although the "slant in the telecast was regrettable overreach."

169. The other amicus Mr. N. Rao was more severe in his criticism of the telecast of the sting programme by NDTV. He maintained that NDTV was equally guilty of contempt of court, though under a different provision of law. Mr. Rao submitted that the programme was an instance of, what is commonly called, 'trial by media' and it was telecast while the criminal trial was going on. He submitted that in our system of law there was no place for trial by media in a sub-judice matter. Mr. Rao submitted that freedom of speech and expression, subject of course to reasonable restrictions, was indeed one of the most important rights guaranteed by the Constitution of India. But the press or the electronic media did not enjoy any right(s) superior to an individual citizen. Further, the right of free and fair trial was of far greater importance and in case of any conflict between free speech and fair trial the latter must always get precedence. Mr. Rao submitted that though the law normally did not permit any pre-censorship of a media report concerning an ongoing criminal trial or sub-judice matter, any person publishing the report in contravention of the provisions of law would certainly make himself liable to the proceeding of contempt. Mr. Rao further submitted that the immunity provided under section 3 (3) of the Contempt of Courts Act was not available to the TV channel in terms of proviso (ii) Explanation (B) to sub-section (3) and thus the telecast of the sting programme by NDTV clearly fell in the prohibited zone under the Act. He further submitted that in such an event, a plea of 'larger public good' was not a legal defence. In support of his submission he cited several decisions of this court in (i) *Saibal Kumar Gupta and Others v. B.K.Sen and Another.*, 1961 3 SCR 460 (473) (ii) *In Re: P.C.Sen*, 1969 2 SCR 649 (651,653,654,658) (iii) *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers, Bombay Pvt. Ltd.*, (1988) 4 SCC 592 pr. 32,34,95,38 (iv) *M. P. Lohia v. State of W. B.*, (2005) 2 SCC 686 pr. 10.

170. Mr. Salve learned Senior Advocate appearing for NDTV, on the other hand, defended the telecast of the programme. Mr. Salve submitted that commenting on or exposing something foul concerning proceedings pending in courts would not constitute contempt if the court is satisfied that the report/comment is substantially accurate, it is bona fide and it is in public interest. He referred to the new section 13 in the Contempt of Courts Act substituted with effect from March 17, 2006, which is as under:

“13. Notwithstanding anything contained in any law for the time being in force,-

(a) no court shall impose a sentence under this Act for a contempt of court unless it is satisfied that the contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice;

(b) the court may permit, in any proceeding for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is bona fide.”

171. Mr. Salve submitted that in a situation of this kind two competing public interests are likely to arise; one, purity of trial and the other public reporting of something concerning the conduct of a trial (that may even have the tendency to impinge on the proceedings) where the trial, for any reason, can be considered as a matter of public concern. With regard to the case in hand Mr. Salve submitted that in the sting programmes there was nothing to influence the outcome of the BMW trial. But even if the telecast had any potential to influence the trial proceedings that risk was far outweighed by the public good served by the programme. He further submitted that in a case where two important considerations arise, vying with each other, the court is the final arbiter to judge whether or not the publication or telecast is in larger public interest; how far, if at all, it interferes or tends to interfere with or obstructs or tends to obstruct the course of justice and on which side the balance tilts. In support of his submission he relied upon a decision of the House of Lords in *Re Lonrho plc and others*, [1989] 2 All ER 1100 paragraphs 7.2 and 7.3 at 1116.

172. We have already dealt with the allegations made on behalf of RK Anand while considering his appeal earlier in this judgment and we find no substance in those allegations. Reporting of pending trial:

173. We are also unable to agree with the submission made by Mr. P. P. Rao that the TV channel should have carried out the stings only after obtaining the permission of the trial court or the Chief Justice of the Delhi High Court and should have submitted the sting materials to the court before its telecast. Such a course would not be an exercise in journalism but in that case the media would be acting as some sort of special vigilance agency for the court. On little consideration the idea appears to be quite repugnant both from the points of view of the court and the media. It would be a sad day for the court to employ the media for setting its own house in order; and media too would certainly not relish the role of being the snoopers for the court. Moreover, to insist that a report concerning a pending trial may be published or a sting operation concerning a trial may be done only subject to the prior consent and permission of the court would tantamount to pre- censorship

of reporting of court proceedings. And this would be plainly an infraction of the media's right of freedom of speech and expression guaranteed under Article 19(1) of the Constitution. This is, however, not to say that media is free to publish any kind of report concerning a sub-judice matter or to do a sting on some matter concerning a pending trial in any manner they please. The legal parameter within which a report or comment on a sub-judice matter can be made is well defined and any action in breach of the legal bounds would invite consequences. Compared to normal reporting, a sting operation is an incalculably more risky and dangerous thing to do. A sting is based on deception and, therefore, it would attract the legal restrictions with far greater stringency and any infraction would invite more severe punishment.

Sting programme whether trial by media??

174. The submissions of Mr. N. Rao are based on two premises: one, the sting programme telecast by NDTV was of the genre, 'trial by media' and two, the programme interfered or tended to interfere with or obstructed or tended to obstruct the proceedings of the BMW trial that was going on at the time of the telecast. If the two premises are correct then the rest of the submissions would logically follow. But are the two premises correct? What is trial by media? The expression 'trial by media' is defined to mean:

“the impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt regardless of any verdict in a court of law. During high publicity court cases, the media are often accused of provoking an atmosphere of public hysteria akin to a lynch mob which not only makes a fair trial nearly impossible but means that, regardless of the result of the trial, in public perception the accused is already held guilty and would not be able to live the rest of their life without intense public scrutiny.”

175. In light of the above it can hardly be said that the sting programme telecast by NDTV was a media trial. Leaving aside some stray remarks or comments by the anchors or the interviewees, the programme showed some people trying to subvert the BMW trial and the state of the criminal administration of justice in the country (as perceived by the TV channel and the interviewees). There was nothing in the programme to suggest that the accused in the BMW case were guilty or innocent. The programme was not about the accused but it was mainly about two lawyers representing the two sides and one of the witnesses in the case. It indeed made serious allegations against the two lawyers. The allegations, insofar as RK Anand is concerned, stand established after strict scrutiny by the High Court and this Court. Insofar as IU Khan is concerned, though this Court held that his conduct did not constitute criminal contempt of court, nonetheless allegations against him too are established to the extent that his conduct has been found to be inappropriate for a Special Prosecutor. In regard to the witness the comments and remarks made in the telecast were never subject to a judicial scrutiny but those too are broadly in conformity with the materials on the court's record. We are thus clearly of the view that the sting programme telecast by NDTV cannot be described as a piece of trial by media.

Stings & telecast of sting programmes not constituting criminal contempt:

176. Coming now to section 3 of the Contempt of Courts Act we are unable to appreciate Mr. Rao's submission that NDTV did not have the immunity under sub-section (3) of section 3 as the telecast was hit by proviso (ii) Explanation (B) to that sub section. Section 3 of the Act insofar as relevant is as under:

“3. Innocent publication and distribution of matter not contempt.- (1) A person shall not be guilty of contempt of court on the ground that he has published (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) any matter which interferes or tends to interfere with, or obstructs or tends to obstruct, the course of justice in connection with any civil or criminal proceeding pending at that time of publication, if at that time he had no reasonable grounds for believing that the proceeding was pending.

(2) xxx (3) A person shall not be guilty of contempt of court on the ground that he has distributed a publication containing any such matter as is mentioned in sub-section (1), if at the time of distribution he had no reasonable grounds for believing that it contained or was likely to contain any such matter as aforesaid:

Provided that this sub-section shall not apply in respect of the distribution of-

(i) any publication which is a book or paper printed or published otherwise than in conformity with the rules contained in section 3 of the Press and Registration of Books Act, 1867 (25 of 1867);

(ii) any publication which is a newspaper published otherwise than in conformity with the rules contained in section 5 of the said Act.

Explanation.- For the purposes of this section, a judicial proceeding-

(a) is said to be pending-

(A) xxx (B) in the case of a criminal proceeding under the Code of Criminal Procedure, 1898 (5 of 1898), or any other law-

(i) where it relates to the commission of an offence, when the charge-sheet or challan is filed, or when the court issues summons or warrant, as the case may be, against the accused, and

(ii) in any other case, when the court takes cognizance of the matter to which the proceeding relates, and xxx

(b) xxxx”

177. Section 5 provides that a fair criticism of a judicial act concerning any case which has been heard and finally decided would not constitute contempt.

178. Sub-section (1) of section 3 provides immunity to a publisher of any matter which interferes or tends to interfere with, or obstructs or tends to obstruct the course of justice in any civil or criminal proceeding if he reasonably believed that there was no proceeding pending. A sub- section (3) deal with distribution of the publication as mentioned in sub-section (1) and provides immunity to the distributor if he reasonably believed that the publication did not contain any matter which interfered or tended to interfere with, or obstructed or tended to obstruct the course of justice in any civil or criminal proceeding. The immunity provided under sub-section (3) is subject to the

exceptions as stated in the proviso and explanations to the sub-section. We fail to see any application of section 3(3) of the Contempt of Courts Act in the facts of this case. In this case there is no distribution of any publication made under sub-section (1). Hence, neither sub-section (3) nor its proviso or explanation is attracted. NDTV did the sting, prepared a programme on the basis of the sting materials and telecast it at a time when it fully knew that the BMW trial was going on. Hence, if the programme is held to be a matter which interfered or tended to interfere with, or obstructed or tended to obstruct the due course of the BMW case then the immunity under sub-section (1) will not be available to it and the telecast would clearly constitute criminal contempt within the meaning of section 2 (c) (ii) & (iii) of the Act. But can the programme be accused of interfering or tending to interfere with, or obstructing or tending to obstruct the due course of the BMW case. Whichever way we look at the programme we are not able to come to that conclusion. The programme may have any other faults or weaknesses but it certainly did not interfere with or obstruct the due course of the BMW trial. The programme telecast by NDTV showed to the people (the courts not excluded) that a conspiracy was afoot to undermine the BMW trial. What was shown was proved to be substantially true and accurate. The programme was thus clearly intended to prevent the attempt to interfere with or obstruct the due course of the BMW trial.

STINGS & TELECAST OF STING PROGRAMMES SERVED IMPORTANT PUBLIC CAUSE

179. Looking at the matter from a slightly different angle we ask the simple question, what would have been in greater public interest; to allow the attempt to suborn a witness, with the object to undermine a criminal trial, lie quietly behind the veil of secrecy or to bring out the mischief in full public gaze? To our mind the answer is obvious. The sting telecast by NDTV was indeed in larger public interest and it served an important public cause.

180. We have held that the sting programme telecast by NDTV in no way interfered with or obstructed the due course of any judicial proceeding, rather it was intended to prevent the attempt to interfere with or obstruct the due course of law in the BMW trial. We have also held that the sting programme telecast by NDTV served an important public cause. In view of the twin findings we need not go into the larger question canvassed by Mr Salve that even if the programme marginally tended to influence the proceedings in the BMW trial the larger public interest served by it was so important that the little risk should not be allowed to stand in its way. Excesses in the telecast:

181. We have unequivocally upheld the basic legitimacy of the stings and the sting programmes telecast by NDTV. But at the same time we must also point out the deficiencies (or rather the excesses) in the telecast. Mr. Subramaniam spoke about the 'slant' in the telecast as 'regrettable overreach'. But we find many instances in the programme that cannot be simply described as 'slants'. There are a number of statements and remarks which are actually incorrect and misleading. [.....]

194. Having said all this we would say, in the end, that for all its faults the stings and the telecast of the sting programme by NDTV rendered valuable service to the important public cause to protect

and salvage the purity of the course of justice. We appreciate the professional initiative and courage shown by the young reporter Poonam Agarwal and we are impressed by the painstaking investigation undertaken by NDTV to uncover the Shimla connection between Kulkarni and RK Anand.

195. We have recounted above the acts of omission and commission by NDTV before the High Court and in the telecast of the sting programme in the hope that the observations will help NDTV and other TV channels in their future operations and programmes. We are conscious that the privately run TV channels in this country are very young, no more than eighteen or twenty years old. We also find that like almost every other sphere of human activity in the country the electronic news media has a very broad spectrum ranging from very good to unspeakably bad.

196. The better news channels in the country (NDTV being one of them) are second to none in the world in matters of coverage of news, impartiality and objectivity in reporting, reach to the audience and capacity to influence public opinion and are actually better than many foreign TV channels. But that is not to say that they are totally free from biases and prejudices or they do not commit mistakes or gaffes or they sometimes do not tend to trivialize highly serious issues or that there is nothing wanting in their social content and orientation or that they maintain the same standards in all their programmes. In quest of excellence they have still a long way to go.

197. A private TV channel which is also a vast business venture has the inherent dilemma to reconcile its business interests with the higher standards of professionalism/demands of profession. The two may not always converge and then the TV channel would find its professional options getting limited as a result of conflict of priorities. The media trips mostly on TRPs (television rating points), when commercial considerations assume dominance over higher standards of professionalism.

198. It is not our intent here to lay down any reformist agenda for the media. Any attempt to control and regulate the media from outside is likely to cause more harm than good. The norms to regulate the media and to raise its professional standards must come from inside.

206. In light of the discussions made above we pass the following orders and directions.

1. The appeal filed by IU Khan is allowed and his conviction for criminal contempt is set aside. The period of four month's prohibition from appearing in Delhi High Court and the courts subordinate to it is already over. The punishment of fine given to him by the High Court is set aside. The Full Court of the Delhi High Court may still consider whether or not to continue the honour of Senior Advocate conferred on him in light of the findings recorded in this judgment.

2. The appeal of RK Anand is dismissed subject to the notice of enhancement of punishment issued to him as indicated in paragraph 165 of the judgment. He is allowed eight weeks time from the date of service of notice for filing his show-cause.

3. Those of the High Courts which have so far not framed any rules under section 34 of the Advocates Act, shall frame appropriate rules without any further delay as directed in paragraph 147 of the judgment.

4. Put up the appeal of RK Anand after the show-cause is filed.

STING OPERATIONS

Rajat Prasad v. C.B.I

(2014) 6 SCC 495

Ranjan Gogoi, J. (for himself and P. Sathasivam and N.V. Ramana, JJ.):

1. The refusal of the Delhi High Court to exercise its inherent jurisdiction under Section 482 Cr.P.C. to quash the criminal charges framed against the accused-appellants has been challenged in the present appeals. Specifically, the appellants, Rajat Prasad and Arvind Vijay Mohan who are the sixth and fourth accused respectively in CC Case No. 28 of 2005 (hereinafter referred to as A-6 and A-4) in the Court of the learned Special Judge, CBI, Delhi had assailed the order dated 24/25.04.2007 passed by the learned Trial Court framing charges against them under Section 120-B of the IPC read with Section 12 of the Prevention of Corruption Act, 1988 (hereinafter for short the Act) before the High Court. The High Court by its order dated 30.05.2008 refused to interfere with the said order of the learned Trial Judge. Hence, the present appeals by special leave.

2. The relevant facts which will require enumeration can be summed up as follows. On 16th of November, 2003 in the Delhi Edition of the Indian Express a news item under the caption Caught on Tape: Union Minister Taking Cash saying money is no less than God had appeared showing visuals of one Dalip Singh Ju Dev, (deceased first accused) (A-1), the then Union Minister of State for Environment and Forest, receiving illegal gratification from one Rahul alias Bhupinder Singh Patel (third accused) (A-3) in the presence of the Additional Private Secretary to the Minister one Natwar Rateria (second accused) (A-2). Immediately on publication of the abovesaid news item a preliminary enquiry was registered by the ACU-II of the Central Bureau of Investigation, New Delhi and on conclusion of the said preliminary enquiry FIR dated 19.12.2013 was filed alleging commission of offences under Section 12 of the PC Act, 1988 read with Section 120-B IPC by the present appellants (A-4 and A-6).

3. The aforesaid FIR was challenged in a proceeding before the Delhi High Court registered and numbered as Crl. Misc. Case No. 59/2004. It appears that there was no interim restraint on the investigation pursuant to the FIR filed. While the investigation was in progress, Crl. Misc. Case No. 59/2004 came to be dismissed by the Delhi High Court by order dated 10.11.2004. As against the said order dated 10.11.2004, SLP (Crl.) No. 6336 of 2004 was instituted by the 4th Accused as well as other accused before this Court. However, as on completion of investigation chargesheet had been filed on 5.12.2005, the aforesaid SLP was closed by order dated 23.11.2007 as having become infructuous.

4. From the charge-sheet dated 05.12.2005 filed by the CBI before the competent court, the gravamen of the allegations against the accused- appellants appear to be that one Amit Jogi (accused No.5) (A-5) son of Ajit Jogi, who was then the Chief Minister of the State of Chhatisgarh, had hatched a conspiracy alongwith A-3 to A-6 to execute a sting operation showing receipt of bribe by the Union Minister of State for Environment and Forest (A-1) so as to discredit him on the eve of the elections to the State Assembly of Chhatisgarh and thereby bring political advantage to Shri Ajit Jogi who was a rival of the Union Minister. According to

the prosecution, as per the conspiracy hatched, A-5 alongwith other co- conspirators had initially brought in one Manish Rachhoya (PW-23), a close friend of A-5, as a representative of a Calcutta based mining company which had pending work in the Ministry of Environment and Forest as one of the conspirators. A-5 had requested one Shekhar Singh (PW-22) to introduce the aforesaid Manish Rachhoya to A-1, which was agreed to. The said meeting was to be held in Hotel Taj Palace, New Delhi and to effectuate the said purpose A-6 had booked suite No. 151 in Hotel Taj Palace, New Delhi in the fictitious name of Manish Sarogi. According to the prosecution, Manish was introduced to Shekhar Singh. However, subsequently Manish developed cold feet and decided to disassociate himself from the plan hatched by A-5. However, on instructions of A-5, Manish had informed A-1 that as the deal had certain technical parameters, in future, his partner Rahul (A-3) would be discussing the matter with A-1.

5. The further case of the prosecution, as alleged in the charge-sheet, is that at this stage Rahul alias Bhupinder Singh Patel (A-3) was roped into the conspiracy. He stayed in suite No. 151 in Hotel Taj Palace, New Delhi for a number of days and had meetings both with A-1 and A-2 on several occasions in the said hotel and had successfully befriended them. According to the prosecution, on 5.11.2003, Rahul (A-3) had checked into Room No. 822 in Hotel Taj Mahal, Man Singh Road, New Delhi which was booked under the fictitious name of Raman Jadoja. It appears that on the same day i.e. 5.11.2003, A-3 requested A-1 and A-2 to visit him in the said hotel room. According to the prosecution, A-4 had arranged for installation of hidden video recording equipment in the sitting room of the said suite in Taj Mahal Hotel, Man Singh Road, New Delhi through one Manoj Hora, a dealer in the electronic products. In the late evening of 5.11.2003 A-1 and A-2 reached the abovesaid hotel and went to Room No. 822. They were entertained. Wide ranging discussions between A-3 and other two accused (A- 1 and A-2) were held in different matters including matters relating to certain mining projects in the States of Orissa and Chattisgarh which were pending in the Ministry. According to the prosecution, both A-1 and A-2 had assured A-3 that necessary assistance in getting the pending proposals cleared will be offered. Thereafter, currency notes amounting to Rs. 9 lakhs were handed over by A-3 to A-1 who accepted the same and carried the same out of the hotel in a laundry bag offered by A-3. The video recording of the entire incident along with audio recording of the conversations exchanged was secretly done and the same was subsequently released to the media. The video and audio cassette recording of the event was sent for analysis and report thereof was received from the FSL, Hyderabad. It is on these facts that the prosecution had alleged commission of the offence under Section 7 of the Act against A-1 and offences under Section 120-B IPC read with Section 7 of the Act against A-2. Insofar as the other accused including the present accused-appellants are concerned, according to the prosecution, they had committed offences punishable under Section 12 of the Act read with Section 120-B of the IPC. As already noticed, pursuant to the aforesaid chargesheet filed, the learned Trial Court had framed charges against the accused-appellants under Section 120-B IPC read with Section 12 of the PC Act.

6. We have heard Shri Uday U. Lalit and Shri P.S. Narsimha, learned senior counsels for the appellant in Criminal Appeal No. 747/2010 and 748/2010 respectively and Shri P.P. Malhotra, learned Addl. Solicitor General for the respondent.

7. Learned counsels for the appellants have placed before us the relevant part of the charge-sheet mentioning the claim raised by A-3, during investigation, that the act of payment of illegal gratification to A-1 and the secret video recording of the same was prompted by a journalistic desire to expose corruption in public life. It is contended that the present case raises an issue of great public importance, namely, the legality of a sting operation prompted by overwhelming public interest. According to learned counsel, the said operation had been carried out to reveal the murky deeds in seats of governmental power. If an intention to commit any such criminal act is to be attributed to a citizen/journalist who had undertaken a sting operation, public interest would be severely jeopardized. It is also argued that in the charge-sheet filed it is mentioned that investigations had revealed that the entire operation was carried out to disgrace the first appellant prior to the elections to the Chhatisgarh State Assembly and that the motive behind the operation was to derive political mileage in favour of the father of A-5 who was the then Chief Minister of State of Chhatisgarh. It is contended that if the above was the aim of the sting operation, surely, no offence under Section 12 of the Act or 120-B IPC is even remotely made out against the accused- appellants.

8. Learned counsels have elaborately laid before the Court the ingredients of the offence of criminal conspiracy defined in Section 120-A of the IPC to contend that there must be (1) commonality of object to be accomplished; (2) a plan or scheme embodying means to accomplish; and (3) an agreement or understanding between two or more persons whereby they become committed to cooperate for accomplishment of the object by the means embodied in the agreement. It is pointed out that going by the result of the investigation mentioned in the charge-sheet, as elicited earlier, namely that the operation was aimed to disgrace A-1 and to derive political mileage in favour of the father of A-5, the conspiracy, if any, is to defame A-1 and not to commit any of the offences alleged in the charge-sheet. It is also argued that a reading of the charge-sheet goes to show that the conspiracy alleged against A-3 to A-6 is one against A-1 and A-2 whereas the charge framed is for the offence of conspiracy to abet A-1 and A-2. The inherent contradiction behind the alleged intent of the accused to trap and expose A-1 and A-2 and the charge of abetment to facilitate the commission of the offence by A-1 is highlighted. According to the appellants, the intention on their part as alleged by the prosecution was not to aid, assist or facilitate A-1 and A-2 in committing the offence but to expose A-1 and A-2 yet, the charge of abetment has been levelled. It is also argued that there was no criminal intent behind the giving of bribe and the absence of mens rea to commit the offences alleged is ex-facie apparent. Learned counsels for the accused-appellants have, by referring to the specific allegations mentioned in the chargesheet, submitted that even if the said allegations are accepted to be correct no criminal offence is made out against either of the accused-appellants. In this regard it is pointed out by Shri Narasimha that except for the allegation of arranging the video equipment, which was installed in the hotel room, there is no other material against Accused A-4. The said fact, by itself, is not enough to even prima facie attract the offence of criminal conspiracy. Insofar as A-6 is concerned, Shri Lalit, learned senior counsel has urged that the role attributed to the said accused is only in respect of booking of the room in Hotel Taj Palace where Manish Rachhoya (PW-23) had stayed. However, as the aforesaid Manish Rachhoya had withdrawn from the plan and, thereafter, no specific role in the alleged

conspiracy is attributed to A-6, the prosecution insofar as A-6 is concerned is wholly unsustainable.

9. In reply, Shri P.P. Malhotra, learned Addl. Solicitor General has submitted that the sting operation involved the giving of bribe to A-1 who was a Union Minister at the relevant point of time and in return certain favours were sought. While the motive behind the act of videographing the incident may have been to derive political mileage by discrediting A-1, the giving of bribe amounts to abetment within the meaning of Section 107 of the IPC. The said criminal act would not stand obliterated by what is claimed to be the pious desire of the accused to expose corruption in public life. Learned Addl. Solicitor General has further submitted that the evidence in the case is yet to be recorded. Whether the exchange of money for favours in mining projects in Orissa and Chhatisgarh was pretence or otherwise, i.e., real, and what were the true intentions behind the operation carried out are matters which will be clear only after evidence in the case is recorded. The aforesaid stage must be allowed to be reached and completed, the learned Addl. Solicitor General has urged. It is also urged that the power to quash a criminal charge ought to be exercised within well-defined parameters none of which exists in the present case.

10. The expression sting operation seems to have emerged from the title of a popular movie called *The Sting*, which was screened sometime in the year 1973. The movie was based on a somewhat complicated plot hatched by two persons to trick a third person into committing a crime. Being essentially a deceptive operation, though designed to nab a criminal, a sting operation raises certain moral and ethical questions. The victim, who is otherwise innocent, is lured into committing a crime on the assurance of absolute secrecy and confidentiality of the circumstances raising the potential question as to how such a victim can be held responsible for the crime which he would not have committed but for the enticement. Another issue that arises from such an operation is the fact that the means deployed to establish the commission of the crime itself involves a culpable act.

11. Unlike the U.S. and certain other countries where a sting operation is recognized as a legal method of law enforcement, though in a limited manner as will be noticed hereinafter, the same is not the position in India which makes the issues arising in the present case somewhat unique. A sting operation carried out in public interest has had the approval of this Court in *R.K. Anand vs. Registrar, Delhi High Court*[1] though it will be difficult to understand the ratio in the said case as an approval of such a method as an acceptable principle of law enforcement valid in all cases. Even in countries like the United States of America where sting operations are used by law enforcement agencies to apprehend suspected offenders involved in different offences like drug trafficking, political and judicial corruption, prostitution, property theft, traffic violations etc., the criminal jurisprudence differentiates between the trap for the unwary innocent and the trap for the unwary criminal (per Chief Justice Warren in *Sherman vs. United States*[2]) approving situations where government agents merely afford opportunities or facilities for the commission of the offense and censuring situations where the crime is the product of the creative activity of law-enforcement officials (*Sorrell vs. United States*[3]). In the latter type of cases the defence of entrapment is recognized as a valid defence in the USA. If properly founded such a defence could defeat the prosecution.

12. A somewhat similar jurisprudence recognizing the defence of entrapment in sting operations has developed in Canada where the defence available under specified conditions, if established, may result in stay of judicial proceedings against the accused the effect of which in the said jurisdiction is a termination of the prosecution. [R vs. Regan (para 2)].

In R vs. Mack, it has been explained by the Canadian Supreme Court that entrapment occurs when (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry, and, (b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and induce the commission of an offence. The following factors determine whether the police have done more than provide an opportunity to commit a crime.

- (1) The type of crime being investigated and the availability of other techniques for the police detection of its commission.
- (2) whether an average person, with both strengths and weaknesses, in the position of the accused would be induced into the commission of a crime;
- (3) the persistence and number of attempts made by the police before the accused agreed to committing the offence;
- (4) the type of inducement used by the police including: deceit, fraud, trickery or reward;
- (5) the timing of the police conduct, in particular whether the police have instigated the offence or became involved in ongoing criminal activity;
- (6) whether the police conduct involves an exploitation of human characteristics such as the emotions of compassion, sympathy and friendship;
- (7) whether the police appear to have exploited a particular vulnerability of a person such as a mental handicap or a substance addiction;
- (8) the proportionality between the police involvement, as compared to the accused, including an assessment of the degree of harm caused or risked by the police, as compared to the accused, and the commission of any illegal acts by the police themselves;
- (9) the existence of any threats, implied or express, made to the accused by the police or their agents;
- (10) whether the police conduct is directed at undermining other constitutional values.

13. In United Kingdom the defence of entrapment is not a substantive defence as observed in R vs. Sang by the House of Lords:-

The conduct of the police where it has involved the use of an agent provocateur may well be a matter to be taken into consideration in mitigation of sentence; but under the English system of criminal justice, it does not give rise to any discretion on the part of the judge himself to acquit the accused or to direct the jury to do so, notwithstanding that he is guilty of the offence. However, a shift in judicial reaction appears to be emerging which is clearly discernable in R v. Loosely wherein the House of Lords found that:-

A prosecution founded on entrapment would be an abuse of the courts process. The court will not permit the prosecutorial arm of the state to behave in this way. (para 16) Entrapment is not a matter going only to the blameworthiness or culpability of the defendant and, hence, to sentence as distinct from conviction. Entrapment goes to the propriety of there being a prosecution at all for the relevant offence, having regard to the states involvement in the circumstance in which it was committed. (para 17)

14. Thus, sting operations conducted by the law enforcement agencies themselves in the above jurisdictions have not been recognized as absolute principles of crime detection and proof of criminal acts. Such operations by the enforcement agencies are yet to be experimented and tested in India and legal acceptance thereof by our legal system is yet to be answered. Nonetheless, the question that arises in the present case is what would be the position of such operations if conducted not by a State agency but by a private individual and the liability, not of the principal offender honey trapped into committing the crime, but that of the sting operator who had stained his own hands while entrapping what he considers to be the main crime and the main offender. Should such an individual i.e. the sting operator be held to be criminally liable for commission of the offence that is inherent and inseparable from the process by which commission of another offence is sought to be established? Should the commission of the first offence be understood to be obliterated and extinguished in the face of claims of larger public interest that the sting operator seeks to make, namely, to expose the main offender of a serious crime injurious to public interest? Can the commission of the initial offence by the sting operator be understood to be without any criminal intent and only to facilitate the commission of the other offence by the main culprit and its exposure before the public? These are some of the ancillary questions that arise for our answer in the present appeals and that too at the threshold of the prosecution i.e. before the commencement of the trial.

15. The answer to the above, in our considered view would depend, as in any criminal case, on the facts and circumstances thereof. A crime does not stand obliterated or extinguished merely because its commission is claimed to be in public interest. Any such principle would be abhorrent to our criminal jurisprudence. At the same time the criminal intent behind the commission of the act which is alleged to have occasioned the crime will have to be established before the liability of the person charged with the commission of crime can be adjudged. The doctrine of mens rea, though a salient feature of the Indian criminal justice system, finds expression in different statutory provisions requiring proof of either intention or knowledge on the part of the accused. Such proof is to be gathered from the surrounding facts established by the evidence and materials before the Court and not by a process of probe of the mental state of the accused which the law does not contemplate. The offence of abetment defined by Section 107 of the IPC or the offence of criminal conspiracy under Section 120A of IPC would, thus, require criminal intent on the part of the offender like any other offence. Both the offences would require existence of a culpable mental state which is a matter of proof from the surrounding facts established by the materials on record. Therefore, whether the commission of offence under Section 12 of the PC Act read with Section 120B IPC had been occasioned by the acts attributed to the accused appellants or not, ideally, is a matter that can be determined only after the evidence in the case is recorded. What the accused appellants assert is that in view of the fact that the sting operation was a journalistic exercise, no criminal intent can be

imputed to the participants therein. Whether the operation was really such an exercise and the giving of bribe to A-1 was a mere sham or pretence or whether the giving of the bribe was with expectation of favours in connection with mining projects, are questions that can only be answered by the evidence of the parties which is yet to come. Such facts cannot be a matter of an assumption. Why in the present case there was a long gap (nearly 12 days) between the operation and the circulation thereof to the public is another relevant facet of the case that would require examination. The inherent possibilities of abuse of the operation as videographed, namely, retention and use thereof to ensure delivery of the favours assured by the receiver of the bribe has to be excluded before liability can be attributed or excluded. This can happen only after the evidence of witnesses is recorded. Also, merely because in the chargesheet it is stated that the accused had undertaken the operation to gain political mileage cannot undermine the importance of proof of the aforesaid facts to draw permissible conclusions on basis thereof as regards the criminal intent of the accused in the present case.

16. An issue has been raised on behalf of the appellants that any finding with regard to the culpability of the accused, even prima-facie, would be detrimental to the public interest inasmuch as any such opinion of the Court would act as an inhibition for enterprising and conscious journalists and citizens from carrying out sting operations to expose corruption and other illegal acts in high places. The matter can be viewed differently. A journalist or any other citizen who has no connection, even remotely, with the favour that is allegedly sought in exchange for the bribe offered, cannot be imputed with the necessary intent to commit the offence of abetment under Section 12 or that of conspiracy under Section 120B IPC. Non applicability of the aforesaid provisions of law in such situations, therefore, may be ex-facie apparent. The cause of journalism and its role and responsibility in spreading information and awareness will stand subserved. It is only in cases where the question reasonably arises whether the sting operator had a stake in the favours that were allegedly sought in return for the bribe that the issue will require determination in the course of a full- fledged trial. The above is certainly not exhaustive of the situations where such further questions may arise requiring a deeper probe. As such situations are myriad, if not infinite, any attempt at illustration must be avoided.

17. The contention of the appellants that the materials/allegations against the accused appellants in the charge-sheet filed do not make out any criminal offence against them will not require a detailed probe and our conclusion thereon at the present stage of the proceeding. Suffice it will be to negative the said contention by holding that prima facie materials are available for a fuller probe into the precise role of A-4 and A-6 in the alleged conspiracy.

18. In view of the above discussion the order dated 30.05.2008 of the High Court refusing to interfere with the charges framed against the accused-appellants is fully justified. Accordingly, we dismiss the present appeals and affirm the order dated 30.05.2008 passed by the High Court.

Court On Its Own Motion v. State

146 (2008) DLT 429

Mukundakam Sharma, J. (for himself and S Khanna, J.): 1. In today's age and world, the impact of media is far reaching. Electronic media as compared to print media has an added advantage because visuals have greater ramification and impact as it directly and immediately influences the mind of the viewer. With the growth of the number of News Channels and increasing popularity of "breaking news", electronic media has come to play a major role in stirring public opinion and consciousness. It is this potency to reach the public that entails that all the channels understand and realize the heavy responsibility that is thrust on them and that there is no case for possible misuse. Keeping in mind the role a responsible media can play in disseminating information and creating awareness among masses without crossing the limits that a civilized society would expect, we proceed to dispose of the present writ petition.

2. We came across a news item reported in the daily edition of Hindustan Times dated 7th September, 2007 in respect of a sting operation relating to one Ms. Uma Khurana. Prior to the said date, 'Live India' a Television News Channel aired a programme on 30th August, 2007 regarding the above-said sting operation conducted by them showing Ms. Uma Khurana, a teacher with a Delhi Government school, purportedly forcing a girl student into prostitution. Subsequent to the said telecast, aghast at the said act of the teacher, a crowd gathered at the school gate and started raising slogans demanding handing over of Ms. Uma Khurana to them. In the commotion and mayhem that followed some persons physically attacked Ms. Uma Khurana and even tore her clothes. Shocked by the aforesaid incident and consequent to public outcry the Directorate of Education, Government of Delhi first suspended Ms. Khurana and later dismissed her from service, in exercise of special powers vested in the Government. Police also sprung into action and started investigation. Later the aforementioned news item was published in the Hindustan Times which indicated that there was something more to the whole string operation than what met the eyes. In the aforesaid news item it was stated that the girl who had been shown as a student who was allegedly being forced into prostitution by Ms. Uma Khurana was neither a school girl nor a prostitute but a budding journalist eager to make a name in the media world.

3. Anguished at the news item published, which was preceded by violence and damage to property, we thought it fit to draw up proceedings on our own motion. After taking suo moto notice, we issued notices to the Government of NCT of Delhi and the Delhi Police. Mr. A.S. Chandhiok and Mr. S.S. Gandhi, Senior Advocates, were requested to assist the Court as amices Curiae in the matter. On receipt of notice, the Education Department of the Government of NCT of Delhi and the Delhi Police entered appearance through their counsel.

4. Pursuant to the said notice, Mr. Madhup Tewari, Deputy Commissioner of Police, Crime & Railways, Delhi Police, filed a status report on 10th September, 2007. In the status report it is stated that one Mr.

Virender Kumar, who had some monetary dispute with Ms. Uma Khurana, in connivance with one Mr. Prakash Singh, hatched a plan to trap Ms. Uma Khurana in a stage-managed act of forcing girls into prostitution. It is stated that on Ms. Uma Khurana's refusal to arrange girls to be delivered to some customer, Mr. Prakash Singh roped in Ms. Rashmi Singh, who was known to him, to act as a school girl, who Ms. Uma Khurana would be delivering to some 'customer'. Mr. Virender Kumar and Mr. Prakash Singh filmed Ms. Rashmi Singh with Ms. Uma Khurana at a pre-planned place where Ms. Uma Khurana came to 'deliver' Ms. Rashmi Singh to some customer, as instructed by Mr. Virender Kumar. This whole stage managed episode was shown as a 'sting operation' by the news channel. Public outrage followed causing violence and damage to property. Ms. Uma Khurana was beaten up, her clothes torn and later on arrested.

6. Mr. Madhup Tewari filed another status report on 12th September, 2007 wherein, in the penultimate paragraph, it is stated that the Additional Director, Education has been informed that Ms. Uma Khurana has not been found to be involved in any organized prostitution racket involving school girls as shown in the sting operation and that a part of the sting operation was stage managed. In another status report filed on 6th October, 2007 by Mr. Madhup Tewari, it is stated that voice samples of Uma Khurana, Rashmi Singh and Prakash Singh were recorded by expert at CFSL and has been placed with the CFSL for expert opinion. It is also stated that recording of the sting operation was done selectively and the investigation was still in progress.

7. Subsequently on completion of the investigation, Police has also submitted charge sheet in the case. It was made clear by the Delhi Police that no concrete evidence was found against Ms. Uma Khurana to support the allegations of child prostitution made against her. Consequently, name of Ms. Uma Khurana has been cleared as no evidence was found by the Police which indicates that Ms. Uma Khurana was in any manner not involved with the alleged prostitution racket as tried to be projected through the aforesaid sting operation. Ms. Rashmi Singh, who was shown with the accused in the sting operation, was charged with impersonation, criminal conspiracy and creating false evidence. Mr. Prakash Singh and Mr. Virender Kumar were also charged with similar accusations.

8. The aforesaid position clearly establishes the fact that an innocent person was being induced to commit a very heinous crime. Her reputation has been damaged in the eyes of the public and even her modesty was outraged in the sense that she was manhandled and her clothes were torn by some people. The sting operation has become a stinking experience for Ms. Uma Khurana as she has not only lost her reputation but also her job. The question is how the recurrence of such incident could be stopped and minimised so that an innocent person cannot be victimised and not made to lose reputation.

9. Our attention was drawn by the learned counsel appearing for the Ministry of Information & Broadcasting, Government of India to the show cause notice issued by the said Ministry to Janmat TV-Live India, on 11th September, 2007. In the said show cause notice it was alleged that the telecast of the sting operation by the Janmat TV-Live India is defamatory, deliberate, containing false and suggestive innuendos and half truths. It is also indicated therein that as per Section 5 of the Cable

Television Networks (Regulation) Act, 1995 read with provisions of Cable Television Networks Rules, 1994, no programme can be transmitted/re-transmitted on any cable service which contains anything obscene, defamatory, deliberate, false and suggestive innuendos and half truths. The said TV channel was further informed that it was bound to follow the Programme Code and Advertising Code which was not followed and in fact violated provisions of the said Act and the Rules. The said Channel was directed to show cause as to why action as per the provisions of Section 20 of the Cable Act should not be taken against them. On 19th September, 2007 an order was passed by the Director (Broadcast Content) in exercise of the powers conferred by sub-Section (2) of Section 20 of the Cable Television Networks Regulation Act, 1995. By the said order, transmission/re-transmission of JANMAT TV-Live India channel was prohibited with effect from 20th September, 2007 and upto 20th October, 2007 through cable television networks and any other platform throughout the country.

10. Action has been taken by the Central Government against Janmat TV-Live India under the aforesaid Rules. Under the provisions of the Rule making power, Cable Television Networks Rules, 1994 were enacted.

11. Section 5 of the aforesaid Act provides that no person shall transmit or re-transmit through cable service any programme unless the programme is in conformity with the prescribed programme code. Rule 6 of the Cable Television Network Rules, 1994 prescribes a programme code that should be followed by any person responsible for transmission/re-transmission of any programme. The programme code is fairly exhaustive and stipulates that no programme which encourages and incites violence, maligns and slanders any individual and person, contain any false and half truths etc, should be carried and broadcast in a cable service. Section 20 of the said Act empowers the government to prohibit operation of any cable television network if it thinks it is necessary and expedient in public interest to do so, by a notification in the official gazette. Further, the Central Government can by an order regulate or prohibit transmission or re-transmission of any programme which is not in conformity with the programme code. Additionally, power has been given to the Central Government to regulate and prohibit transmission or re-transmission by any channel of a programme if it is not in the interest of integrity and sovereignty of India, security of India, friendly relations of India with any foreign State or public order, decency or morality.

12. Regulation of electronic media has always invoked sharp and divergent views with emotive and logical pleas and counter arguments. We are informed that the Ministry has invited suggestions from the general public including the media on a proposed Broadcasting Bill and Code of Conduct. A decision in this regard has to be taken by the government. But it cannot be denied that electronic media should and must protect innocent people so that their reputation cannot be sullied and damaged by false and incorrect depictions in the name of sting operation.

13. We have already referred to the fact that the Police after investigation could not collect any evidence against the alleged act of Ms. Uma Khurana. Police could not even find any evidence in support of the allegation made against Ms. Uma Khurana through the sting operation by the aforesaid television news

channel. In these circumstances there are enough grounds and material on which Ms. Uma Khurana could file an appropriate case for causing damage to her reputation and for the mental agony and physical hardship gone through by her. Damages in accordance with the law can be awarded by Courts in cases of defamation and loss of reputation. We leave it open to Ms. Uma Khurana to initiate appropriate proceedings, as advised in accordance with law for redressal of her grievances.

14. We were also informed that the Directorate of Education is reconsidering the matter with regard to her dismissal from service and therefore that aspect is also left open by us to be taken up by the Government of NCT of Delhi and also by Ms. Uma Khurana in appropriate manner and appropriate forum.

15. Such incidents should not happen and false and fabricated sting operations directly infringing upon a persons right to privacy should not recur because of desire to earn more and to have higher TRP rating. Right to freedom of press is a valuable right but the right carries with it responsibility and duty to be truthful and to protect rights of others.

16. We have also come across an article titled "A tale in the sting", relating to the Uma Khurana incident, written by Ms. Barkha Dutt, Managing Editor of NDTV wherein she has referred to media reports/sting operations in the United States. Ms. Dutt in her article referred to reports of the American newspaper 'Chicago Sun Times' wherein Police officers were bribed by journalists to get a bar license. Police officers taking bribe were caught on hidden camera and later the sting operation was shown on TV. The said programme won many awards but not the Pulitzer prize because they could not agree on whether the methods used were honourable enough. After having referred to the said incident, Ms. Dutt observed:

This is, perhaps, what is at the heart of the matter. There is something unseemly and mildly sleazy about reporters playing Pied Pipers who lay out the cheese to seduce conmen into their rat traps. It is much easier to justify the use of a hidden camera when it is for capturing the event that would take place whether or not the camera was there. Entrapment somehow can't manage to shake off the suggestion of fabrication.

17. There is no doubt and there is no second opinion that truth is required to be shown to the public in public interest and the same can be shown whether in the nature of sting operation or otherwise but what we feel is that entrapment of any person should not be resorted to and should not be permitted. In this connection we may appropriately refer to the decision of the Supreme Court of the United States decided on 6th April, 1992 titled Keith Jacobson v. United States reported in 503 US 540. In the said decision it was held by the Supreme Court of the United States that in their zeal to enforce law, law protectors must not originate a criminal design, implant in an innocent person's mind a disposition to commit a criminal act, and then induce commission of the crime so that the government may prosecute. Where the government or their agents induce an individual to break the law and the defense of entrapment is at issue, the prosecution must meet and answer by establishing and answering beyond reasonable doubt that the defendant was predisposed to commit the criminal act prior to first being

approached by government agents. The Supreme Court of the United States has also declared that law enforcement officials go too far when they implant in the mind of an innocent person a disposition to commit an offense and induce its commission in order that they may prosecute. The Court held in very unambiguous terms that the Government should not play on the weakness of an innocent party and beguile the party into committing a crime which the party otherwise would not have attempted. While artifice and stratagem may be employed to catch those who are engaged in criminal enterprises, there would be a need to prove that the person in question had a predisposition to commit the said criminal act prior to being approached by the enforcement agencies. The Government must not punish an individual "for an alleged offence which is the produce because of the creative activity of its own officials". Ratio of the aforesaid decision rendered by the Supreme Court of the United States is in our considered opinion can be applied to the instant context also i.e. to the media.

18. Giving inducement to a person to commit an offence, which he is otherwise not likely and inclined to commit, so as to make the same part of the sting operation is deplorable and must be deprecated by all concerned including the media. Sting operations showing acts and facts as they are truly and actually happening may be necessary in public interest and as a tool for justice, but a hidden camera cannot be allowed to depict something which is not true, correct and is not happening but has happened because of inducement by entrapping a person.

19. The duty of the press as the fourth pillar of democracy is immense. It has great power and with it comes increasing amounts of responsibility. No doubt the media is well within its rightful domain when it seeks to use tools of investigative journalism to bring us face to face with the ugly underbelly of the society. However, it is not permissible for the media to entice and try to actively induce an individual into committing an offence which otherwise he is not known and likely to commit. In such cases there is no predisposition. If one were to look into our mythology even a sage like Vishwamitra succumbed to the enchantment of "Maneka". It would be stating the obvious that the Media is not to test individuals by putting them through what one might call the "inducement test" and portray it as a scoop that has uncovered a hidden or concealed truth. In such cases the individual may as well claim that the person offering inducement is equally guilty and a party to the crime, that he/she is being accused of. This would infringe upon the individual's right to privacy. We believe and trust that all TV channels/Media shall take steps and prohibit its reporters from producing or airing any programme which is based on entrapment and which are fabricated, intrusive and sensitive. We also believe that responsible and senior TV journalists/reporters and editors who are involved in production and airing of programmes through electronic media should take steps for drawing up a self-regulatory code of conduct. The Press Council of India should also examine and can take initiative in this regard.

20. Certain proposed guidelines were also placed before us by the learned amices. The said proposed guidelines are as follows:

1. A channel proposing to telecast a sting operation shall obtain a certificate from the person who recorded or produced the same certifying that the operation is genuine to his knowledge.

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2. There must be concurrent record in writing of the various stages of the sting operation.
 3. Permission for telecasting a sting operation be obtained from a committee appointed by the Ministry of Information and Broadcasting. The said committee will be headed by a retired High Court Judge to be appointed by the Government in consultation with the High Court & two members, one of which should be a person not below the rank of Additional Secretary and the second one being the Additional Commissioner of Police. Permission to telecast sting operation will be granted by the committee after satisfying itself that it is in public interest to telecast the same. This safeguard is necessary since those who mount a sting operation themselves commit the offences of impersonation, criminal trespass under false pretence and making a person commit an offence.
 4. While the transcript of the recordings may be edited, the films and tapes themselves should not be edited. Both edited and unedited tapes be produced before the committee.
 5. Sting operation shown on TV or published in print media should be scheduled with an awareness of the likely audience/reader in mind. Great care and sensitivity should be exercised to avoid shocking or offending the audience.
 6. All television channels must ensure compliance with the Certification Rules prescribed under the Cable Television Network (Regulation) Act 1995 and the Rules made there under.
 7. The Chief Editor of the channel shall be made responsible for self regulation and ensure that the programmes are consistent with the Rules and comply with all other legal and administrative requirements under various statutes in respect of content broadcast on the channel.
 8. The subject matter of reports or current events shall not:
 - (a) Deliberately present as true any unverified or inaccurate facts so as to avoid trial by media since a "man is innocent till proven guilty by law";
 - (b) Present facts and views in such a manner as is likely to mislead the public about their factual inaccuracy or veracity;
 - (c) Mislead the public by mixing facts and fiction in such a manner that the public are unlikely to be able to distinguish between the two;
 - (d) Present a distorted picture of reality by over-emphasizing or under-playing certain aspects that may trivialise or sensationalise the content;
 - (e) Make public any activities or material relating to an individual's personal or private affairs or which invades an individual's privacy unless there is an identifiable large public interest;
 - (f) Create public panic or unnecessary alarm which is likely to encourage or incite the public to crime or lead to disorder or be offensive to public or religious feeling.
 9. Broadcasters/Media shall observe general community standards of decency and civility in news content, taking particular care to protect the interest and sensitivities of children and general family viewing.
 10. News should be reported with due accuracy. Accuracy requires the verification (to the fullest extent possible) and presentation of all facts that are necessary to understand a particular event or issue.

11. Infringement of privacy in a news based/related programme is a sensitive issue. Therefore, greater degree of responsibility should be exercised by the channels while telecasting any such programmes, as may be breaching privacy of individuals.

12. Channels must not use material relating to persons' personal or private affairs or which invades an individual's privacy unless there is identifiable larger public interest reason for the material to be broadcast or published.

21. The Ministry of Information and Broadcasting is already examining whether a statute and/or a code of conduct should be enacted. The above proposed guidelines should be considered by the concerned Ministry and if they find favor, they may be incorporated in the enactment/guidelines, with modifications as deemed fit and proper.

22. In terms of the aforesaid observations, we discharge the notices suo moto issued by us to the State. The petition stands disposed of.

RIGHT TO INFORMATION

Public authority and their privacy: Scope of RTI Act

CPIO, Supreme Court of India v. Subhash Chandra Aggarwal,

AIR 2010 Delhi 159

A.P. Shah, C.J. (for himself and Vikramjit Sen and S. Muralidhar, JJ.): 1. This proceeding, under Article 226 of the Constitution of India, requires the examination of questions and issues involving declaration as to personal assets of judges of the Supreme Court, made to the Chief Justice of India, pursuant to a Full Court resolution of the Supreme Court of India, made in 1997. The petitioners challenge an order of the Central Information Commission, dated 6th January, 2009, upholding the request of the respondent who had applied for disclosure of certain information concerning such declaration of personal assets, by the judges (of the Supreme Court).

2. The facts of the case are that the Respondent (hereafter “applicant”) had, on 10.11.2007 required the Central Public Information Officer, Supreme Court of India (“the CPIO”), nominated under the Right to Information Act (hereafter “the Act”) to furnish a copy of the resolution dated 7.5.1997 of the Full Court of the Supreme Court, (“the 1997 resolution”) which requires every judge to make a declaration of all assets. He further sought for information relating to declaration of assets etc., furnished by the respective Chief Justices of States. By order dated 30th November, 2007, the CPIO informed the applicant that a copy of the resolution dated 7.5.1997 would be furnished on remitting the requisite charges. He was also told that information relating to declaration of assets by the judges was not held by or under the control of the Registry of the Supreme Court and, therefore, it could not be furnished.

3. The applicant challenged the second part of the impugned order which held that the CPIO did not hold any information regarding the declaration of assets. It was also contended that if the CPIO was not holding the information, he should have disclosed the authority holding such information and should have referred the application to such an authority, invoking Section 6 (3) of the Right to Information Act.

The appellate authority remanded the matter for reconsideration, to the CPIO, observing as follows:

“...to the above extent, I feel that the appellant is justified in contending that if the CPIO was not holding the information, he should have considered the question of Section 6 (3). Regarding the respective States, if the CPIO was not holding information, he should have considered whether he should have invoked the provision under Section 6 (3) of the Right to Information Act.

In the above circumstances, the impugned order to the above extent is liable to be remanded back. The matter is remanded to the CPIO to consider the question whether Section 6(3) of the Act, is liable to be invoked by the CPIO.”

After remission, the CPIO rejected the application, stating as follows:

“In the case at hand, you yourself knew that the information sought by you is related to various High Court in the country and instead of applying to those Public Authorities you have taken a short circuit procedure by approaching the CPIO, Supreme Court of India remitting the fee of Rs.10/- payable to one authority and getting it referred to all the public authorities at the expense of one Central Public Information Officer. In view of this, the relief sought by you cannot be appreciated and is against the spirit of Section 6 (3) of the Right to Information Act, 2005.”

4. The Applicant approached the Central Information Commission (CIC). It was contended that the CPIO had not followed the directions of the appellate authority, which originally remanded the case, and decided whether the application had to be sent to another authority, as it was expected to. It was also contended that the CPIO's order maintained a studied silence about disclosure of information about asset declaration by judges of the Supreme Court to the Chief Justice of India (“CJI”) in accordance with the 1997 Resolution. The CPIO contended, before the CIC, that the RTI application had two parts, the first part related to copy of Resolution, which was provided to the applicant, and the second part related to declaration of assets by the Supreme Court judges. The CPIO submitted that the Registrar of the Supreme Court did not hold the information. It was submitted that the 1997 Resolution was an in-house exercise; and the declaration regarding assets of the judges is only voluntary. The resolution itself describes submission of such declarations as “Confidential”. It was also contended that disclosure of the declarations would be breach of a fiduciary relationship. The CPIO further submitted that the declarations were submitted to the Chief Justice of India not in his official capacity but in his personal capacity and that any disclosure would be violate of the 1997 resolution, deemed such declarations ‘confidential’. It was also contended that the disclosure would be contrary to the provisions of section 8(1) of the Act.

5. The CIC, in its impugned order, reasoned that since the Supreme Court was established by the Constitution of India and is a public authority within the meaning of Section 2(h) of the Act. Section 2(e) (i) was referred, to say that the Chief Justice of India was a competent authority, under the Act, empowered to frame Rules under Section 28 of the Act to carry out provisions of the Act. It was held that rule making power is conferred by provisions of the Act, upon the Chief Justice and the Supreme Court, who cannot disclaim being public authorities. The applicant's appeal was allowed, on the following reasoning:

“16. The rule making power has been explicitly given for the purpose of carrying out the provisions of the RTI Act. The Act, therefore, empowers the Supreme Court and the other competent authorities under the act and entrusts upon them an additional responsibility of ensuring that the RTI Act is implemented in letter and spirit. In view of this, the contention of the respondent public authority that the provisions of Right to Information act are not applicable in case of Supreme Court cannot be accepted.

17. The learned counsel appearing on behalf of the Supreme Court during the course of hearing argued that the information concerning the declaration of assets by the judges is provided to the Chief Justice of India in his personal capacity and it is "voluntary" and "confidential". From what was presented before us. It can be inferred that the declaration of assets are filed with the Chief Justice of India and the office of the Chief Justice of India is the custodian of this information. The information is maintained in a confidential manner and like any other official information it is available for perusal and inspection to every succeeding Chief Justice of India.

The information, therefore, cannot be categorized as "personal information" available with the Chief Justices in their personal capacity.

18. The only issue that needs to be determined is as to whether the Chief Justice of India and the Supreme Court of India are two distinct Public Authorities or one Public Authority. In this context, it would be pertinent to refer again to the provisions of section 2(h) of the Right to Information Act, the relevant part of which reads as under:

"2(h) "Public authority" means any authority or body or institution of self - government established or constituted..."

19. The Public Authority, therefore, can only be an "authority" 'body' or an "institution" of self, government, established or constituted, by or under the Constitution or by any other law, or by an order made by the appropriate government.

20. The words "Authority, "body" or "institution" has not been distinctly defined in the Act, the expression "authority" in its etymological sense means a Body invested with power to command or give an ultimate decision, or enforce obedience or having a legal right to command and be obeyed. Webster's Dictionary of the English language defined "authorities as "official bodies that control a particular department or activity, especially of the Government". The expression "other authorities" has been explained as authorities entrusted with a power of issuing directions, disobedience of which is punishable as an offence, or bodies exercising legislative or executive functions of the state or bodies which exercise part of the sovereign power or authority of the State and which have power to make rules and regulations and to administer or enforce them to the detriment of the citizens. In the absence of any statutory definition or judicial interpretation to the contrary, the normal etymological meaning of the expression, has to be accepted as the true and correct meaning.

21. According to the dictionary meaning, the term "institution" means a body or organization or an association brought into being for the purpose of achieving some object. Oxford Dictionary defines an "institution as a establishment, organization or an association instituted for the promotion of some objects especially one of public or general utility, religious, charitable, educational etc., The definition of the 'institution', therefore, includes an authority as well as a body. By very implication, the three terms exclude an "individual". Even the Hon'ble Apex Court in *Kamaraju Venkata Krishna Rao v. Sub - collector, Ongole* AIR 1969 SC 563 has observed that it is by no means easy to give definition of the word "institution" that would cover every use of it. Its meaning must always depend upon the context in which it is found.

22. If the provisions of Article 124 of the Constitution are read in view of the above perspective, it would be clear that the Supreme Court of India, consisting of the Chief Justice of India and such number of judges as the Parliament may by law prescribe, is an institution or authority of which the Hon'ble Chief Justice of India is the Head. The institution and its Head cannot be two distinct public authorities. They are one and the same. Information, therefore, available with the Chief Justice of India must be deemed to be available with the Supreme Court of India. The Registrar of the Supreme Court of India, which is only a part of the Supreme Court cannot be categorized as a Public Authority independent and distinct from the Supreme Court itself.

23. In view of this, the question of transferring an application under Section 6(3) of the Right to Information Act by the CPIO of the Supreme Court cannot arise. It is the duty of the CPIO to obtain the information that is held by or available with the public authority. Each of the sections or department of a public Authority cannot be treated as a separate or distinct public authority. If any information is available with one section or the department, it shall be deemed to be available with the Public Authority as one single entity CPIO cannot take a view contrary to this.

24. In the instant case, admittedly, the information concerning the judges of the Supreme Court is available with the Supreme Court and the CPIO represents the Supreme Court as a public authority. Under the RTI Act, he is, therefore, obliged to provide this information to a citizen making an application under the RTI Act unless the disclosure of such information is exempted under the law.

25. During course of hearing, it has been argued that the declaration of assets submitted by the judges of the Supreme Court are confidential and the information has been provided to the chief justice of India in a fiduciary relationship and as such, its disclosure is exempted under Section 8(1) (e) of the RTI Act.

26. In this context it will be pertinent to reiterate what the appellant has asked for in his RTI Application and which is as follows:

I will be obliged if your honour very kindly arranges to send me a copy of the said resolution passed by the judges of the Supreme Court on 7.5.2007.

I will be obliged if your honour kindly provides me information on any such declaration of assets etc. ever filed by Hon'ble judges of the Supreme Court. Kindly also arrange information if High Court judges are submitting declaration about their assets etc. to respective Chief Justices in States.

27. The information in regard to point (i) as above has already been provided. As regards the information covered by point No. (ii) & (iii) above, the same has been denied on the ground that it is not held by or under the control of the Registrar of the Supreme Court of India and, therefore, cannot be furnished by the CPIO.

28. The First Appellant Authority while deciding the matter assumed that the CPIO of the Supreme Court was not holding the information concerning the declaration of the assets made by the High Court judges and that this information is held by the chief justices of the State High Courts and accordingly, he observed that the appellant is justified in contending that if the CPIO was not holding the information, he should have considered the question of invoking Section 6(3) of the RTI Act. Accordingly, the matter was remanded back by him to the CPIO of the Supreme Court for fresh consideration on limited point i.e. transfer of application to various High Courts u/s 6(3) of the RTI Act.

29. CPIO on receiving the matter back on remand rejected the application of the appellant. It appears that both the CPIO and the first Appellant Authority have remained silent as regards the information concerning declaration of assets by the judges of the Supreme Court. At the time of hearing, it was admitted that the information concerning declaration of the assets by the judges of the Supreme Court is not available with the Registry, but the office of the Chief Justice

of India holds the same. The information requested under the RTI Act was denied only on the ground that the Registry does not hold the information. But the first appellate authority did not find as to where the information is available. The CPIO maintained silence as regards this matter even after he received the matter on remand. At the time of hearing before this Commission, however, it was submitted that the information might be available with the office of the Chief Justice of India. It is clear that neither the CPIO nor the First Appellate Authority has claimed that the information asked for by the appellant is exempt either under Section 8 (1) (e) of the Act being received in fiduciary relationship or that this information is 'personal information' attracting exemption under section 8 (1) (j).

30. The appellant Shri S.C. Agrawal is apparently not seeking a copy of the declarations or the contents therein or even the names etc. of the judges filing the declaration, or is he requesting inspection of any such declaration already filed. He is seeking simple information as to whether any such declaration of assets etc., has ever been filled by the judges of the Supreme Court or High Courts. What he is seeking cannot be held to attract exemption under Sections 8(1)(e) or 8(1) (j).

31. The only question that remains to be decided is as to whether CPIO was justified in turning down the request of the Appellant to transfer the RTI application to the concerned CPIO of the High Courts even after the First Appellate Authority remanded the case to him. In this connection, it may be mentioned that the request for transfer under section 6(3) of the Right to information Act has been turned down on the ground that the appellant was well aware that the information is available with the respective High Courts which are separate and distinct public authorities. This point has not been pressed at the time of hearing as such, it is not necessary to decide this issue at this stage.

32. In view of what has been observed above, the CPIO of this Supreme Court is directed to provide the information asked for by the appellant in his RTI application as to whether such declaration of assets etc. has been filed by the Hon'ble Judges of the Supreme Court or not within ten working days from the date of receipt of this decision notice."

11. It is next argued that any disclosure made by judges, pursuant to the 1997 resolution, is not a public act done in the discharge of duties of their office. The petitioners elaborate this by saying that the Act is aimed at ensuring access to all actions of public officials done or performed during the course of their official duties. Such being the case, the declaration of personal assets, by individual judges, has nothing to do with their duties, as judges. The petitioners again emphasize the voluntary nature of such disclosure, and absence of any legal sanction as a result of non-disclosure.

16. The respondent next submits that Section 8 of the Act, in the statutory scheme, exempts certain classes of information. (The provision begins with a non-obstante clause); it is argued that exemptions contain several legitimate grounds for excluding information from public scrutiny in public interest. No other ground for excluding information which exists with any

public authority can be deduced under the Act, particularly in respect of information merely marked “confidential”. The only exemption there in connection with this is the exemption under clause 8 (1) (j) which deals with information which relates to personal information the disclosure of which has not relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual. However this information may also be disclosed if the Central Public Information officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information. It is argued that by no stretch of imagination can the query whether judges have declared their assets, be considered exempt; there is no question of any confidentiality or privacy. The respondents argue that the information sought is only in this regard. It was however argued, that the question of contents of asset declarations and access are also intrinsically linked to this issue, since they involve the examination of the same legal regime.

17. It is submitted that this issue has been settled by the Supreme Court in 2002, and 2003 in its judgment in *Union of India v. Association for Democratic Reforms*, AIR 2002 SC 2112, and *People’s Union for Civil Liberties v. Union of India*, AIR 2003 SC 2363, where the Court held that the fundamental right of citizens, under Article 19 (1) (a) includes the citizens’ right to know the assets and liabilities of candidates contesting elections to parliament or to the State Legislatures, thereby seeking to hold positions of responsibility in Government. In para 50 of their judgment in the *Association for Democratic Reforms* case, it was held that:

“Mr. Ashwni Kumar, learned senior counsel appearing on behalf of the intervenor submitted that the aforesaid observations are with regard to citizens right to know about the affairs of the Government, but this would not mean that citizens have a right to know the personal affairs of MPs or MLAs. In our view this submission is totally misconceived. There is no question of knowing personal affairs of MP’s or MLAs. The limited information is whether the person who is contesting elections is involved in any criminal case and if involved, what is the result? Further, there are widespread allegations of corruption against the persons holding post and power. In such a situation, question is not of knowing personal affairs but to have openness in democracy for attempting to cure cancerous growth of corruption by few rays of light. Hence, citizens who elect MPs or MLAs are entitled to know that their representative has not misconducted himself in collecting wealth after being elected. This information could be easily gathered only if prior to election, the assets of such person are disclosed...”

21. Dealing with the contention regarding exemption under Section 8(1)(j), the respondent argues that asset information of electoral aspirants are not deemed private or personal information, and blanket exemption cannot be granted; reliance is placed on the *Association for Democratic Reforms* case. It is also contended that likewise judges are public functionaries, and in their official capacity, make declarations, and immunity cannot be granted to them. Counsel disputes the petitioners’ submission that independence of the judiciary would be undermined, if access to asset declaration is permitted. It is emphasized that if information is given to the Government, possibly independence of the judiciary would be compromised; however, public disclosure of the declaration, under the Act will allow access to the public,

which would thwart attempt at blackmailing of individual judges, or “corrosion” of their independence.

27. The previous narration of events and submissions would reveal that the petition involves the following points, that are to be ruled upon by the Court:

- (1) Whether the CJI is a public authority;
- (2) Whether the office of CPIO, of the Supreme Court of India, is different from the office of the CJI; and if so, whether the Act covers the office of the CJI;

- (5) Whether such information is exempt from disclosure by reason of Section 8(1) (j) of the Act;

Point Nos. 1 and 2:

28. Both these points are taken up for consideration, together, for convenience, as they involve analysis of related issues. Before a decision on the point, a few words about the Act are necessary. Under the scheme of the Information Act, “record”, “information”, are held by defined “public authorities”. By virtue of Sections 3, 5, 6 and 7, every public authority requested to provide information is under a positive obligation to do so; the information seeker is under no obligation to disclose why he requests it. Public authorities, as noticed above are defined by Section 2(h) as-

“means any authority or body or institution of self - government established or constituted-

(a) by or under the Constitution of India.”

Section 4 obliges public authorities to publish various specified classes of information.

The information provider or the concerned agency is, under the Act, obliged to decide the applications, of information seekers, within prescribed time limits. A hierarchy of authorities is created with the CIC, at the apex to decide disputes pertaining to information disclosure. In this Scheme, the Parliament has in its wisdom, visualized certain exemptions. Section 6 enjoins that information disclosure is the norm; in case the public authority who is approached, does not possess the information sought, the Public Information Officer (PIO) has to forward the application, under Section 6(3) to the authority who actually holds the information; in that situation, the latter authority is accountable for disclosure of the information. Section 8 lists exemptions; it opens with a non-obstante clause, signifying the intention that irrespective of the rights of the information seeker, in regard to matters listed under that provision, the information providers can justifiably withhold access to the information seeker the record, information or queries sought for by him (i.e. the information seeker or applicant).

29. The Act arguably is one of the most important pieces of legislation, in the post independence era, to effectuate democracy. It may be likened to a powerful beacon, which illuminates unlit corners of state activity, and those of public authorities which impact citizens’ daily lives, to which they previously had no access. It mandates disclosure of all manner of information, and abolishes the concept of *locus standi*, of the information applicant; no justification for applying (for information) is necessary; indeed, Section 6(2) enjoins that reasons for seeking such

information cannot be sought- (to a certain extent, this bar is relieved, by Section 8). Decisions and decision making processes, which affect lives of individuals and collectives can now be subjected to gaze; if improper motives, or reasons contrary to law or avowed policies are discernable, those actions can be questioned. Parliamentary intention in enacting this law was to arm citizens with the mechanism to scrutinize government and public processes, and ensure transparency. At the same time, however, the needs of society at large, and governments as well as individuals in particular, to ensure that sensitive information is kept out of bounds, have also been accommodated, under the Act. This has been addressed at two levels: one, by taking a number of security and intelligence related organizations out of purview of the Act, and two, by enacting specified exemptions - from disclosure, on grounds of public interest.

30. As noted previously, “public authority” has been widely defined; it includes an authority created by or under the Constitution of India. The CIC concluded that the CJI is a public authority, on a facial reading of Article 124. The provision is under the heading “Establishment and constitution of the Supreme Court,” and in the relevant part, it says that “There shall be a Supreme Court of India consisting of a Chief Justice of India and...” The Act, notes the CIC, also provides for competent authorities defined by Section 2(e). The CJI is one such specified competent authority, in relation to the Supreme Court, under Section 2(e) (ii) of the Act and Section 28 empowers him to frame Rules to carry out purposes of the Act. In view of these provisions, the court is of opinion that the CIC did not commit any error in concluding that the CJI is a public authority.

31. The second point, which flows out of the first, requires further examination. It is contended that the office of the CJI is different from that of the Registry (of the Supreme Court); the further contention here appears to be that the CJI performs a verisimilitude of functions, than merely as Chief Justice of the Supreme Court, and in such capacity, through his office, separately holds asset declarations, and information relating to it, pursuant to the 1997 resolution.

32. That the Constitution recognizes the CJI's prominent role in higher judicial appointments is stating the obvious. He is, unlike the United States (where the Chief Justice is the Chief Justice of the US Supreme Court) the Chief Justice of India. This prominent role as “head of the judiciary” or the judicial family, if one may use a well worn term, was underlined by a Constitution Bench of the Supreme Court in *K. Veeraswami v. Union of India* 1991 (3) SCC 655, where the court, by the majority and concurring judgments held that members of the higher judiciary (High Courts and the Supreme Court) are covered by the Prevention of Corruption Act, and can be prosecuted, provided the CJI is consulted beforehand, and consents to that course. Mr. Justice J.S. Verma (who later held the office of Chief Justice of India with distinction) dissented; he held that the Prevention of Corruption Act, according to its scheme, as existing, does not apply to constitutional functionaries, such as Judges of the High Courts, Judges of the Supreme Court, the Comptroller and Auditor General and the Chief Election Commissioner. Though not a "vertical" superior (to borrow a phrase from the dissenting opinion in *Veeraswami*) nevertheless the CJI discharges various other functions. The question is whether those are exempted from the Act.

34. Now, there cannot be any two opinions about the reality that the Chief Justice of India performs a multitude of tasks, specifically assigned to him under the Constitution and various enactments; he is involved in the process of appointment of judges of High Courts, Chief Justices of High Courts, appointment of Judges of Supreme Court, transfer of High Court judges and so on. Besides, he discharges administrative functions under various enactments or rules, concerning appointment of members of *quasi* judicial tribunals; this may be by him, or nominees (other Supreme Court judges) appointed by him. He is also involved in the administration of legal aid, and heads policy formulation bodies, under law, in that regard, at the national level; he heads the judicial education programme initiative, at the national level. It is quite possible therefore, that the Chief Justice, for convenience maintains a separate office or establishment. However, the petitioners did not urge about these aspects, or bring any other facts to this court's notice.

35. What this court cannot ignore, regardless of the varied roles of the CJI, is that they are directly relatable to his holding the office of CJI, and heading the Supreme Court. His role as Chief Justice of India, is by reason of appointment to the high office of the head of the Supreme Court. The first petitioner did not assign the application to either the CJI or any other office or authority; it is not also urged that such office has a separate establishment, with its own Public Information Office, under the Act. There is no provision, other than Section 24, exemption organizations. That provision exempts, through the Second Schedule (to the Act), the Intelligence Bureau, Research and Analysis Wing of the Cabinet Secretariat; Directorate of Revenue Intelligence; Central Economic Intelligence Bureau, Directorate of Enforcement, Narcotic Control Bureau, Aviation Research Centre, various para-military forces, and named police establishments. Section 24(2) empowers the Central Government, by notification to vary the Second Schedule, and add other organizations. There is no clue in these provisions, that the office of the Chief Justice of India, is exempt; on the contrary, internal indications in the enactment point to even the President of India, being covered by the Act (Section 2(h) and Section 2(e) (iv)). To conclude that the CJI does not hold asset declaration information in his capacity as Chief Justice of India, would also be incongruous, since the 1997 resolution explicitly states that the information would be given to him. In these circumstances the court concludes that the CJI holds the information pertaining to asset declarations in his capacity as Chief Justice; that office is a "public authority" under the Act and is covered by its provisions. The second point stands decided, accordingly.

60. The petitioners argue that the information sought for is exempt from disclosure by reason of Section 8 (1) (j) of the Act. The argument here is that such class of information - about personal asset declarations has nothing to do with the individual's duties required to be discharged, as a judge, an obvious reference to the first part of Section 8 (1) (j); it is also emphasized that access to such information would result in unwarranted intrusion of privacy. The applicant counters the submission and says that details of whether declarations have been made, to the CJI can hardly be said to be called "private" and that declarations are made by

individual judges to the CJI in their capacity as judges. It is submitted that the present proceeding is not concerned with the content of asset declarations.

61. The scheme of the Act, visualizes certain exemptions from information disclosure. Section 8 lists these exemptions; it opens with a non-obstante clause, signifying the intention that irrespective of the rights of the information seeker, in regard to matters listed under that provision, the information providers can justifiably withhold access to the information seeker the record, information or queries sought for by him. Section 8 (1) (j) says that disclosure may be refused if the request pertains to:

“personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual”

If, however, the information applicant can show sufficient public interest in disclosure, the bar (preventing disclosure) is lifted, and after duly notifying the third party (i.e. the individual who is concerned with the information or whose records are sought) and after considering his views, the authority can disclose it.

62. The right to access public information, that is, information in the possession of state agencies and governments, in democracies is an accountability measure empowering citizens to be aware of the actions taken by such state “actors”. This transparency value, at the same time, has to be reconciled with the legal interests protected by law, such as other fundamental rights, particularly the fundamental right to privacy. Certain conflicts may underlie particular cases of access to information and the protection of personal data, arising from the fact that both rights cannot be exercised absolutely in all cases. The rights of all those affected must be respected, and no single right must prevail over others, except in clear and express circumstances. To achieve these objectives, and resolve the underlying tension between the two (sometimes) conflicting values, the Act reveals a well-defined list of 11 kinds of matters that cannot be made public, under section 8(1)(j). There are two types of information seen as exceptions to access; the first usually refers to those matters limited only to the State in protection of the general public good, such as national security, international relations, confidentiality in cabinet meetings, etc. The second class of information with state or its agencies, is personal data of individual citizens, investigative processes, or confidential information disclosed by artificial or juristic entities, like corporations, etc. Individuals’ personal data is protected by the laws of access to confidential data and by privacy rights. Often these guarantees - right to access information, and right to privacy, occur at the same regulatory level. The Universal Declaration of Human Rights, through Article 19 articulates the right to information; Article 12, at the same time, protects the right to privacy:

“no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”.

64. Ironically the right to privacy, a recognized fundamental right by our Supreme Court, has found articulation - through a safeguard, though limited, against information disclosure, under the Act. In India, there is no law relating to data protection, or privacy; these have evolved through the interpretive process. The right to privacy, characterized by Justice Brandeis in his

memorable dissent, in *Olmstead v. United States*, 277 US 438 (1928) as “right to be let alone... the most comprehensive of rights and the right most valued by civilised men” is recognized under our Constitution by the Supreme Court in four rulings - *Kharak Singh v. State of U.P.* (1964) 1 SCR 332; *Gobind v. State of M.P.*, (1975) 2 SCC 148; *R. Rajagopal v. State of T.N.*, (1994) 6 SCC 632; and *District Registrar and Collector v. Canara Bank*, (2005) 1 SCC 496. These judgments, however did not explore the latent tension between the two values of information rights and privacy rights; *Rajagopal*, which is nearest in point, was concerned to an extent with publication of material that was part of court records.

65. It has been held by a Constitution Bench of the Supreme Court that an individual does not forfeit his fundamental rights, by becoming a public servant, in *O.K. Ghosh v. E.X. Joseph* AIR 1963 SC 812. In *Kameshwar Prasad v. State of Bihar* AIR 1962 1166, the Supreme Court repelled an argument that public servants do not possess fundamental rights, through another Constitution Bench, as follows:

“It was said that a Government servant who was posted to a particular place could obviously not exercise the freedom to move throughout the territory of India and similarly, his right to reside and settle in any part of India could be said to be violated by his being posted to any particular place. Similarly, so long as he was in government service he would not be entitled to practice any profession or trade and it was therefore urged that to hold that these freedoms guaranteed under Art. 19 were applicable to government servants would render public service or administration impossible....

.....

We find ourselves unable to accept the argument that the Constitution excludes Government servants as a class from the protection of the several rights guaranteed by the several Articles in Part III save in those cases where such persons were specifically named.

14. In our opinion, this argument even if otherwise possible, has to be repelled in view of the terms of Art. 33. That Article select two of the Services under the State-members of the armed forces charged with the maintenance of public order and saves the rules prescribing the conditions of service in regard to them - from invalidity on the ground of violation of any of the fundamental rights guaranteed by Part III and also defines the purpose for which such abrogation or restriction might take place, this being limited to ensure the proper discharge of duties and the maintenance of discipline among them. The Article having thus selected the Services members of which might be deprived of the benefit of the fundamental rights guaranteed to other persons and citizens and also having prescribed the limits within which such restrictions or abrogation might take place, we consider that other classes of servants of Government in common with other persons and other citizens of the country cannot be excluded from the protection of the rights guaranteed by Part III by reason merely of their being Government servants and the nature and incidents of the duties which they have to discharge in that capacity might necessarily involve restrictions of certain freedoms as we have pointed out in relation to Art. 19(1)(e) and (g).” (emphasis supplied)

The above discussion would mean that an individual or citizen’s fundamental rights, which include the right to privacy - are not subsumed or extinguished if he accepts or holds public office. Section 8(1) (j) is an affirmation of this; it ensures that all information furnished to public

authorities - including personal information (such as asset disclosures) are not given blanket access; the information seeker has to disclose a sustainable public interest element for release of the information.

66. It could arguably be said that that privacy rights, by virtue of Section 8(1)(j) whenever asserted, would prevail. However, that is not always the case, since the public interest element, seeps through that provision. Thus when a member of the public requests personal information about a public servant, - such as asset declarations made by him- a distinction must be made between the personal data inherent to the position and those that are not, and therefore affect only his/her private life. This balancing task appears to be easy; but is in practice, not so, having regard to the dynamics inherent in the conflict. If public access to the personal data containing details, like photographs of public servants, personal particulars such as their dates of birth, personal identification numbers, or other personal information furnished to public agencies, is requested, the balancing exercise, necessarily dependant and evolving on a case by case basis, would take into account of many factors which would require examination, having regard to circumstances of each case. These may include:

- i) whether the disclosure of the personal information is with the aim of providing knowledge of the proper performance of the duties and tasks assigned to the public servant in any specific case;
- ii) whether the information is deemed to comprise the individual's private details, unrelated to his position in the organization, and,
- iii) whether the disclosure will furnish any information required to establish accountability or transparency in the use of public resources.

Section 8(1)(j)'s explicit mention of privacy, therefore, has to be viewed in the context. Lord Denning in his "What next in Law", presciently emphasized the need to suitably balance the competing values, as follows:

"English law should recognise a right to privacy. Any infringement of it should give a cause of action for damages or an injunction as the case may require. It should also recognise a right of confidence for all correspondence and communications which expressly or impliedly are given in confidence. None of these rights is absolute. Each is subject to exceptions. These exceptions are to be allowed whenever the public interest in openness outweighs the public interest in privacy or confidentiality. In every instance it is a balancing exercise for the Courts. As each case is decided, it will form a precedent for others. So a body of case-law will be established."

67. A private citizen's privacy right is undoubtedly of the same nature and character as that of a public servant. Therefore, it would be wrong to assume that the substantive rights of the two differ. Yet, inherent in the situation of the latter is the premise that he acts for the public good, in the discharge of his duties, and is accountable for them. The character of protection, therefore, afforded to the two classes - public servants and private individuals, is to be viewed from this perspective. The nature of restriction on the right to privacy is therefore of a different order; in the case of private individuals, the degree of protection afforded is greater; in the case of public servants, the degree of protection can be lower, depending on what is at stake. Therefore, if an important value in public disclosure of personal information is demonstrated, in the particular facts of a case, by way of objective material or evidence, furnished by the

information seeker, the protection afforded by Section 8(1)(j) may not be available; in such case, the information officer can proceed to the next step of issuing notice to the concerned public official, as a "third party" and consider his views on why there should be no disclosure. The onus of showing that disclosure should be made, is upon the individual asserting it; he cannot merely say that as the information relates to a public official, there is a public interest element. Adopting such a simplistic argument would defeat the objective of Section 8(1)(j); Parliamentary intention in carving out an exception from the normal rule requiring no "locus" by virtue of Section 6, in the case of exemptions, is explicit through the non-obstante clause.

69. There is another aspect to this issue. The obligation to spell out what class of information exists with each public authority, is provided in Section 4; the relevant part reads as follows:

“Section 4. Obligations of public authorities: (1) Every public authority shall-

(a) Maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under this Act and ensure that all records that are appropriate to be computerized are, within a reasonable time, and subject to availability of resources, computerized and connected through a network all over the country on different systems so that access to such records is facilitated;

(b) publish within one hundred and twenty days from the enactment of this Act:-

(i) particulars of its organization, functions and duties;

(ii) the powers and duties of its officers and employees;

(iv) the norms set by it for the discharge of its functions;

(vi) a statement of the categories of documents that are held by it or under its control

(xiv) details in respect of the information, available to or held by it, reduced in electronic form;

(2) It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of clause (b) of sub-section (1) to provide as much information *suo motu* to the public at regular intervals through various means of communication, including internet, so that the public have minimum resort to the use of this Act to obtain information....”

70. The obligation to provide unimpeded access, to information, even through the internet, however, is lifted in case of the 11 categories or classes of information, mentioned in Section 8; this is apparent from the opening words “Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen...” If these two provisions are seen together, the primary obligation to facilitate public access - even through internet, cast by Section 4, does not apply in respect of information that would fall under Section 8. The norm, (by virtue of the subject matter of Section 8, and the non-obstante clause) is non-disclosure, of those categories which fall under the exemptions. Now, Section 8 (1) (j) clearly alludes to personal information the disclosure of which has no relationship to any public activity or interest, or which would

cause unwarranted invasion of the privacy of the individual. If public servants - here the expression is used expansively to include members of the higher judiciary too - are obliged to furnish asset declarations, the mere fact that they have to furnish such declaration would not mean that it is part of public activity, or "interest". As observed earlier, a public servant does not cease to enjoy fundamental rights, upon assuming office. That the public servant has to make disclosures is a part of the system's endeavor to appraise itself of potential asset acquisitions, which may have to be explained properly. However, such acquisitions can be made legitimately; no law bars public servants from acquiring properties, or investing their income. The obligation to disclose these investments and assets is to check the propensity to abuse a public office, for private gain. If the information applicant is able to demonstrate what Section 8(1) (j) enjoins the information seeker to, i.e. that "the larger public interest justifies the disclosure of such information" the authority deciding the application can proceed to the next step, after recording its prima facie satisfaction, to issue notice to the "third party" i.e. the public servant who is the information subject, why the information sought should not be disclosed. After considering all these views and materials, the CPIO or concerned State PIO, as the case may be can pass appropriate orders, including directing disclosure. This order is appealable.

71. Section 8 (1) in the opinion of the court, confers substantive rights even while engrafting procedural safeguards, because of the following elements:

(1) Personal information and privacy rights being recognized by Section 8 (1) (j), as the substantive rights of third parties;

Due satisfaction of the CPIO or the State PIO, that disclosure of such personal information is necessary and in the public interest - which is to be arrived at on the basis of objective materials;

The satisfaction being recorded after hearing or considering the views of the third party whose information is in issue, in accordance with the procedure prescribed in Section 11;

(2) The satisfaction being recorded in writing, through an order, under Section 11 (3);

(3) The order, if adverse to the third party, is appealable (Section 11 (4)).

72. The respondents had relied on *Union of India v. Association for Democratic Reforms*, AIR 2002 SC 2112, and contended that in a democracy, public officials, including members of the higher judiciary are under a duty to disclose their assets. The context of that decision was whether electoral aspirants, i.e. candidates to elective office, in the absence of statutory obligation, could be compelled to disclose their assets. The Supreme Court said that they could be, affirming this court's decision, and significantly observing that if a law had existed, courts would have been bound by its terms.

73. Being a participant in the democratic process, where law and policy makers are elected, the court reasoned that the "little" man cannot be kept in the dark, about the individuals who offer themselves as candidates, in elections. The situation here is radically different, to say the least. One, a statute occupies the field, in the form of the Right to Information Act, whose provisions were not considered by the Supreme Court, in the above case. Two, India did not choose the US model of either electing judges, or subjecting their appointment to a confirmation process

(as in the case of the Federal Judiciary) where the legislature plays a prominent participatory role. Three, any obligations and safeguards have to be seen in the context of the statutory mandate, and the court cannot, on vague notions of transparency, detract from well established values of independence. It is one thing to say that judges are accountable, and have to make asset declarations; for extension of complete and uninhibited access to the contents, of asset declarations, by invoking transparency, a mere demand is insufficient, as the court would be decreeing something which the law not only does not provide, but for which the existing law makes explicit provisions to the contrary. Most importantly, it would be wrong for the court to, for this purpose equate the two class of public servants - i.e. legislators and members of the higher judiciary. Apart from the inalienable value of independence of the judiciary, which is entrenched in the Constitution, and guaranteed by various provisions, judges' tenure is secured till retirement, subject to good behaviour (the threshold of their removal being very high), whereas legislators, Parliamentarians and the top most echelons of the Government, at ministerial level, occupy office as long as the people choose to keep them there, or as long as the concerned individual has the confidence of the Prime Minister or Chief Minister (in the case of a minister, in the cabinet or council of minister). Rhetoric and polemics apart, there is no reason to undermine the protections provided by law, merely because some members of the public believe that judges ought to permit unimpeded disclosure of their personal assets to the public. The obligation to give access or deny access to information, is today controlled by provisions of the Act, as it presently exists. It nowhere obliges disclosure of assets of spouses, dependants and children - of judges. Members of the higher judiciary are, in this respect entitled to the same protection - and exemptions- as in the case of other public servants, including judicial officers up to the District Judge level, members of All India services, and other services under the Union. The acceptance of such contentions, in disregard of express provisions of law, can possibly lead to utterly unreasonable demands for all kinds of disclosure, from all classes of public servants - which would be contrary to statutory intentment.

74. In this court's opinion Section 8(1)(j) is both a check on the power of requiring information dissemination, (having regard to its potential impact on individual privacy rights,) as well as a mechanism whereby individuals have limited control over whether personal details can be made public. This safeguard is made in public interest in favour of all public officials and public servants. There can be no manner of doubt that Supreme Court and High Court judges are public servants (*K. Veeraswami* established that). They are no doubt given a high status, and afforded considerable degree of protections, under the Constitution; yet that does not make them public servants any less. If that is the true position, the protection afforded by Section 8(1) (j) to judges is of no lesser quality than that given to other public servants, in this regard. To hold otherwise would be incongruous, because, members of the higher judiciary are held to self imposed obligatory Constitutional standards, and their asset disclosures are held, (by this judgment), to be "information" held by the CJI, a public authority, under the Act; yet, they would be deprived of the protection that the same enactment extends to all those covered by it. It cannot be that judges' being held to high standards, on the basis of norms articulated by the 1997 resolution and the judicial conference resolution of 1999, should place their asset declarations outside of the Act - a demand never made by the applicant, whose case from inception of these proceeding has been that they are subjected to the Act, being "information". Therefore, as regards contents of the declaration, information applicants would have to, whenever they approach the

authorities, under the Act, satisfy them under Section 8(1)(j) and cross the threshold of revealing the “larger public interest” for disclosure, as in the case of all those covered by the said provision. For the purposes of this case, however, the particulars sought do not justify or warrant that protection; all that the applicant sought is whether the 1997 resolution was complied with. That kind of innocuous information does not warrant the protection granted by Section 8 (1)(j).

75. In view of the above discussion, it is held that the contents of asset declarations, pursuant to the 1997 resolution - and the 1999 Conference resolution- are entitled to be treated as personal information, and may be accessed in accordance with the procedure prescribed under Section 8(1)(j); they are not otherwise subject to disclosure. As far as the information sought by the applicant in this case is concerned, (i.e. whether the declarations were made pursuant to the 1997 resolution) the procedure under Section 8(1)(j) is inapplicable.

84. The above discussion and conclusions in this judgment are summarized as follows:

Re Point Nos. 1 & 2 Whether the CJI is a public authority and whether the CPIO, of the Supreme Court of India, is different from the office of the CJI; and if so, whether the Act covers the office of the CJI;

Answer: The CJI is a public authority under the Right to Information Act and the CJI holds the information pertaining to asset declarations in his capacity as Chief Justice; that office is a "public authority" under the Act and is covered by its provisions.

Re Point No. 3: Whether asset declaration by Supreme Court judges, pursuant to the 1997 Resolution are “information”, under the Right to Information Act, 2005;

Answer: It is held that the second part of the respondent's application, relating to declaration of assets by the Supreme Court judges, is “information” within the meaning of the expression, under Section 2 (f) of the Act. The point is answered accordingly; the information pertaining to declarations given, to the CJI and the contents of such declaration are “information” and subject to the provisions of the Right to Information Act.

Re Point No. 4: If such asset declarations are "information" does the CJI hold them in a "fiduciary" capacity, and are they therefore, exempt from disclosure under the Act

Answer: The petitioners’ argument about the CJI holding asset declarations in a fiduciary capacity, (which would be breached if it is directed to be disclosed, in the manner sought by the applicant) is insubstantial. The CJI does not hold such declarations in a fiduciary capacity or relationship.

Re Point No. 5: Whether such information is exempt from disclosure by reason of Section 8(1)(j) of the Act.

Answer: It is held that the contents of asset declarations, pursuant to the 1997 resolution - and the 1999 Conference resolution- are entitled to be treated as personal information, and may be accessed in accordance with the procedure prescribed under Section 8(1)(j); they are not otherwise subject to disclosure. As far as the information sought by the applicant in this case is concerned, (i.e. whether the declarations were made pursuant to the 1997 resolution) the procedure under Section 8(1)(j) is inapplicable.

85. In this case, the appellate authority had recorded inter alia, that:

“A perusal of the application dated 10.11.2007 discloses that the appellant had sought for information relating, to the declaration of assets by the Hon'ble Judges of the Supreme Court as well as the Chief Justice of the States.”

In view of the findings recorded above, the first petitioner CPIO shall release the information sought by the respondent applicant- about the declaration of assets, (and not the contents of the declarations, as that was not sought for) made by judges of the Supreme Court, within four weeks. The writ petition is disposed of in terms of this direction; in the circumstances, the parties shall bear their own cost.

Copies of this judgment be given Dasti to counsel for the parties.

* * * * *

TRIAL BY MEDIA

M.P. Lohia v. State of West Bengal

(2005) 2 SCC 686

N. Santosh Hegde, J. (for himself and S.B. Sinha, J.): The appellants in these appeals have been charged for offences punishable under Sections 304B, 406 and 498A read with Section 34 of the IPC. Their applications for the grant of anticipatory bail have been rejected by the courts below. Daughter of the complainant Chandni (since deceased) was married to the appellant in the third appeal before us. Their marriage took place on 18th February, 2002. The appellants live in Ludhiana whereas the complainant and his family are residents of Calcutta. Chandni committed suicide on 28th of October, 2003 at her parents' house in Calcutta. It is the case of the appellants herein that the deceased was a schizophrenic psychotic patient with cyclic depression and was under medical treatment. Though she was living in the matrimonial home often went to Calcutta to reside with her parents and she was also being treated by doctors there for the above- mentioned ailments.

While the complaint against the appellants is that they were not satisfied with the dowry given at the time of wedding and were harassing the deceased continuously, consequent to which she developed depression and even though the parents of the deceased tried to assure the appellants that they would try to meet their demand of the dowry, the deceased was being treated cruelly at her matrimonial home and her husband had no love and affection to her because of which she developed depression. It has also come on record that the deceased had tried to commit suicide at the residence of her parents sometime in July, 2002 i.e. about a year earlier than the actual date of her death. On behalf of the prosecution as well as on behalf of the defence, large number of documents have been produced to show that the appellants were demanding dowry because of which the deceased was depressed and ultimately committed suicide. Per contra the documents from the side of the defence show that the relationship between the husband, wife and the in-laws were cordial and it was only illness of the deceased that was the cause of her premature death.

One thing is obvious that there has been an attempt on the part of both the sides to create documents either to establish the criminal case against the appellants or on the part of the appellants to create evidence to defend themselves from such criminal charges. Correctness or genuineness of this document can only be gone into in a full-fledged trial and it will not be safe to place reliance on any one of these documents at this stage. Therefore, we would venture not to comment on the genuineness of these documents at this stage. Suffice it to say that this is a matter to be considered at the trial.

In this background the only question for our consideration at this stage is whether the appellants be granted anticipatory bail or not. As stated above, any expression of opinion on the merits of the case except to the extent of finding out prima facie whether the appellants are entitled for anticipatory bail or not, would likely to effect the trial. Therefore, taking into consideration the entire material available on record without expressing any opinion on the same, we think it appropriate that the appellants should be released on bail in the event of their arrest on their furnishing a bail bond of Rs. 1,00,000/- (Rupees One lakh) each and one surety for the like sum

by each appellants to the satisfaction of the Court or the arresting authority as the case may be. We direct that the appellants shall abide by the conditions statutorily imposed under Section 438(2) of the Code of Criminal Procedure and further direct that in the event of the investigating agency requiring the presence of the appellants for the purpose of investigation they be given one week's notice and they shall appear before such investigating agency and their presence at such investigation shall not exceed two days at a time but such interrogation shall not be a custodial interrogation. They shall be entitled to have their counsel present at the time of such interrogation.

Having gone through the records, we find one disturbing factor which we feel is necessary to comment upon in the interest of justice. The death of Chandni took place on 28th February, 2002 and the complaint in this regard was registered and the investigation was in progress. The application for grant of anticipatory bail was disposed of by the High Court of Calcutta on 13.2.2004 and special leave petition was pending before this Court. Even then an article has appeared in a magazine called 'Saga' titled "Doomed by Dowry" written by one Kakoli Poddar based on her interview of the family of the deceased. Giving version of the tragedy and extensively quoting the father of the deceased as to his version of the case. The facts narrated therein are all materials that may be used in the forthcoming trial in this case and we have no hesitation that this type of articles appearing in the media would certainly interfere with the administration of justice. We deprecate this practice and caution the publisher, editor and the journalist who was responsible for the said article against indulging in such trial by media when the issue is subjudiced. However, to prevent any further issue being raised in this regard, we treat this matter as closed and hope that the other concerned in journalism would take note of this displeasure expressed by us for interfering with the administration of justice.

For the reasons stated above, these appeals succeed and the same are allowed.

* * * * *

Naveen Jindal & Anr. v. Zee Media Corporation Ltd & Ors

CS(OS) 143/2015

Jayant Nath, J.: 1. This is another unfortunate case where two known corporate personalities are fighting each other tooth and nail oblivious of consuming precious judicial time. The present application is filed seeking an interim injunction to restrain the defendants, etc. from writing, telecasting or airing any material, article, news etc. directly or indirectly pertaining to the purported allegations made against the plaintiff pertaining to an alleged incident of the year 2001 and 2010 by a lady who has been described in the plaint as Mrs. ABC. Other connected reliefs are also sought.

3. It is averred that there is a past history of certain controversial conduct indulged in by the defendants and their promoters which has resulted in a deluge of litigations being filed between the plaintiff and the defendants and the person who controls the defendants. It is alleged that sometimes in September 2012, an enormous demand by way of extortion was made by the Editors of defendant No. 1 in conspiracy with the chairman of defendant No.1. This extortion call, it is said, was made pursuant to a vilification campaign against the plaintiff and his company in relation to purported coverage of coal-gate scam in which the plaintiff's company was sought to be falsely implicated. Money was sought with a promise to "go slow" on the vilification campaign. The said act of defendant No. 1 is said to have led to the following legal actions:-

a. FIR No. 240/2012 under Section 384, 511 & 120 B IPC lodged by Jindal Steel & Power Ltd. (JSPL) against defendant No.1 and its office bearers. Some officers of defendant No. 1 were also said to have been arrested.

b. On 26.11.2012 Jindal Steel & Power Ltd. filed a suit before the Bombay High Court seeking damages for Rs.200 crores. On 30.11.2012 the Bombay High Court was pleased to pass an interim order directing that anything displayed by the defendants on their channels regarding coal contracts to Navin Jindal Group of Companies shall include the response/explanation given by Navin Jindal Group of Companies.

c. The plaintiff and his company filed a suit before this High Court being CS(OS)881/2014 for permanent and mandatory injunction and damages on account of defamation against defendant No.1 and its office bearers. By order dated 01.04.2014 this Court was pleased to direct that the views of the plaintiff and the connected companies JSPL would also be aired so that their side of story is reflected.

d. FIR No. 12/2013 was registered by Delhi Police against defendant No.1 in connection with airing of forged documents. The FIR was registered under Sections 466, 468, 469 & 471 read with Section 120-B IPC.

e. A criminal complaint for the commission of offences punishable under Sections 500, 501 & 506 IPC read with Section 34/120-B was filed by JSPL before the Ld. CMM, Patiala House Court, New Delhi.

5. The present controversy has arisen out of filing of writ petition No. 235/2014 before the Chattisgarh High Court by Mrs. ABC in which it is averred that in 2001 one Mr. D.K. Bhargava along with others went to the house of Mrs. ABC and asked her to sell her land. On her refusal, she

was threatened. Some days thereafter the same Mr. D.K. Bhargava along with the plaintiff again went to her house, removed her clothes and robbed her chastity. It is further averred that her thumb impression and signatures were forcibly taken on some documents. She went to the police station to record her complaint but nothing happened. Mrs. ABC has further alleged that on 18.08.2010 she was forcibly dragged and brought before Mr. D.K. Bhargava where again criminal acts were done against her.

6. It is averred by the plaintiff that the allegations made by Mrs. ABC are absolutely false. There were disputes between JSPL and Mrs. ABC as regards the compensation of land and various transactions took place between JSPL and Mrs. ABC since 1999. A legal notice was also issued on 10.06.2008 by Mrs. ABC and thereafter she filed a civil suit. The Trial Court passed a decree in favour of Mrs. ABC *vide* judgment dated 15.03.2013. An appeal is said to have been filed. It is stated that the allegations are belated, totally false and motivated. It is urged that the allegations have been made much after the alleged incident in 2001. Several legal proceedings have taken place between Mrs. ABC, the plaintiff and its associate companies but no such allegation was ever made earlier.

7. On 19.12.2014 when the said writ petition No.235 of 2014 was listed before the Chhatisgarh High Court, the High Court passed an order directing that reporting of the said matter with respect to the proceedings of the court in print and electronic media are stayed till the next date of hearing.

8. On 06.01.2015 the writ petition was disposed off (*without making any observation on the merits of the case or passing an other order*) holding that the petitioner may visit the office of Superintendent of Police, Raigarh for submission of her complaint. On such submission, the Superintendent of Police, Raigarh shall forward the same to the concerned police station who shall take steps in accordance with the judgment of the Supreme Court in the case of *Lalita Kumari v. Government of Uttar Pradesh & Ors.*, (2014) 2 SCC 1.

11. It is urged that the plaintiff is aggrieved by the publication/televising of the subject matter, pending investigation, for the following reasons:

- (a) The said publications/news programs are totally manipulated, misleading, false and have no iota of truth and are aimed at defaming the plaintiff in the eyes of the public at large;
- (b) It will emerge from the facts that publication of such news articles and airing of such programmes clearly violates the fundamental rights of the plaintiff guaranteed under Article 21 of the Constitution of India, 1950 such as right to live with dignity and privacy;
- (c) It is submitted that airing of such programmes/printing of such newspaper articles is an abuse of the Defendants' fundamental right of freedom of speech and expression as it oversteps the Plaintiff's fundamental rights and gravely contravenes the norms and principles of journalistic conduct laid down for the press and broadcasters;
- (d) That the publication and televising of such news articles and news programmes raises a real and imminent threat of impeding fair enquiry of the matter. It is stated that there has been no finding as regards the plaintiff.

(e) It is urged that the news programmes published and broadcasted by defendants No. 1 and 2 are motivated with the intent of sensationalizing the matter and conducting a media trial. The acts are per se defamatory, false, frivolous and misleading.

12. It is averred that the defendants have aired more than 20 false, defamatory programmes against the plaintiff from 07.01.2015 to 15.01.2015 on the alleged incident of rape. It is pointed out as an illustration that various programmes are being aired asking questions and attempting to terrorize the police to push the police to take criminal action against the plaintiff. Suggestions have been put to the ASP that in a case of rape, an FIR should be registered first and enquiry should be conducted later. It is further urged that an attempt is being made to harp on the fact that the police is working under the pressure of the plaintiff.... Suggestions are being made in the course of the programmes to suggest that the entire administrative machinery is acting in collusion with the plaintiff. It is further urged that though the version of the plaintiff is purportedly aired, it is a highly edited version and has been given inconsequential space and has no effect whatsoever on the viewers.

13. The defendants have filed their response to the interim relief application.... that apart from the defendants there are various other publications and channels which have covered the order dated 06.01.2015 of the Chhatisgarh High Court in a similar manner. It is stated that prior to publication and broadcast the defendants had sought the comments of the plaintiff in terms of an order of this High Court..... In the response to the allegations in the plaint about the duration of the programmes or the frequency of the programme are not denied. What the defendant have argued is that the telecast time is only roughly around five hours for the 10 days in question and the average time per day is only 8 minutes per channel.

14. Learned senior counsel appearing for the plaintiff has submitted that the present application should be allowed and appropriate injunction order should be passed against the defendant.

16. Learned senior counsel appearing for the defendant No.2 has submitted that discussion is a part of freedom of speech which may not be absolute but restrictions that are imposed on the same have to be an aid to the rule of law. Any restriction placed by this court would have the effect of curbing the freedom of speech which would be incorrect. It is further urged that at best the reports made by the defendant are a case of fair comment and justification. It is further urged that this is a complete defence to a suit for defamation and no stay can be granted. It is also urged that the plaintiff is a public figure having been a Member of Parliament. Public is interested in the activities of a figure like the plaintiff and there can be no restrictions imposed on a right to comment upon the conduct of the plaintiff.

17. Learned senior counsel appearing for the plaintiff have rebutted the contentions of the defendant in Rejoinder. It is urged that merely because a plea of justification i.e. fair comment and justification are raised that would not be a ground to decline injunction. To prove the case of justification and truth, the matter would have to go to trial. At this stage, in case the plaintiff makes out a prima facie case, this Court would grant injunction and would not refuse injunction merely because a plea of justification has been raised.

Further, reliance is placed on Article 21 of the Constitution to claim that the rights of the plaintiff are being trampled upon and it would be the duty of this Court to protect the plaintiff.

It is next urged that the reporting being done by the defendant is abnormal reporting. It is motivated on account of the history of the conduct of the defendant whereby defendants have been indulging in extortion. In 7 days it is urged that 20 programmes lasting 22 hours have been telecasted on various channels of defendant showing an abnormal and extra zeal. It is urged that this is not a case of a bona fide channel reporting facts and events or commenting on the same but a clear case of malicious reporting.

It is also gross abuse of the process of law as the plaintiffs are hectoring and pressurizing the police to take action against the plaintiff and also harassing the police with a view to take action against the plaintiff.

It is denied that the plaintiff is a public figure and inasmuch as he is an ex M.P. and not a public figure.

18. Learned senior counsel for the defendants have sought to respond to the rejoinder arguments of the plaintiff. It is stressed that the programmes aired by the defendants or the articles written do not cause any interference in the course of justice. Merely asking inconvenient or uncomfortable questions to the police or about the plaintiff would not amount to interference in the cause of justice. It is further urged that there is no hectoring going on and the journalists of the defendants are only probing and trying to get to the veracity of the true facts.

19. The first question that arises in this case is whether this Court would have the powers to grant a pre-publication or pre-broadcasting injunction against the defendants. The above issue is no longer *res integra*. A Constitution Bench of the Supreme Court in *Sahara India Real Estate Corporation Ltd. and Ors. v. Securities and Exchange Board of India and Anr.*, (2012) 10 SCC 603 concluded that in most jurisdictions there is power in the Court to postpone reporting of judicial proceedings in the interest of administration of justice. That was a case in which Civil Appeals were pending filed by the petitioner challenging the orders passed by the Security Appellate Tribunal. Certain communications were exchanged between the counsel for the parties pursuant to a direction by the Court that the learned counsel should attempt to reach a consensus with respect to acceptable security in the form of an unencumbered asset. The communications exchanged between the counsels appear to have come on one of the TV Channels. In this background, the petitioner has stated that the Court should give appropriate directions with regard to reporting of matters which are *subjudice*. (Refer to paras 29-32).

20. In *Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and Anr.* AIR 1967 SC 1 the Supreme Court was dealing with a issue where an order was passed by the High Court not to publish reports regarding the evidence of one of the witnesses. This was a curb on the principle of public trial in open Court. A nine Judge Bench of the Supreme Court held that the High Court has inherent jurisdiction to hold a trial in camera. The Supreme Court held as follows:

“21. Having thus enunciated the universally accepted proposition in favour of open trials, it is necessary to consider whether this rule admits of any exceptions or not..... That is why we feel no hesitation in holding that the High Court has inherent jurisdiction to hold a trial in camera if the ends of justice clearly and necessarily require the adoption of such a course. It is hardly necessary to emphasize that this inherent power must be exercised with great caution

and it is only if the court is satisfied beyond the doubt that the ends of justice themselves would be defeated if a case is tried in open court that it can pass an order to hold the trial in camera; but to deny the existence of such inherent power to the court would be to ignore the primary object of adjudication itself. The principle underlying the insistence on hearing causes in open court is to protect and assist fair, impartial and objective administration of justice; but if the requirement of justice itself sometimes dictates the necessity of trying the case in camera, it cannot be said that the said requirement should be sacrificed because of the principle that every trial must be held in open court....”

21. Similarly, reference may also be had to the judgment of Supreme Court in *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers, Bombay Pvt. Ltd. and Ors.*, AIR 1989 SC 190. In that case the petitioner had made a public issue of Secured Convertible Debentures. A petition was filed in the Karnataka High Court and in the Delhi High Court challenging the consent of the Controller of Capital Issues. In the Transfer Petition, the Supreme Court granted an injunction order directing that the issue would be proceeded with ‘without let or hindrance’. Certain adverse reports were published commenting adversely on the debentures. The petitioners had objected to the reports claiming that the effect was to comment on a matter which was *subjudice* and to undermine the effect of interim order passed by this Court. Trial by newspaper on an issue which is *sub-judice* was argued to be grossest mode of interference with the due administration of justice. The Supreme Court issued an order of injunction restraining the respondents from publishing any article, comment, report or any editorial questioning the legality or validity of any of the consents, approvals or permissions for issue of the Secured Full Convertible Debentures. Hence, the Supreme Court ordered restraint on publication. Needless to add that after the time for subscription to the debentures had closed and the imminent danger to the subscription subsided, the Supreme Court held that continuance of the injunction is no longer necessary. The Supreme Court applied the test of real and imminent danger in order to infer as to whether the proposed publication would lead to an interference in the course of justice for the purpose of grant or non-grant of interim injunction of prior restraint against publication.

22. Hence, courts have power to pass pre publication or pre- broadcasting injunction where the court is satisfied that interest of justice so require.

23. The next issue would be as to under what facts and circumstances, the Court should exercise its jurisdiction to grant an injunction regarding publication of news items or broadcasting of programmes. The Constitution Bench in *Sahara India Real Estate Corporation Ltd. and Ors. v. Securities and Exchange Board of India and Anr.* (*supra*) held as follows:

42. But, what happens when courts are required to balance important public interests placed side by side. For example, in cases where presumption of open justice has to be balanced with presumption of innocence, which as stated above, is now recognized as a human right. These presumptions existed at the time when the Constitution was framed [existing law under Article 19(2)] and they continue till date not only as part of rule of law under Article 14 but also as an Article 21 right. The constitutional protection in Article 21 which protects the rights of the person for a fair trial is, in law, a valid restriction operating on the right to free

speech under Article 19(1)(a), by virtue of force of it being a constitutional provision. Given that the postponement orders curtail the freedom of expression of third parties, such orders have to be passed only in cases in which there is real and substantial risk of prejudice to fairness of the trial or to the proper administration of justice which in the words of Justice Cardozo is “the end and purpose of all laws”. However, such orders of postponement should be ordered for a limited duration and without disturbing the content of the publication. They should be passed only when necessary to prevent real and substantial risk to the fairness of the trial (court proceedings), if reasonable alternative methods or measures such as change of venue or postponement of trial will not prevent the said risk and when the salutary effects of such orders outweigh the deleterious effects to the free expression of those affected by the prior restraint. The order of postponement will only be appropriate in cases where the balancing test otherwise favours non-publication for a limited period. It is not possible for this Court to enumerate categories of publications amounting to contempt. It would require the courts in each case to see the content and the context of the offending publication. There cannot be any straightjacket formula enumerating such categories. In our view, keeping the above parameters, if the High Court/ Supreme Court (being Courts of Record) pass postponement orders under their inherent jurisdictions, such orders would fall within “reasonable restrictions” under Article 19(2) and which would be in conformity with societal interests, as held in the case of *Cricket Association of Bengal (supra)*...

43. In the light of the law enunciated hereinabove, anyone, be he an accused or an aggrieved person, who genuinely apprehends on the basis of the content of the publication and its effect, an infringement of his/ her rights under Article 21 to a fair trial and all that it comprehends, would be entitled to approach an appropriate writ court and seek an order of postponement of the offending publication/ broadcast or postponement of reporting of certain phases of the trial (including identity of the victim or the witness or the complainant), and that the court may grant such preventive relief, on a balancing of the right to a fair trial and Article 19(1)(a) rights, bearing in mind the abovementioned principles of necessity and proportionality and keeping in mind that such orders of postponement should be for short duration and should be applied only in cases of real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. Such neutralizing device (balancing test) would not be an unreasonable restriction and on the contrary would fall within the proper constitutional framework.

24. This High Court had also the occasion to deal with the entire gamut of judgments on this issue in the case of *Swatanter Kumar v. The Indian Express Ltd. & Ors. (supra)* in CS(OS) 102/2014 passed on 16.01.2014. This Court held that it had power to restrain publication in media if it arrives at a finding that the publication may result in interference with the administration of justice or against the principle of fair trial or open justice. [*Refer paras 46 and 49 and relevant paras of Sahara India judgment (supra)*].

25. The present matter is at the stage of preliminary enquiry by the police. The question is whether it will be appropriate for the Court to grant stay on publication at this preliminary stage. Do the

powers of the court encompass within its sweep, the power to pass an injunction or prior restraint before or after an FIR is registered and before the court commences trial.

26. For the legal position in this regard, reference may be had to the judgment of the Supreme Court in the case of *Sidhartha Vashisht v. State (NCT of Delhi)*, AIR 2010 SC 2352. That was a case in which the accused was tried for the offence of murder. In that case, the learned senior counsel appearing for the appellant submitted that the appellant had been specifically targeted and maligned before and during the proceedings by the media, despite his acquittal by the Trial Court. The Apex Court while discussing the role of the media and press opined that there is a danger of serious risk of prejudice if the media exercises an unrestricted and unregulated freedom. The Court further stated that certain articles and news appearing in the newspaper immediately after the date of occurrence did cause confusion in the mind of the public. In this regard, the relevant paras are as follows:

“148. Despite the significance of the print and electronic media in the present day, it is not only desirable but least that is expected of the persons at the helm of affairs in the field, to ensure that trial by media does not hamper fair investigation by the investigating agency and more importantly does not prejudice the right of defence of the accused in any manner whatsoever. It will amount to travesty of justice if either of this causes impediments in the accepted judicious and fair investigation and trial.

....

151. Presumption of innocence of an accused is a legal presumption and should not be destroyed at the very threshold through the process of media trial and that too when the investigation is pending. In that event, it will be opposed to the very basic rule of law and would impinge upon the protection granted to an accused under Article 21 of the Constitution [*Anukul Chandra Pradhan v. Union of India and Ors.* (1996) 6 SCC 354]. It is essential for the maintenance of dignity of Courts and is one of the cardinal principles of rule of law in a free democratic country, that the criticism or even the reporting particularly, in *sub-judice* matters must be subjected to check and balances so as not to interfere with the administration of justice.

152. In the present case, various articles in the print media had appeared even during the pendency of the matter before the High Court which again gave rise to unnecessary controversies and apparently, had an effect of interfering with the administration of criminal justice. We would certainly caution all modes of media to extend their cooperation to ensure fair investigation, trial, defence of accused and non-interference in the administration of justice in matters *sub-judice*.

153. Summary of our Conclusion:

...

11. Every effort should be made by the print and electronic media to ensure that the distinction between trial by media and informative media should always be maintained. Trial by media should be avoided particularly, at a stage when the suspect is entitled to the constitutional protections. Invasion of his rights is bound to be held as impermissible.”

27. Reference may next be had to the judgment of this Court in the case of *Kartongen Kemi Och Forvaltning AB & Ors. v. State through CBI*, 2004 (72) DRJ 693. In that case the public servants were charged for entering into criminal conspiracy to cheat the Government of India and cause wrongful loss to the tune of Rs.64 crores for the award of contract for supply of guns. The Court observed that after thirteen long years of investigation by the CBI no evidence has been collected against the public servants. The Court while observing the result of trial by media held as follows:

“7. This case is a nefarious example which manifestly demonstrates how the trial and justice by media can cause irreparable, irreversible and incalculable harm to the reputation of a person and shunning of his family, relatives and friends by the society. He is ostracized, humiliated and convicted without trial. All this puts at grave risk due administration of justice.

8. It is common knowledge that such trials and investigative journalism and publicity of premature, half baked or even presumptive facets of investigation either by the media itself or at the instance of Investigating Agency has almost become a daily occurrence whether by electronic media, radio or press. They chase some wrong doer, publish material about him little realizing the peril it may cause as it involves substantial risk to the fairness of the trial. Unfortunately we are getting used to it.

13. This is one of such cases where public servants who are no more have met somewhat similar fate being victim of trial by media. They have already been condemned and convicted in the eyes of public. Recent instance of such a trial is of Daler Mehandi whose discharge is being sought few days after his humiliation and pseudo trial through media as they have not been able to find the evidence sufficient even for filing the chargesheet. Does such trials amount to public service is a question to be introspected by the media itself.”

28. Similarly, reference may also be had to the judgment of the Bombay High Court in the case of *Deepti Anil Devasthali and Leena Anil Devasthali v. State of Maharashtra* 2009 (111) Bom LR 3981. In that case the accused were sentenced to death for abduction and murder. The appeal was filed against the conviction by the accused persons. The main attack of defence was the dishonest, shoddy and incomplete investigation by the police. The prosecution proved that the victim was made unconscious, killed and his body parts were dismembered. The police during investigation for the recovery of body parts arranged for a camera to shoot the recovery process. The Special Prosecutor conceded that such disclosure by the Police in respect of their leads while collecting evidence affected the quality of investigation. The Court while stating that due to media interference the authenticity of the investigation is questionable held as follows:

“120. ...When the investigation is in embryo stage, the police should eschew themselves from any publicity. It is high time for the police officer to understand their responsibility not to approach the media to get cheap and objectionable publicity which makes the criminal justice system not transparent but patchy and hazy. Right to information is wrongly interpreted by the police as right to inform. High degree of secrecy is a must when the investigation is in process. The publication of the matter in the print/electronic media and highhanded telecast and immature comments of the anchors of the TV media may mislead the people as public

opinion is bound to be influenced by the manner the case is projected and ultimately affect the sanctity and fairness of the criminal trial. The overzealous efforts made by the prosecution to telecast the investigation i.e. discovery panchanama dilutes the investigation and lends support to the argument of the defence that the police from the beginning were not fair in the investigation.”

29. Reference may be had to be judgment in the case of *M.S. Ravi & Ors.* MANU/KE/1298/2009. The High Court of Kerala in that case was dealing with a publication of an article relating to a case of murder of a Nun. The issue concerned was whether the article amounted to contempt of court. On the issue of media interfering with the due course of justice, the Court held as follows:

“16. We notice that there is a growing tendency among the media to make comments on the merits of the cause pending before the courts, while reporting on pending proceedings. Talk shows are held even on the merits of interim orders passed by the courts. Conflicting views, even on interim orders, are broadcast and the anchor, in some cases, finally pronounce the verdict also. Such trial by media is sure to prejudice either the prosecution/ Plaintiff/ Petitioner or the accused/ Defendant/ Respondent. Such programmes of the media have the effect of interfering with the administration of justice and therefore, will amount to criminal contempt. The theory of our system of justice is that "the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by outside influence, whether of private talk or public print". Such programmes make a mockery of this theory against outside influence. "The right to sue and defend in courts is the alternative of force in an organised society. It is the right conservative of all other rights and lies at the foundation of orderly Government". But, the said cardinal right is being infringed by such talk shows. To keep the viewers remain glued to their programme in the evening, the channels broadcast such talk shows. But, in that process, unknowingly, the system of administration of justice of our State is being weakened and distorted. Interference even with police investigation will amount to interference with the due course of justice. Influencing the investigating officer will also amount to contempt of court.....”

30. The power of the High Court to order restrain of publication in the media would clearly encompass the stage when the criminal case against the accused is at the preliminary enquiry or investigation stage also. In the light of the said position, I will now see whether facts and circumstances exist which necessitate the passing of a pre-publication or pre-broadcasting injunction against the defendants.

31. At this point let me have a look at some of the judgments relied upon by the defendant.

32. I may refer to two of the judgments filed by the defendant No.1 alongwith its paper book. First case is a judgment of the Division Bench of this High Court in the case of *Khushwant Singh and Anr. v. Maneka Gandhi*, AIR 2002 Delhi 58. In that case the High Court was dealing with a petition where a public figure claimed protection against publication under her right of privacy. The Division Bench noted that publication of the excerpts of the proposed publication had occurred much prior to the filing of the suit. In those facts the Division Bench held that private life of public figure does become matter of public interest. It was in those facts that the Division Bench held that

there was no question of any irreparable loss and injury since the respondent had herself claimed damages which would be a remedy in case she is able to establish defamation.

Next case is *Tata Sons Limited v. Greenpeace International & Anr.*, 178(2011) DLT 705. That was a case in which the plaintiff was said to be developing an eco-friendly port. However, the defendants were raising concerns about probable dangers to the nesting and breeding of Olive Ridley Turtles by the proposed port in various quarters. It was averred by the plaintiff that the contentions of the defendant are false, frivolous and misleading on facts. It is further urged that the defendants had gone a step further and had made an online game titled 'Turtle v. TATA'. It was urged that the impugned game and the defendant's use of TATA mark amounts to defamation with an ulterior motive of damaging its reputation. It was in those facts that this High Court held as follows:

"28. The English common law precedent on awarding interim injunctions in cases of defamation is set out by the case of *Bonnard* (supra). In *Bonnard* it was decided that an interim injunction should not be awarded unless a defence of justification by the Defendant was certain to fail at trial level. The Court's observations, widely applied in subsequent judgments are as follows:

...[The subject-matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong. The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions.... In the particular case before us, indeed, the libelous character of the publication is beyond dispute, but the effect of it upon the Defendant can be finally disposed of only by a jury, and we cannot feel sure that the defence of justification is one which, on the facts which may be before them, the jury may find to be wholly unfounded; nor can we tell what may be the damages recoverable.

Again, in *Fraser v. Evans* [1969] 1 QB 349 Lord Denning MR stated the law as follows:

The court will not restrain the publication of an article, even though it is defamatory, when the Defendant says he intends to justify it or to make fair comment on a matter of public interest. That has been established for many years ever since *Bonnard v. Perryman*. The reason sometimes given is that the defences of justification and fair comment are for the jury, which is the constitutional tribunal, and not for a judge. But a better reason is the importance in the public interest that the truth should out.... There is no wrong done if it is true, or if [the alleged libel] is fair comment on a matter of public interest. The court will not prejudice the issue by granting an injunction in advance of publication...."

The Court concluded that the issue which the defendant's game seeks to address is one of public concern. The Court held that granting an injunction would freeze the entire public debate on the effect of the port project on the Olive Ridley Turtle's Habitat. On those grounds, the interim injunction was declined.

The facts of these two cases are entirely different from what is being said and alleged by the plaintiff in the present case. Here the issue is as to whether the acts done by the defendant are subservient and obstructing the course of justice.

33. The learned senior counsel appearing for defendant No.1 has also strongly relied upon the judgement of this High Court in the case of *Naveen Jindal vs. Zee Media Corporation Ltd. and Anr. (supra)* which judgment was given on 01.04.2014. As per the facts given, the case dealt with a situation where the plaintiff appears to have been contesting the elections for the third time from the Kurukshetra Lok Sabha Constituency in Haryana. It was averred by the plaintiff in that case that the allegations which were subject matter of that suit were aired by the defendants in the news programmes from 01.03.2014 and 24.03.2014 were per se defamatory and were repeated 131 times against the plaintiff which not only effected the sentiments of a particular community and caste but also done with a view to damage the prospect of the plaintiff in getting elected to the Parliament in the ensuing elections. The allegations that were levelled against the plaintiff have been reproduced hereinafter when dealing with the preliminary submissions of the defendant.

35. This court, however, concluded that prima facie there may be incorrect statements or inaccurate statements which were made by the defendants which may not be to the liking of the plaintiff or which may be causing annoyance to the plaintiff therein but were not per se defamatory. Having arrived at that conclusion the Court held that to restrain the defendants from pre-telecasting of programmes or news articles or reporting the same would not only be gagging the Right to Freedom of Press but also gagging of the public to know about a candidate who is sought to be elected by its electorate. Hence, this Court in that case granted limited relief to the plaintiff whereby the defendants were directed to obtain the view of plaintiff Nos. 1 and 2 therein in case they intend to televise any programme pertaining to plaintiff No. 1 or its companies and to ensure that the interviews/comments are simultaneously reflected at the end of said programme. In my view the conclusions arrived at by the Court are based on those facts. That judgment does not have any application to the facts of the present case.

36. I will also here to deal with the preliminary objections raised by the defendant. It has been urged that the said earlier suit was filed by the plaintiff being CS(OS) 881/2014 titled *Naveen Jindal & Anr. v. Zee Media Corporation & Ors. (supra)*. The reliefs claimed by the plaintiff in the present suit, it is urged, are covered by the reliefs claimed in the earlier suit. The facts of that case as already elaborated were that the plaintiff was contesting the Lok Sabha Elections from the Kurukshetra Lok Sabha Constituency in Haryana. It was averred that allegations are being aired by the defendants in their news programme which were per se defamatory and were repeated 131 times against the plaintiff. A perusal of the allegations made would show that there were several allegations most of which related to the conduct and behavior of the plaintiff as a Member of Parliament etc. The allegations which were subject matter of the said suit read as follows:

“6. In order to deal with these allegations which were leveled against plaintiff No. 1, it may be pertinent here to refer to the allegations which have been reproduced by the plaintiff, which are as under:

- Congress candidate Naveen Jindal during his campaign for 3rd inning had to face brunt of the people. The Member of Parliament could not give any answer when some people confronted him with the frauds going on since 10 years and his inability to fulfil the promises made at the time of election.
- When people asked him as to why he has not fulfilled the promises made by him and people expressed their anger in this regard, then netaji became angry and started blaming the people. His security guards also misbehaved with the people. Jindal went to the extent of saying Ok don't vote for me.
- You will be shocked to see Naveen Jindal caught in an imbroglio with the people of Kurukshetra which is his own constituency. But this is true.
- The people of Kumhar community were voting for him on this very condition.
- But see the high headedness of the Member of Parliament that he even went to the extent of saying them that they should not vote for him. If you do not believe, then listen to this. In the meanwhile, the security guards of Jindal not only misbehaved with the public but they also pushed aside all those who came to complaint.
- The entire Kumhar community is extremely unhappy and rather angry on hearing such words from the mouth of their own Member of Parliament and the treatment given to them by the security guards of Jindal. They are at a complete loss to understand as to what was their fault, whether it is a crime to ask question from their own Member of Parliament who is a liar.
- Naveen Jindal could not tolerate this behaviour of theirs and you can see the manner in which he has misbehaved with the members of prajapat community.
- Thereafter when he tried to raise his point in the workers meeting then he misbehaved and ignored and the body guards pushed him aside. Such kind of attitude has left a totally negative impact on the prajapati community.
- Several of our correspondents have joined us. We will gather information from them and will discuss on this issue.
- Generally, whenever a leader goes to public, he listens to the grievance of the people and he should talk with the people in a very polite manner. But it is not so in this case. The security guards of Jindal highly misbehaved with the local people. You can feel the impact of such an incident.
- History is a witness that whenever a minor spark has risen from any area of Haryana the same has always turned into a massive demonstration. Whether it is the demonstration of JP or of Jat community or of transport employees or of farmers. Such agitations always emerge in the form of small sparks and turn into a monstrous demonstration. The witness to this is the incident of yesterday. The members of Prajapat community are not confined only in the areas of Kurukshetra or Gulachika alone but it is spread throughout Haryana in vast numbers. In Sonapat also, there are large members of this community. Voters of prajapat community play a significant role in Haryana and in this case Naveen Jindal has succeeded in reaching

Lok Sabha twice due to these Kumhars. But his conduct towards them shows nothing but his high-headedness and the downfall of a person always starts from such conducts. He has started his own doom. Now it depends upon the members of the Kumhar community to make its future plans for the coming Lok Sabha Elections.

- All this will definitely leave a negative impact. • You have seen the incident which has happened with a particular community. If we see the whole incident, we clearly find the high-headedness of Naveen Jindal.
- He is undoubtedly a very high-headed person and it actually shows somewhere or the other. You can see his attitude towards employees of his own company with whom they are talking.
- The every effect of this defeat in the coming elections is now clearly visible on the face of Naveen Jindal and in his speeches.
- Even otherwise, the attitude of Naveen Jindal is like this. Whenever we ask any question from him, he shows his high headedness. Earlier also, he had done exactly the same with our camera during a discussion with him. He had jerked the camera when our reporter tried to ask a question from him. His conduct is visible in the public also. He will have to pay for his attitude.
- Public also knows how to reply the anger. Public has only one power with them which is their vote and you have seen this for yourself in the recent elections of Delhi Assembly. Now when the elections are very near, then public will definitely give its reply which will cause sleepless nights to several leaders. Public will give its fitting reply to Jindal Sahib by means of voting.
- Frustration is self evident. He has won twice from this constituency and now he is here for the third time. Such a conduct on his part with the public just before the elections can cause a huge loss to the Congress party in the entire Haryana. We are receiving inputs that this prajapat community is spread in entire Haryana and it is a very strong community and that several other communities are also attached with this community.
- But is he absolutely unafraid of the results. High command has given him a free hand to deal with the public in the manner he wants.
- Someone will definitely question his attitude. Public will not tolerate such kind of conduct. Public will give its representative through voting and the results of Lok Sabha elections will definitely show the negative impact in the Kurukshetra. You have just seen the conduct of one kind. The candidate will have to bear the brunt for his conduct at every cost.
- It is natural that he will have to bear the brunt for his attitude. What do you think?
- You must know how to talk with the public when you go to them before the elections. Public will definitely ask question from you when you fail to fulfil all those promises of developments which you had made at the time of last elections. Specially your volunteer who is widely advertising for you and whatever he is saying before the people, will be the same position with all the workers and such a situation will become the biggest problem.
- His mines in Bhilwara has been cancelled or is likely to be cancelled while as he has no mines.”

37. In those facts and circumstances, this Court declined to give a blanket pre-telecast restraint order. Directions were passed that the defendants therein would obtain views of the plaintiffs in case they intend to televise any program pertaining to plaintiff No.1 or his companies so that the said interview, comment or their side of the story is simultaneously reflected at the end of the said programme.

41. Plaintiff has strenuously denied the [...] allegations against the plaintiff pointing out that the allegations are belated and stale, being made 12 to 14 years after the alleged incident. Further in the various proceedings earlier, no such allegation was made by Ms. ABC.

43. The plaintiffs aver that defendants have aired more than 20 defamatory and false programs against the plaintiff w.e.f. 7.1.2015 to 15.1.2015. [...] It is averred that defendants are interfering with the administration of justice and are trying to conduct a media trial and to cause deliberate harm and prejudice to the plaintiff.

44. It is urged that the publication and televising of such articles and news programmes is raising a real and imminent threat to pending fair enquiry in the matter by the police.

45. Hence, essentially the plaintiff seeks to press for an *ad interim* injunction based on two contentions. Firstly, that the defendants are motivated on account of the past litigation between the parties where they were caught trying to extort large amount of money from the plaintiff.

Hence, the defendants are actuated by malice and ill will towards the plaintiff. The second contention is the conduct of the defendant is such as to interfere with the administration of justice and hamper a fair enquiry. The said conduct is an intrusion to the right to open justice unbiased by any public opinion expressed in publications. It is urged that the programmes not only defame the plaintiff but also tend to interfere with the administration of justice and that the entire attempt of the defendant/its reporters is to pressurize, browbeat or hectoring/ pressurize the police into lodging an FIR against the plaintiff.

47. The nature of the programme, the questions and observations show they are likely to prejudice the police and hamper the course of investigation/ inquiry which is being conducted by the police. I am persuaded to come to this conclusion on seeing the nature of questions being put by the Anchor in various TV programmes. As an example, I may refer to the questions of the Anchor in asking the ASP as to who is responsible for the presumed delay i.e. SSP Rai Garh, IG Police, DG Chattisgarh, Home Secretary, Home Minister or the Chief Minister. Another example is an observation by the reporter that the Women Commission and the police have maintained silence. Another example is the observation what the High Court has said can be done in two days if the police so desire. The programmes are replete with such questions/ observations.

48. The nature of questioning done by the reporters of defendants, the extent of coverage being done by the defendants does show that an attempt is being prima facie made to prod the police if not pressurize. The plaintiff has made out a *prima facie* case.

49. In these facts would the plaintiff be entitled to an injunction to restrain the defendants from publishing reports or airing reports pertaining to the allegations which are pending before the police by Mrs. ABC. Legal position as explained above is quite clear. Any publication which gives excessive adverse publicity to an accused or which is likely to hamper fair trial and constitutes an

interference with the course of justice could be a ground for grant of injunction. The court has ample inherent power to restrain publication in media in the event it arrives at a finding that the said publication may result in interference with the administration of justice or would be against the principle of fair trial or open justice.

50. The balance of convenience is in favour of the plaintiff. Serious prejudice will be caused to plaintiff in case injunction is not granted. Accordingly, the defendants 1 and 2, their associates are restrained by an order of injunction from publishing any article or right-ups or telecasting programmes on the allegations against the plaintiff as made by Mrs. ABC either in the complaint or before the police, till the time the police completes its enquiry and, if necessary, investigation and files an appropriate report/ document before the court. The injunction passed is of a temporary nature and is applicable only till the police completes its preliminary enquiry or any other investigation if required that may be done at a later stage. However, the defendants are free to report about the court cases or about the final conclusion of the police in the course of preliminary enquiry covered under the ambit of fair reporting on the basis of true, correct and verified information. The application stands disposed of.

CONTEMPT OF COURT Fair Comment

In Re: S. Mulgaokar v. Unknown
(1978) 3 SCC 339

V.K. Iyer, J. (for himself and Beg and P. Kailasam, JJ.): 1. The matter before us arises out of a publication in the Indian Express newspapers dated 13th December, 1977. Some people perhaps believe that attempts to hold trials of everything and everybody by publications in newspapers must include those directed against the highest Court of Justice in this country and its pronouncements. If this is done in a reasonable manner, which pre-supposes accuracy of information about a matter on which any criticism is offered, and arguments are directed fairly against any reasoning adopted, I would, speaking for myself, be the last person to consider it objectionable even if some criticism offered is erroneous. In *Bennett Coleman & Co. and Ors. v. Union of India and Ors.* :

John Stuart Mill, in his essay on “Liberty”, pointed out the need for allowing even erroneous opinions to be expressed on the ground that the correct ones become more firmly established by what may be called the ‘dialectical’ process of a struggle with wrong ones which exposes errors.

Milton, in his “Areopagitica” (1644) said: ‘Though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously be licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; whoever knew Truth put to the worse, in a free and open encounter?... Who knows not that Truth is strong, next to the Almighty; she needs no policies, no stratagems, no licensings to make her victorious; those are the shifts and defences that error makes against her power...’

Political philosophers and historians have taught us that intellectual advances made by our civilisation would have been, impossible without freedom of speech and expression. At any rate, political democracy is based on the assumption that such freedom must be jealously guarded. Voltaire expressed a democrat's faith when he told an adversary in arguments ‘I do not agree with a word you say, but I will defend to the death your right to say it’. Champions of human freedom of thought and expression throughout the ages, have realised that intellectual paralysis creeps over a Society which denies, in however subtle a form, due freedom of thought and expression to its members. Although our Constitution does not contain a separate guarantee of Freedom of the Press, apart from the freedom of expression and opinion contained in Article 19(1)(a) of the Constitution, yet, it is well recognised that the Press provides the principal vehicle of expression of their views to citizens. It has been said ‘Freedom of the Press is the Ark of the Covenant of Democracy because public criticism is essential to the working of its institutions. Never has criticism been more necessary than today, when the weapons of propaganda are so strong and so subtle. But, like other liberties, this also must be limited’.

2. I find, however, that gross distortions of what was actually held by this Court in what is known as the *Habeas Corpus case (Additional District Magistrate, Jabalpur v. S. Shukla)* being made presumably to serve ulterior objects. Some of these distortions have been exposed by me

in a separate statement of detailed reasons which place on record my difference of opinion with the order ultimately passed by a majority in this Court upon a case resulting from a news item published in the Times of India recently. I have, unfortunately, now to take notice of a much milder publication in the Indian Express newspaper, in which the following sentence occurs about the supposed code of judicial ethics assumed wrongly to have been drafted by some Judges of the Supreme Court: So adverse has been the criticism that the Supreme Court Judges, some of whom had prepared the draft code, have disowned it.

3. Judges of this Court were not even aware of the contents of the letter before it was sent by me as Chief Justice of India to Chief Justices of various High Courts suggesting, inter-alia, that Chief Justices could meet and draft a code of ethics themselves or through a Committee of Chief Justices so as to prevent possible lapses from the path of rectitude and propriety on the part of Judges. The error of the assumption that Judges of the Supreme Court had any hand in drafting a code which I could have had at the back of my mind when I sent my suggestions to Chief Justices of High Courts was pointed out to the Editor of the Indian Express in a letter sent by the Registrar of this Court. No question of disowning the supposed code by any Judge could, in the circumstances, arise. And, I had never “disowned” the suggestions made by me. The Registrar of this Court, therefore, wrote to inform the Editor of the mis-statement which ought to have been corrected. In reply, the Registrar received a letter from the Editor showing that the contents of my letter to Chief Justices of High Courts, which were confidential, were known to the Editor. Instead of publishing any correction of the mis-statement about the conduct of Judges of this Court, the Editor offered to publish the whole material in his possession, as though there was an issue to be tried between the Editor of the newspaper and this Court and the readers were there to try it and decide it.

4. Comments about Judges of the Supreme Court suggesting that they lack moral courage to the extent of having “disowned” what they had done, or, in other words, to the extent of uttering what was untrue, at least verge on contempt. I do not think that anyone could say that such suggestions would not make Judges of this Court look ridiculous or even unworthy, in the estimation of the public, of the very high office they hold if they would so easily “disown” what they had done after having really done it. The readiness with which possible correctness of such a suggestion could be accepted by the Editor of a newspaper has its own implications about the general fall in standards and values in life which Judges are supposed to share.

5. It seems to me that Editors of at least responsible newspapers should be aware that it is Courts of law and not newspaper readers who have to try certain issues which courts alone are empowered to determine. Courts adopt a procedure designed to prevent, as far as possible, unfair prejudices, irrelevances, and untruths creeping in. The character and the legal consequences of any publication about conduct of judges are certainly matters for Courts to determine. Editors of newspapers are expected to know also something of the special place of this Court in the Republic’s Constitution which amply protects its judges so that they may not be exposed to opprobrious attacks by either malicious or ignorant persons.

6. This Court is armed, by Article 129 of the Constitution, with very wide and special powers, as a Court of Record, to punish its contempt. Elsewhere, I have said in an attempt to explain the principle of the Supremacy of the Constitution which this Court represents and expounds: Thus, the principle of Supremacy of the Constitution requires for its maintenance in

full force and vigour; firstly, an executive which respects the judiciary and its verdicts and does not take away, by the exercise of its constitutional powers, judicial powers to deal with the rights of citizens even against executive actions of the State; and, secondly the absence of any legislative interference with judicial functions in a manner characterised by Dean Roscoe Pound as “legislative lynching” of threats of any kind held out for reaching particular conclusions however unpalatable they may be to “any one. Articles 121 and 211 of our Constitution, prohibiting discussion of the conduct of a Supreme Court or a High Court Judge in the discharge of his duties even by Parliament or a State Legislature, except upon a motion for his removal by the constitutionally prescribed procedure of addresses presented by each House of Parliament after proved misconduct or incapacity of a Judge and resolutions by 2/3 majorities of each House present and voting, are there in our Constitution to ensure this. Can ordinary citizens do elsewhere, with impunity, what members of Parliament cannot do in Parliament and legislators cannot do in a State Legislature, and, if so, to what extent? Such questions will have to be answered by Courts with reference to the facts of particular cases if and when brought to their notice. I also said there:

It would be a sad day for the supremacy of the Constitution and for the Rule of Law, which it implies, if malicious or ill informed persons, filled with the irrationality involved in the spirit of what Dean Pound called “lynching” or misguided zest or vindictiveness, acting in a manner freed from the restraints of law or reason, were allowed to take upon themselves the task of passing judgments on actions of others particularly of Judges performing judicial functions. That would certainly sound the death knell of what Dean Roscoe Pound calls “judicial justice” and the Rule of Law. The supremacy of the Constitution can only be maintained when there is a spirit of law abidingness and discipline amongst citizens so that principles of law can be applied scientifically to facts by Courts of Justice, which are the custodians of what has been described by political philosophers as the abiding or continuing “Real Will” of the whole nation embodied in the Constitution as contrasted with the will or wishes of some or majority of citizens for the time being expressed in legislatures or elsewhere. Judges, who have taken oaths of allegiance to the Constitution, are bound to uphold it, conscientiously without fear or favour, affection or ill will’. They have to give their honest judgments without caring for popular approval or disapproval.

7. It seemed particularly necessary to point out the protections enjoyed by this Court and its Judges in order to safeguard the supremacy of the Constitution and the rule of law, which speak through pronouncements of this Court, because it was found that, soon after the incorrect stand taken by the Editor of the Indian Express, in the manner mentioned above, an article appeared, entitled “Behaving like a Judge”, in this very newspaper. The suggestion that a code of ethics should be formulated by judges themselves was characterised in this article as “so utterly inimical to the independence of the judiciary, violative of the Constitutional safeguards in that respect, and offensive to the self-respect of the Judges as to make one wonder how it was conceived in the first place”. The writer of the article asserted a right of the public to know what I, at any rate, would be quite willing to tell him if he came to me as a citizen wanting, in good faith, correct information.

8. The writer of an article of a responsible newspaper on legal matters is expected to know that there is no constitutional safeguard or provision relating to the independence of the

judiciary which could possibly prevent Judges themselves meeting to formulate a code of judicial ethics or to constitute a committee to formulate a code of judicial ethics and etiquette. This is what was suggested to Chief Justices of High Courts. Indeed, in America, the American Bar Association has formulated a code of this kind. None has been formulated so far in this country. A purported enactment which tried to prevent Judges from meeting and formulating such a code of ethics and etiquette so as to be clear about points on which, at times, there is uncertainty in the minds of Judges themselves, would not be valid. Such a purported law would offend against Article 19(1)(a) of the Constitution. Neither our Constitution nor our law, could conceivably be infringed if Judges were to meet to devise means to present situations arising in which an accusing finger could be raised against the conduct of a judge, whether inside or outside the Court, let alone involving Constitutional provisions of Article 124 for his removal after an inquiry by a body constituted under the Judges Inquiry Act, 1968. A code of this kind, if scrupulously observed by all the Judges, could only enhance their independence and prestige and not injure these in any way whatsoever.

9. This article proceeds on the assumption that there is already a formulated code of ethics sent to the Chief Justices. In fact, nothing more than some suggestions or examples of the kind of conduct which a possible code could deal with were sent to the Chief Justices. If there was anything inappropriate which could be found in those suggestions, that could be criticised and set right or discarded. Better suggestions could be made and incorporated in a proper code of judicial ethics and etiquette, if that could be framed. Indeed, in case the Judges felt bolder, it was suggested that they could formulate a mode of action to deal with allegations which are sometimes made baselessly or maliciously against Judges. If a Committee of Chief Justices or Judges could consider the allegations made against any individual Judge and was to find them baseless or malicious it would protect the unfortunate Judge Who was made a Victim of malicious onslaughts. On the other hand, if there was substance in the very serious allegations which are sometimes made against Judges of High Courts (I am glad to say that their number is extremely small and limited), the Committee could itself forward its findings for appropriate action under Article 124 of the Constitution, to the Central Government which could then set up a Committee of Inquiry, in this way, in serious cases, the Judge concerned would get a consideration from his peers as well as by the Committee provided by the Judges' Inquiries Act, 1968.

10. The article of 21 December, 1977, referred to above, ends by attempting to make a distinction between the wonderful performance of High Court Judges and the "disappointing" record of the Supreme Court. It was suggested there that this was due to the fact that the Supreme Court is "packed" by the former Prime Minister, Mrs. Gandhi, "with pliant and submissive judges except for a few". Questions, naturally, must arise in the public mind: To what do they become "pliant"? Is it to the dictates or directions of the Executive? When and how have they done so? Had such insinuations any factual basis which they, fortunately, do not have I would, at any rate, be among those who would say that the sooner this Court is wound up the better it would be for the country.

11. The supposed writer of the article was evidently so shaky about his ability to substantiate his suggestions, on the strength of his own knowledge or opinion, that he took shelter behind views alleged to have been expressed by Mr. Jayaprakash Narayan on some

occasion to the effect alleged by him in the article. We cannot pass any judgment upon such views without giving notice to other parties, and without taking evidence about the circumstances and the context, which largely determine the real meaning, in which any opinion to that effect may or may not have been expressed by anybody.

12. Mr. Jethmalani appearing for A. G. Noorani, to whom we had issued no notice, tried to convince us that there was no intention on the part of the writer of the article or the editor to injure the dignity or position of this Court but the intention was only to direct public attention to matters of extreme importance to the nation. If this were so it would be a desirable object. But, as we should all know, there are proper and permissible ways of carrying out such an object and others which are not permitted by law, or, at least by elementary rules of fairness.

13. A reason which has also weighed with me in dropping this and a similar earlier proceeding is that, we have been passing through a period of exceptional strain and stress and excitement in this country in which unusual remarks made have not been confined to what appears in newspapers. Indeed, extraordinary and surprisingly erroneous statements, which could not be there if rules of judicial ethics were formulated and strictly adhered to, have found place even in solemn pronouncements of this Court on rare occasions. However, I do not want to expatiate on that theme here. All I can say is that, if this is a correct observation, it would also disclose a need for rules of judicial ethics or propriety for judges of even this august Court.

14. The statement made above by me should remove the misapprehension, if there was really any in the mind of whoever wrote the article in the Indian Express of 13th December, 1977, condemning my proposals for framing a code of judicial ethics on the ground, inter alia that it was proposed to have one only for High Court Judges. I think that there should be codes of ethics not merely for judges but for occupants of every office-high or low- and for members of every profession and calling. Without such codes, progress in right directions in any sphere becomes more uncertain and problematic than it could be with such codes of ethics.

15. National interest requires that all criticisms of the judiciary must be strictly rational and sober and proceed from the highest motives without being coloured by any partisan spirit or tactics. This should be a part of national ethics. Newspapers, in particular, ought to observe such a rule imbued with what Montesquieu considered essential for a healthy democracy : the spirit of "virtue". They should, if they are interested in promoting national welfare and progress, support proposals for framing correct rules of ethics for every class of office holder and citizen in the country. And, the judiciary must, in its actions and thoughts and pronouncements, hold aloft the values and the spirit of justice and truth enshrined in the Constitution and soar high above all other lower loyalties and alignments if it is to be truly independent.

16. The judiciary cannot be immune from criticism. But, when that criticism is based on obvious distortion or gross mis-statement and made in a manner which seems designed to lower respect for the judiciary and destroy public confidence in it, it cannot be ignored. I am not one of those who thinks that an action for contempt of Court, which is discretionary, should be frequently or lightly taken. But, at the same time, I do not think that we should abstain from using this weapon even when its use is needed to correct standards of behavior in a grossly and repeatedly erring quarter. It may be better in many cases for the judiciary to adopt a magnanimously charitable attitude even when utterly uncharitable and unfair criticism of its

operations is made out of bona fide concern for improvement. But, when there appears some scheme and a design to bring about results which must damage confidence in our judicial system and demoralize Judges of the highest court by making malicious attacks, anyone interested in maintaining high standards of fearless, impartial, and unbending justice will feel perturbed. I sincerely hope that my own undisguised perturbation at what has been taking place recently is unnecessary. One may be able to live in a world of yogic detachment when unjustified abuses are hurled at one's self personally, but, when the question is of injury to an institution, such as the highest Court of justice in the land, one cannot overlook its effects upon national honour and prestige in the comity of nations. Indeed, it becomes a matter deserving consideration of all serious minded people who are interested in seeing that democracy does not flounder or fail in our country. If fearless and impartial courts of justice are the bulwark of a healthy democracy, confidence in them cannot be permitted to be impaired by malicious attacks upon them. However, as we have not proceeded further in this case, I do not think that it would be fair to characterize anything written or said in the Indian Express as really malicious or ill-intentioned and I do not do so. We have recorded no decision on that although the possible constructions on what was written there have been indicated above.

17. My opinion on matters touched by my learned brother Krishna Iyer is that, although, the question whether an attack is malicious or ill intentioned, may be often difficult to determine, yet, the language in which it is made, the fairness, the factual accuracy, the logical soundness of it, the care taken in justly and properly analysing the materials before the maker of it, are important considerations. Moreover, in judging whether it constitutes a contempt of Court or not we are concerned more with the reasonable and probable effects of what is said or written than with the motives lying behind what is done. A decision on the question whether the discretion to take action for contempt of Court should be exercised in one way or the other must depend on the totality of facts and circumstances.

18. After I had drafted my reasons for dropping the proceedings I have had the benefit of perusing the views expressed by my learned brother Kailasam. I would like to make it quite clear that there is, as I have already mentioned above, no finding given here by me against any person. I entirely agree that it would not be fair or legal, without giving opportunities to be heard to any persons against whom any aspersions are to be cast or any remarks are to be made to record findings against them. But, I think that we are entitled to express our separate and individual opinions for dropping the proceedings now before us. Indeed, my separate judgment in the case relating to the recent publication in the Times of India case was a dissenting one. It was, therefore, all the more necessary for me to record my reasons for a dissent. In the case now before us, we are all agreed that the proceedings should be dropped. Nevertheless, I think that we are completely justified in giving and are free to give our separate reasons why this should be done either with or without comment so long as we do not give any finding which may be unfair to anyone. I would, therefore, like to make it clear once again that, as the matter has not proceeded beyond putting the cause of the notice to learned Counsel and hearing only their prima facie reactions on whether the proceedings should be dropped or not, we have accepted the submissions of Mr. Tarkunde and Mr. Jethmalani that we should not proceed further, there is no question of recording any finding against anyone and I have not done so. It was, however, necessary to indicate the way in which and reasons for which the notice was

issued. It seems to me that it was also necessary for me to refer to the reasons why I consider codes of ethics, and, in particular, judicial ethics are necessary. That is a matter of conscience and of my understanding of what is right for a judge to do “without fear or favour, affection or ill will”.

19. The need for appropriate standards relating even to what our judgments should or should not contain is so great that I think this matter has to be taken up soon by Judges themselves at some stage or other. Even the difference of views between learned judges of this Court on such a question illustrates that. If we had clear rules of judicial practice and ethics on even such matters our judgments would not be encumbered with what should not be there. If such rules are absent there may be, sometimes, serious disagreement as to what a judgment should or should not contain. In such a case, the only sound rule I could follow is to hear all those who are to be heard according to law but no others and then to express the opinion I feel bound by my conscience to express without allowing any other consideration to weigh with me.

20. As I have already pointed out above, I think that the need for appropriate norms of conduct exists in practically every sphere of life in which enlightened people strive to attain exalted ends irrespective of consequences. If our separate statements of reasons for dropping the proceedings before us succeed in at least emphasizing that need they would not have been made in vain. I concur in the order that the proceedings before us be dropped at this stage without any finding against any individual.

Krishna Iyer, J.

21. Silence is no sanctuary for me when speech from the Chief Justice persuades my pen into a divergent course. I profoundly appreciate and deeply respect his sense of hurt and obligation for explanation but refer to travel along another street in stating why I agreed to jettison the contempt proceedings. My judgment is more an explanation than an expostulation and certainly not a reflection on the respondents.

22. We had unanimously directed that the above proceedings in contemplation of contempt action be dropped but the fact that we had converged to this conclusion did not rule out-as is now apparent-our divergence in the process of reasoning. Minds differ as rivers differ. Such, perhaps, in part, is the case here.

23. The contempt power, though jurisdictionally large, is discretionary in its unsheathed exercise. Every commission of contempt need not erupt in indignant committal or demand punishment, because judges are judicious, their valour non-violent and their wisdom goes into action when played upon by a volley of values, the least of which is personal protection-for a wide discretion, range of circumspection and rainbow of public considerations benignantly guide that power. Justice is not hubris; power is not petulance and prudence is not pussilanimity, especially when judges are themselves prosecutors and mercy is a mark of strength, not whimper of weakness. Christ and Gandhi shall not be lost on the judges at a critical time when courts are on trial and the people (“We, the People of India”) pronounce the final verdict on all national institutions. Such was the sublime perspective, not plural little factors, that prompted me to nip in the bud the proceeding started for serving a larger cause of public justice than punitive action against a publisher, even assuming (without admitting) he was guilty. The preliminary proceeding has been buried publicly; let it lie in peace. Many values like free press,

fair trial, judicial fearlessness and community confidence must generously enter the verdict, the benefit of doubt, without absolutist insistence, being extended to the defendant. Such are the dynamics of power in this special jurisdiction. These diverse indicators, carefully considered, have persuaded me to go no further, by a unilateral decision of the bench. This closure has two consequences. It puts the lid on the proceedings without pronouncing on the guilt or otherwise of the opposite parties. In a quasi-criminal action, a presumption of innocence operates. Secondly, whatever belated reasons we may give for our action, we must not proceed to substantiate the accusation, if any. To condemn unheard is not fair-play. Bodyline bowling, perhaps, is not cricket. So my reasons do not reflect on the merits of the charge.

24. Poise and peace and inner harmony are so quintessential to the judicial temper that huff, 'haywire' or even humiliation shall not besiege; nor, unveracious provocation, frivolous persiflage nor terminological inexactitude throw into palpitating tantrums the balanced cerebration of the judicial mind. The integral *yoga* of *shanti* and *neeti* is so much the cornerstone of the judicial process that criticism, wild or valid, authentic or anathematic, shall have little purchase over the mentation of the court. I quite realise how hard it is to resist, with sage silence, the shafts of acid speech; and, how alluring it is to succumb to the temptation of argumentation where the thorn, not the rose, triumphs. Truth's taciturn strategy, the testimony of history says, has a higher power than a hundred thousand tongues or pens. In contempt jurisdiction, silence is a sign of strength since our power is wide and we are prosecutor and judge.

25. Why did I concur in the short order? Why do I now strike a variant note to that of the learned Chief Justice? I do not take up the position that scandalising the Judges does not come within the contempt clutches of the court. The Court's jurisdiction to initiate proceedings and punish for constructive contempt *suo motu* crystallized in the eighteenth century even though it is clear that the Court's inherent powers in this regard were not as wide as Wilmot J. made them out to be in his posthumously published opinion in *R. v. Almon* [1765 published in (1802) Wilmot's opinions] Fortunately, the attacks on the judiciary have been comparatively few in most countries, having regard to the character assassination of the personnel in the other great branches of Government. Even so, the law which punishes those who scandalize judges is as old as the Common Law itself. The existence of the contempt power, however, does not obligate its exercise on every occasion but triggers it only in special situations, not routinely.

26. What, then, are the complex of considerations dissuasive of punitive action? To be exhaustive is a baffling project; to be pontifical is to be impractical; to be flexible is to be realistic. What, then, are these broad guidelines-not a complete inventory, but precedentially validated judicial norms?

27. The first rule in this branch of contempt power is a wise economy of use by the Court of this branch of its jurisdiction. The Court will act with seriousness and severity where justice is jeopardized by a gross and/or unfounded attack on the judges, where the attack is calculated to obstruct or destroy the judicial process. The court is willing to ignore, by a majestic liberalism, trifling and venial offenses-the dogs may bark, the caravan will pass. The court will not be prompted to act as a result of an easy irritability. Much rather, it shall take notice look at the conspectus of features and be guided by a constellation of constitutional and other considerations when it chooses to use, or desist from using, its power of contempt.

28. The second principle must be to harmonise the constitutional values of free criticism, the fourth estate included, and the need for a fearless curial process and its presiding functionary, the judge. A happy balance has to be struck, the benefit of the doubt being given generously against the judge, slurring over marginal deviations but severely proving the supremacy of the law over pugnacious, vicious, unrepentant and malignant contemners, be they the powerful press, gang-up of vested interests, veteran columnists or Olympian establishmentarians. Not because the judge, the human symbol of a high value, is personally armoured by a regal privilege but because 'be you-the condemner ever so high, the law-the People's expression of Justice-is above you'. Curial courage overpowers arrogant might even as judicial benignity forgives errant or exaggerated critics. Indeed, to criticise the judge fairly, albeit fiercely, is no crime but a necessary right, twice blessed in a democracy. For, it blessed him that gives and him that takes. Where freedom of expression, fairly exercised, subserves public interest in reasonable measure, public justice cannot gag it or manacle it, constitutionally speaking. A free people are the ultimate guarantors of fearless justice. Such is the cornerstone of our Constitution; such is the touchstone of our Contempt Power, oriented on the confluence of free speech and fair justice which is the scriptural essence of our Fundamental Law. Speaking of the social philosophy and philosophy of law in an integrated manner as applicable to contempt of court, there is no conceptual polarity but a delicate balance, and judicial 'sapience' draws the line. As it happens, our Constitution makers foresaw the need for balancing all these competing interests. Section 2(1)(c) of the Contempt of Courts Act, 1971 provides :

"Criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which-

(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of any court. This is an extremely wide definition. But, it cannot be read apart from the conspectus of the constitutional provisions within which the Founding Fathers of the Constitution intended all past and future statutes to have meaning. All laws relating to contempt of court had, according to the provisions of Article 19(2), to be "reasonable restrictions" on the exercise of the right of free speech. The courts were given the power-and, indeed, the responsibility-to harmonize conflicting aims, interests and values. This is in sharp contrast to the Phillimore Committee Report on Contempt of Court in the United Kingdom (1974) bund. 5794 prs. 143-5, pp. 61-2) which did not recommend the defence of public interest in contempt cases.

29. The third principle is to avoid confusion between personal protection of a libeled judge and prevention of obstruction of public justice and the community's confidence in that great process. The former is not contempt, the latter is, although overlapping spaces abound.

30. Because the law of contempt exists to protect public confidence in the administration of justice, the offence will not be committed by attacks upon the personal reputation of individual judges as such. As Professor Goodhart has put it :

Scandalising the court means any hostile criticism of the "judge as judge; any personal attack upon him, unconnected with the office he holds, is dealt with under the ordinary rules of slander and libel. (See 'Newspapers and Contempt of Court' (1935) 48, Harv. L. Rule 885, 898.)

Similarly, Griffith, C. J. has said in the Australian case of Nicholls (1911) 12 C.L.R. 280, 285 that:

In one sense, no doubt, every defamatory publication concerning a judge may be said to bring him into contempt as that term is used in the law of libel, but it does not follow that everything said of a judge calculated to bring him into contempt in that sense amounts to contempt of Court.

Thus in in the matter of a Special Reference from the Bahama Island (1893) A.C. 138 the Privy Council advised that a contempt had not been committed through a publication in the Nassau Guardian concerning the resident Chief Justice, who had himself previously criticised local sanitary conditions. Though couched in highly sarcastic terms the publication did not refer to the Chief Justice in his official, as opposed to personal, capacity. Thus while it might have been a libel it was not a contempt.

31. The fourth functional canon which channels discretionary exercise of the contempt power is that the Fourth Estate which is an indispensable intermediary between the State and the people and necessary instrumentality in strengthening the forces of democracy, should be given free play within responsible limits even when the focus of its critical attention is the court, including the highest Court.

32. The fifth normative guideline for the judges to observe in this jurisdiction is not to be hypersensitive even where distortions and criticisms overstep the limits, but to deflate vulgar denunciation by dignified bearing, condescending indifference and repudiation: by judicial rectitude.

33. The sixth consideration is that, after evaluating the totality of factors, if the court considers the attack on the judge or judges scurrilous, offensive, intimidatory or malicious beyond condonable limits, the strong arm of the law must, in the name of public interest and public justice, strike, a blow on him who challenges the supremacy of the rule of law by fouling its source and stream. 34. Speaking generally, there are occasions when the right to comment may be of supreme value (for instance, the thalidomide babies cases in England) I prefer the judgment of Lord Denning M. R. in the Court of Appeal to those in the Divisional Court or House of Lords in the Thalidomide case: *An. Gen. v. Times Newspapers Ltd.* (1972) 3 All. E.R. 1136 (D.C.) : (1973) 1 All. E.R. 815 (C.A.) : (1973) 3 All. E.R. 54 (H.L.) and the law of contempt must adjust competing values and be modified, in its application by the requirements of a free society and the shifting emphasis on paramount public interest in a given situation.

35. Indeed, there is an interesting Australian decision *R. V. Brett* (1950) C.L.R. 226 which has a meaningful relevance for our case and I quote from the Australian Law Journal:

In *R. v. Brett*, the publisher of a newspaper was called on to show cause why he should not be committed for contempt of court. It appeared that the newspaper, under the heading "Mr. Justice Sholl-Diehard Tory" had criticised the appointment of Mr. Justice Sholl and inferentially of all his brethren except one not specified, because they were out of touch with the life of the people and had no experience (it was alleged) in the Criminal Court "the only court where even a semblance of the problems of the people arise", and it concluded that his appointment showed that the judiciary was "an institution forming an integral part of the repressive machinery of the State. O' Bryan, J. pointed out that the fact that the article made

ridiculous mistakes of fact and that its logic was greatly at fault, did not prove that it was a contempt. The question was whether the article, honestly though mistakenly and offensively, criticised the policy of this and previous administrations in appointing judges, or whether it did indeed set out to lower the authority of the Court as such and to excite misgivings as to its partiality. With very great hesitation, his Honour came to the conclusion that a case for the exercise of the extra-ordinary summary jurisdiction of the Court had not been made out and he discharged the order nisi.

36. Another useful illustration from the Australian jurisdiction is contained in short report made of a decision in *Australian Law Journal*, 1928-29, Vol. 2, 145-146 :

The Tasmanian case (The King v. Ogilvie) concerned statements made by the respondent at public meetings, imputing lack of impartiality to Mr. Justice Crisp, and asserting that the respondent was personally disliked by his Honour, and that respondent's clients could not get justice from him. Nicholls, C. J., in delivering the judgment of the Court, agreed with the authorities that fair comment on judicial actions is not only justifiable, but beneficial. He then pointed out "that we regard these proceedings as instituted and our powers conferred, not for the benefit or comfort of the Judges personally, to protect them from criticism or even from libel, but simply to secure that this institution, the Supreme Court, which in the final analysis has to declare and enforce the rules which hold the community together, shall be challenged only in the proper ways, which are two" first, by appeal, and secondly by approach in the proper form to Parliament.

37. A quick flash back to English decisions also is instructive. As early as 1900 in *Queen v. Gray* (1900) Q.B.D. 36 Gray published in a newspaper an article which was "personal scurrilous abuse of a judge as a judge" Lord Russell of Killowen C. J. observed :

It is not too much to say that it is an article of scurrilous abuse of a judge in his character of a judge scurrilous abuse, in reference to the conduct of the judge while sitting under the Queen's Commission, and scurrilous abuse published in a newspaper in the town in which he was still sitting under the Queen's Commission. It cannot be doubted indeed it has not been argued to the contrary by the learned Counsel who represents Howard Alexander Gray that the article does constitute a contempt of Court; but, as these applications are, happily, of an unusual character, we have thought it right to explain a little more fully than is perhaps necessary what does constitute a contempt of Court, and what are the means which the law has placed at the disposal of the Judicature for checking and punishing contempt of Court. Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which Lord Hardwicke L. C. characterised as "scandalising a Court or a Judge". The learned Law Lord, however, indicated a guideline which is extremely important:

Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as a contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be

remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen.

Now, as I have said, no one has suggested that this is not a contempt of Court and no-body has suggested, or could suggest that it falls within the right of public criticism in the sense I have described. It is not criticism : I repeat that it is personal scurrilous abuse of a judge as a judge.... (emphasis added) The tone of *R. v. Gray* (supra) sharply contrasted with the much more liberal tone adopted by the Privy Council in *McLeod v. St. Aubyn* [1899] A.C. 549 even though certain aspects of the latter decision assume a somewhat imperialist tone. Dr. Rajeev Dhavan has observed:

For some strange reason the Privy Council judgment was neither referred to by the Chief Justice or even cited to the Court even though a time lag of nine months separates the two judgments. A harmonious blend and a balanced co-existence of a free press and fearless justice desiderates that the law ought not to be too astute in such cases and that public criticism has a part to play, even if it oversteps the limit, in preserving the democratic health of public institutions. But beyond a point, the wages of contempt is committal.

38. In *Ambard v. Attorney-General for Trinidad* (1936) A.C. 322 the Privy Council pronounced on a case of public criticism of the administration of justice. Lord Atkin stated, with admirable accuracy, the law on this branch of contempt of Court:

But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercise the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein : provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken comments of ordinary men.

Indeed, Lord Morris in *McLeod v. St. Aubyn* (supra) has commented :

Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. But it must be considered that in small colonies, consisting principally of coloured populations, the enforcement in proper cases of committal for contempt of Court for attacks on the Court may be absolutely necessary to preserve in such a community the dignity of and respect for the Court.

39. In will not condemn the Indian people with the contempt manifest in Lord Morris' Observation regarding small colonies and coloured populations. We are cultured people with traditions and canons and may at least be equated in these matters with English men.

40. A very valuable and remarkably fresh approach to this question of criticism of Courts in intemperate language and invocation of contempt of court against the contemner, a person of high position, is found in *Regina v. Metropolitan Police Commissioner ex. p. Black-burn* (1968) 2 W.L.R. 1204. Lord Denning's judgment is particularly instructive in the context of the obnoxious comments made by Quintin Hogg in an article in "Punch" about the members of the

Court of Appeal. The remarks about the Court of Appeal were highly obnoxious and the barbed words thrown at the judges obviously were provocative. Even so, in a brief but telling judgment, Lord Denning held this not to be contempt of court. It is illuminating to excerpt a few observations of the learned judge:

This is the first case, so far as I know, where this Court has been called on to consider an allegation of contempt against itself. It is a jurisdiction which undoubtedly belongs to us but which we will most sparingly exercise: more particularly as we ourselves have an interest in the matter. Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.

It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political. We must rely on our conduct itself to be its own vindication. Exposed as we are to the winds of criticism, nothing which is said by this person or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done.

41. The Indian precedents must naturally receive referential attention from us and so I switch over to the cases of this Court which have relevance to that branch of the contempt jurisprudence bearing upon scandalising the judges. After a brief survey, I will summarise the conclusions. In *Sambhu Nath Jha v. Kedar Prasad Sinha & Qrs.*

It would follow from the above that the courts have power to take action against a person who does an act or publishes a writing which is calculated to bring a court or judge into contempt or to lower his authority or to obstruct the due course of justice or due administration of law...in such cases, the court would exercise circumspection and judicial restraint in the matter of taking action for contempt of court. The court has to take into account the surrounding circumstances and the material facts of the case and on conspectus of them to come to a conclusion whether because of some contumacious conduct or other sufficient reason the person proceeded against should be punished for contempt of court.

42. In *Perspective Publications Ltd. v. State of Maharashtra* [1971] 2 S.C.R. 779 Grover, J., speaking on behalf of the Court, reviewed the entire case law and stated the result of the discussion of the cases on contempt as follows:

(1) It will not be right to say that committals for contempt for scandalizing the court have become obsolete.

(2) The summary jurisdiction by way of contempt must be exercised with great care and caution and only when its exercise is necessary for the proper administration of law and justice.

(3) It is open to anyone to express fair, reasonable and legitimate criticism of any act or conduct of a judge in his judicial capacity or even to make a proper and fair comment on any decision given by him because "justice is not a cloistered virtue and she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.

(4) A distinction must be made between a mere libel or defamation of a judge and what amounts to a contempt of the Court. The test in each case would be whether the impugned publication is a mere defamatory attack on the judge or whether it is calculated to interfere with the due course of justice or the proper administration of law by this Court. It is only in the latter case that it will be punishable as Contempt.

(5) Alternatively the test will be whether the wrong is done to the judge personally or it is done to the public. To borrow from the language of Mukherjee, J. (as he then was) (*Brahma Prakash Sharma's Case*) (1953) S. C. R. 1169) the publication of a disparaging statement will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties. Hidayatullah, C. J., in *R. C. Cooper v. Union of India* observed :

There is no doubt that the Court like any other institution does not enjoy immunity from fair criticism. This Court does not claim to be always right although it does not spare any effort to be right according to the best of the ability, knowledge and judgment of the judges. They do not think themselves in possession of all truth or hold that wherever others differ from them, it is so far error. No one is more conscious of his limitations and fallibility than a judge but because of his training and the assistance he gets from learned Counsel he is apt to avoid mistakes more than others.... We are constrained to say also that while fair and temperate criticism of this Court or any other Court even if strong, may not be actionable, attributing improper motives, or tending to bring judges or courts into hatred and contempt or obstructing directly or indirectly with the functioning of Courts is serious contempt of which notice must and will be taken. Respect is expected not only from those to whom the judgment of the Court is acceptable but also from those to whom it is repugnant. Those who err in their criticism by indulging in vilification of the institution of courts, administration of justice and the instruments through which the administration acts, should take heed for they will act at their own peril. We think this will be enough caution to persons embarking on the path of criticism.

43. In *Brahma Prakash Sharma and Ors. v. The State of Uttar Pradesh* (1953) S.C.R. 1169, 1178, 1180 this Court said:

It seems, therefore, that there are two primary considerations which should weigh with the court when it is called upon to exercise the summary powers in cases of contempt committed by "scandalizing" the court itself. In the first place, the reflection on the conduct or character of a judge in reference to the discharge of his judicial duties would not be contempt of such reflection is made in the exercise of the right of fair and reasonable criticism which every citizen possesses in respect of public acts done in the seat of justice. It is not by stifling criticism that confidence in courts can be created. "The path of criticism", said Lord Atkin (*Ambard v. Attorney-General for Trinidad and Tobago*, (1936) A.C. 322 at 335) is a public way. The wrong

-headed are permitted to err therein; provided that members of the public abstain from imputing motives to those taking part in the administration of justice and are genuinely exercising a right of criticism and not acting in malice, or attempt to impair the administration of justice, they are immune.

In the second place, when attacks or comments are made on a judge or judges, disparaging in character and derogatory to their dignity, care should be taken to distinguish between what is a libel on the judge and what amounts really to contempt of court. The fact that a statement is defamatory so far as the judge is concerned does not necessarily make it a contempt. The distinction between a libel and a contempt was pointed out by a Committee of the Privy Council, to which a reference was made by the Secretary of State in 1892 (In the matter of a special reference from the Bahama Islands (1893) A. C. 138). A man in the Bahama Islands, in a letter published in a colonial newspaper criticised the Chief Justice of the Colony in an extremely ill-chosen language which was sarcastic and pungent. There was a veiled insinuation that he was an incompetent judge and a shirker of work and the writer suggested in a way that it would be a providential thing if he were to die. A strong Board constituting of 11 members reported that the letter complained of, though it might have been made the subject of proceedings for libel, was not, in the circumstances, calculated to obstruct or interfere with the course of justice or the due administration of the law and therefore did not constitute a contempt of court. The same principle was reiterated by Lord Atkin in the case of *Devi Prashad v. King Emperor* (70 I. A., 216) referred to above. It was followed and approved of by the High Court of Australia in *King v. Nicholls* (12 Com. L.R. 280), and has been accepted as sound by this Court in *Reddy v. The State of Madras* (1952) S. C. R., 452). The position therefore is that a defamatory attack on a judge may be a libel so far as the judge is concerned and it would be open to him to proceed against the libeler in a proper action if he so chooses. If, however, the publication of the disparaging statement is calculated to interfere with the due course of justice or proper administration of law by such court, it can be punished summarily as contempt. One is a wrong done to the judge personally while the other is a wrong done to the public. It will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice, or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties. It is well established that it is not necessary to prove affirmatively that there has been an actual interference with the administration or justice by reason of such defamatory statement; it is interference with the proper administration of law. (Mr. Mookerjee J. in *In re : Motilal Ghosh and Others* ILR, 45, Cal., 269 at 283.)

44. There is no doubt that condign and quick punishment for scandalising publication has been awarded by this Court, (Vide *C. K. Daphtary and Ors. v. O.P. Gupta* (1971) Supp. S.C.R. 76, 92-93.

45. Another one is *Shri Baradakanta Mishra v. The Registrar of Orissa High Court and Anr.* . In the latter case, I had occasion to examine the root principles of Indian Contempt jurisprudence and I summed up thus:

Judges and Courts have diverse duties. But functionally, historically and jurisprudentially, the value which is clear to the community and the function which deserves to be cordoned off

from public molestation, is judicial. Vicious criticism of personal and administrative acts of Judges may indirectly mar their image and weaken the confidence of the public in the judiciary but the countervailing good, not merely of free speech but also of greater faith generated by exposure to the actinic light of bona fide, even if marginally over-zealous, criticism cannot be overlooked. Justice is no cloistered virtue.

.....

The Court being the guardian of people's rights, it has been held repeatedly that the contempt jurisdiction should be exercised "with scrupulous care and only when the case is clear and beyond reasonable doubt.

46. I relied on an observation made by Justice Gajendragadkar, C.J., to Special Reference No. 1 of 1964 and proceeded to state the key to the jurisdiction:

We ought never to forget that the power to punish for contempt, large as it is, must always be exercised cautiously, wisely, and with circumspection. Frequent or indiscriminate use of this power in anger or irritation would not help to sustain the dignity or status of the court, but may sometimes affect it adversely. Wise Judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, the fearlessness, fairness and objectivity of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct. If judges decay the contempt power will not save them and so the other side of the coin is that Judges, like Caesar's wife, must be above suspicion. To wind up, the key word is "justice", not "judge"; the key-not thought is unobstructed public justice, not the self-defence of a judge; the cornerstone of the contempt law is the accommodation of two constitutional values-the right of free speech and the right to independent justice. The ignition of contempt action should be substantial and mala fide interference with fearless judicial action, not fair comment or trivial reflections on the judicial process and personnel.

47. Indeed, I am convinced that democratic institutions, including the Court system and judges, must suffer criticism and benefit from it. This approach has been emphasised by me in that case: Even so, if Judges have frailties-after all they are human-they need to be corrected by independent criticism. If the judiciary has serious shortcomings which demand systemic correction through socially-oriented reform initiated through constructive criticism, the contempt power should not be an interdict. All this, far from undermining the confidence of the public in Courts, enhances it and, in the last analysis, cannot be repressed by indiscriminate resort to contempt power. Even bodies like the Law Commission or the Law Institute and researchers, legal and sociological, may run 'contempt' risks because their professional work sometimes involves unpleasant criticism of judges, judicial processes and the system itself and thus hover perilously around the periphery of the law if widely construed. Creative legal journalism and activist statesmanship for judicial reform cannot be jeopardised by an undefined apprehension of "contempt action.

48. American legal history has lessons for us but when national conditions vary adaptation, not imitation, is the creative alternative, to avoid breakdown on the rock of real life. New York is not New Delhi and New York Times deals with different customers from the Times of India.

The law of contempt fluidly flows into the mould of life. This fact once noted, there is instructive thought in the American cases.

49. Their lofty approach, grounded on constitutional values, has an appeal for us. The issue is one of the gravest moment for free peoples and to choose between the cherished basics of free expression and fair hearing is a trying task. For a free press it may be argued as did the U.S. judges:

What is at stake here is a societal function of the First Amendment in preserving free public discussion of governmental affairs.... (P)ublic debate must not only be unfettered; it must also be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression.... An informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment. That function is recognized by specific reference to the press in the text of the Amendment and by the precedents of this Court. The argument further asserts that a curtailment of press freedom is a serious matter. If they can be justified at all, it must be in terms of some serious substantive evil which they are designed to avert. The substantive evil here sought to be averted has been variously described below. It appears to be double disrespect for the judiciary; and disorderly and unfair administration of justice. The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

50. We, may glance at the vigorous dissent of Mr. Justice Frankfurter to this reasoning in *Bridges v. California* [1941] 319 U.S. 252, 279, 283, 284 Our whole history repels the view that it is an exercise of one of the civil liberties secured by the Bill of Rights for a leader of a large following or for a powerful metropolitan newspaper to attempt to overawe a judge in the matter immediately pending before him. The view of the majority deprives California of means for securing to its citizens justice according to law-means which, since the Union was founded, have been the possession, hitherto unchallenged, of all the states. This sudden break with the uninterrupted course of constitutional history has no constitutional warrant. To find justification for such deprivation of the historic powers of the states is to misconceive the idea of freedom of thought and speech as guaranteed by the Constitution....

A trial is not a "free trade in ideas," nor is the best test of truth in a courtroom "the power of the thought to get itself accepted in the competition of the market".... A court is a forum with strictly defined limits for discussion. It is circumscribed in the range of its inquiry and in its methods by the Constitution, by laws, and by age-old traditions. Its judges are restrained in

their freedom of expression by historic compulsions resting on no other officials of government. They are so circumscribed precisely because judges have in their keeping the enforcement of rights and the protection of liberties which, according to the wisdom of the ages, can only be enforced and protected by observing such methods and traditions.

...The Fourteenth Amendment does not forbid a state to continue the historic process of prohibiting expressions calculated to subvert a specific exercise of judicial power. So to assure the impartial accomplishment of justice is not an abridgment of freedom of speech or freedom of the press as these phases of liberty have heretofore been conceived even by the stoutest libertarians. In fact, these liberties themselves depend upon an untrammelled judiciary whose passions are not even unconsciously aroused and whose minds are not distorted" by extra-judicial considerations. Of course freedom of speech and of the press are essential to the enlightenment of a free people and in restraining those who wield power. Particularly should this freedom be employed in comment upon the work of courts, who are without many influences ordinarily making for humor and humility, twin antidotes to the corrosion of power. But the Bill of Rights is not self-destructive. Freedom of expression can hardly carry implications that nullify the guarantees of impartial trials. And since courts, are the ultimate resorts for vindicating the Bill of Rights, a state may surely authorize appropriate historic means to assure that the process for such vindication be not wrenched from its rational tracks into the more primitive melee of passion and pressure. The need is great that courts be criticized, but just as great that they be allowed to do their duty.

51. The representative thinking on the subject is neatly summed up by John R. Brown, Chief Judge:

Thus does Alexander again confront the Gordian Knot. For our history demands that breaches of the unqualified commands of the First Amendment cannot be tolerated and freedom of the press must be given the broadest scope that a liberty-loving people can allow.... On the other hand, our fundamental concepts of absolute fairness in trials dictate that the environment within which justice is administered must be maintained unpolluted by the potential infamous notoriety and biased predilections which a completely unfettered but omnipresent press can irrevocably engender in an age of the mass media....

52. It is apparent from this long discussion that the future of Free Press and of Fair Justice desiderates a juristic socio-political national debate, not ex-cathedra admonitions from the Bench or assertions from the Bar. We must evolve a know-how for the co-existence of free speech and free justice in tune with the Preamble and Article 19. Scurrilous attacks on judges or on parties to pending cases foul the course of justice. Mischievous half-truths, brazen untruths and virulent publicity by partisan media, political organs and spokesmen for vested interests can be traumatic to the cause of social justice.

53. In an area of competing social values absolutist approaches are sure to err. And yet benign neglect of courts to arrest injurious publicity may be misread as importance and timely affirmative action may stem the rot. *Sheppard Sheppard v. Mawell* [1966] 384, U.S., 333 is an American case in point Remember, a 'free' press is often a monopoly press and has been made gargantuan by modern technology. Of course, we must also remember, courts work in public and publishing their proceedings fairly cannot be taboo. Please remember, further, that those

who cry ‘wolf’ against Contempt Power are more often the Proprietariat, not the Proletariat, with exceptions which prove the rule.

54. Prejudicial publicity, indulged in by a ‘free’ press owing no institutional responsibility or public accountability, cannot be all that good, especially when judges are personally vilified, assured that the ‘robes’ traditionally, and for good reasons, do not and should not wrestle with calumniating columnists or yellow journalists. Likewise, a litigant or judge, run down by powerful vested interests wearing the mask of mass media owned by them or hiring the pen of arch spokesmen of political or economic reactionaries, cannot run riot, raising the alarm that free speech is in peril and get away with it. Heroism on the face may often be villainy at heart and the law cannot retreat from its justice-function scared by slogans. Balancing of values is difficult, delicate but indispensable. Neither the Press nor the courts are above the People. Otherwise, even gutter talk or to borrow the phraseology of justice Stevens in *Nebraska Nebraska Press Association v. Stuarts* [1976] 96 Sup. Ct. 2791, shabby, intrusive or perversely motivated media practices, may be dignified as free press and given protective constitutional status, leaving the citizen litigant demoralised and citizen judge powerless, panicked by the ballyhoo of Press restraint.

55. The Court is not an inert abstraction; it is people in judicial power. And when drawing up standards for Press freedom and restraint, as an ‘interface’ with an unafraid court, we must not forget that in our constitutional scheme the most fundamental of all freedoms is the free quest for justice by the small man. ‘When beggars die, there are comets seen’ and ‘when the bull elephants fight, the grass is trampled’. The contempt sanction, once frozen by the high and mighty press’ campaign, the sufferer, in the long run, is the small Indian who seeks social transformation through a fearless judicial process. Social justice is at stake if foul press unlimited were to reign. As Justice Frankfurter stated, may be ‘judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions’ (a question I desist from deciding here), but when comment darkens into coercive imputation or calculated falsehood, threats to impartial adjudication subtly creeps. Not because judges lack firmness nor that the dignity of the bench demands enhanced respect by enforced silence, as Justice Black observed in the Los Angeles Times 314 U.S. 263 case but because the course of justice may be distorted by hostile attribution. Said Justice Jackson in *Craige v. Harney* 331 U.S. 367:

I do not know whether it is the view of the Court that a judge must be thick skinned or just thickheaded, but nothing in my experience or observation confirms the idea that he is insensitive to publicity. Who does not prefer good to ill report of his work? And if fame-a good public name-is, as Milton said, the “last infirmity of noble mind,” it is frequently the first infirmity of a mediocre one. I do not dogmatise but indicate the perils. Of course, the evil must be substantive and substantial, not chimerical or peripheral.

56. A concluding note. I have launched on this long, inconclusive essay in contempt jurisprudence bearing on scandalizing the judges qua judges, aware that not high falstaffian rhetoric but hard-headed realism, illumined by constitutional values, must set the limit and interpret the statute. It is a disturbing development in our country that the media and some men in the trade of traducement are escalatingly scandalizing judges with flippant or motivated write-ups wearing a pro bono public veil and mood of provocative mock-challenge. The court

shall not meditate nor hesitate but shall do stern justice to such ‘professional’ contemners, not shrink because they are scurrilous, influential or incorrigible. Even so, to be gentle is to be just and the quality of mercy is not strained. So, it is that a benign neglect not judicial genuflexion, is often the prescription, and to inhibit haphazardness or injustice it is necessary that the Bar and the Press evolve a dignified consensus on the canons of ethics in this area, with due regard to the Constitution and the laws, so that the Bench may give it a close look and draw the objective line of action. The process of arriving at these norms by those mighty forces who influence public opinion, cannot be delayed and until then the law laid down in precedents of this Court will go into action when judge-baiting is indulged in by masked men or media might. Freedom is what Freedom does and Justice fails when Judges quail. For sure, my plea is not for judicial pachydermy, but for dignified detachment which ignores ill-informed criticism in its tolerant stride, but strikes when offensive excesses are established. Frankly, all these are hypothetical and have no specific reference to the present case. These obiter-dicta are intended to indicate the pros and cons, not to pontificate on the precise limits for exercise of contempt power and to emphasize what Chief Justice Warren Burger mentioned in Nebraska Press Association 96 S. Ct. 2803 as ‘something in the nature of a fiduciary duty’ of the press to act responsibly and I may add, respectfully.

An afterward.

57. An afterward has become necessitous because the learned Chief Justice has, in his reasons, made some critical observations on men and matters based on his rich experience, high responsibility and urge to right wrongs. While respecting his feeling of hurt and attempt to set the record straight regarding his prior judgment and letters on canons of judicial ethics, I desist from comments on the author or the article, including its correctness and propriety, for fear that an indelible word, writ incautiously, may fester into an incurable wound. I am in no mood to pronounce on these subjects or to judge these generalities. Many an arrow at random sent hits a mark the archer never meant, and ex cathedra generalizations run the genetic risk of notice imperfections. The Almighty does not share His omniscience with the Judiciary.

Rajendra Sail v. Madhya Pradesh High Court Bar Association

(2005) 6 SCC109

Y.K. Sabharwal, J. (for himself and Tarun Chatterjee, J.): In the murder trial of Shankar Guha Niyogi, a trade union leader, the accused were found guilty and sentenced to imprisonment for life except one who was awarded death sentence. On appeal, the High Court reversed the trial court judgment and acquitted the accused. A news report was published in newspaper 'Hitavada' on 4th July, 1998 under the caption 'Sail terms High Court decision in Niyogi murder case as rubbish'. That report was based on the speech delivered by appellant Rajendra Sail in a rally organized to commemorate the death of Shankar Guha Niyogi and interview given by him soon after the speech to appellant Ravi Pandey, the correspondent of the newspaper.

The news report termed the decision as rubbish and commented that a Judge who was on verge of retirement should not have been entrusted with the responsibility of dealing with such a crucial case. It was also alleged that the Judges who decided the matter have belittled the respect for judiciary by pronouncing biased and rubbish judgment. The news report also quoted Rajendra Sail as saying that he was a key witness in the murder trial and in spite of engaging a well known advocate as public prosecutor no body could have made much difference when the judges were already prejudiced and that he had substantial evidence to prove that one of the judges who decided the matter was bribed and that the judge possessed properties disproportionate to his income. The aforesaid news item led to initiation of contempt action on an application filed by Madhya Pradesh High Court Bar Association with the consent of Advocate General against the Editor, Printer and Publisher, Chief Sub-Editor and Desk In-charge of the newspaper at Bhilai besides Bureau Chief of 'Hitavada' at Bhilai.

In answer to contempt, while tendering unconditional and unqualified apologies, the stand of the Editor and Printer and Publisher of the newspaper before the High Court was that the news report was published on account of oversight and they were unaware of the publication. It was further stated that even before receipt of notice for contempt, on their own, they published unconditional apology in the newspaper on the front page on 6th August, 1998. The letters of apology were also sent to the Chief Justice and the concerned judges of the High Court as well as to the Madhya Pradesh High Court Bar Association. The Chief Sub-Editor and Desk-in-charge took the stand that the news report was received from the trainee correspondent Ravi Pandey and he did not apply his mind seriously to the news report as the page on which the said report was to be printed was shown to him at the last stage of the printing deadline of that day and under these circumstances he permitted the page to be printed and published.

Appellant Ravi Pandey took the stand that at the relevant time he was working as a trainee correspondent and was present at the venue where Rajendra Sail delivered the speech and had a conversation with him in which he reiterated the substance of the speech delivered by him. He further pleaded that being a trainee correspondent he was unaware of the legal implications of printing and publishing against the judiciary and the judges. He stood by his stand that the news report was based on the speech delivered and the subsequent conversation he had with Rajendra Sail. An unconditional and unqualified apology was also tendered by him. Rajendra Sail denied that he gave any interview to the correspondent and alleged that the news report

was false, prejudiced and intended to malign his image in the eyes of judiciary and public. It was further stated that he was not satisfied with the judgment of the High Court in Niyogi murder case and had only made a bona fide analysis of the judgment without bringing into disrepute the judiciary in general and the judges in particular. It was claimed that he expressed only his personal grief and emotional trauma that arose out of the murder of Shankar Guha Niyogi, who was his close associate and that he was also a key prosecution witness in the murder trial. He further took the stand that he is ready to tender an apology, if his plea does not satisfy the court. The High Court summoned the audio and video recording of the speech delivered by Rajendra Sail as well as the transcript of the speech as contained in those recordings. The Court directed the supply of the copies of the transcript to the contemnors and gave opportunity to file objections. The contemptuous portions of the transcript as extracted by the High court in its judgment contains statements which go to say that,

- (a) Judgment of the murderers of Niyogi was rendered within a year and the murderers have been acquitted because they were moneyed and wealthy people.
- (b) Judgment has been read by him, which is rubbish and is fit to be thrown in dustbin
- (c) He would also get an enquiry held as regard to the conduct of one of the judges who delivered the judgment, as that particular judge is to retire within a month.
- (d) A judge of High Court or Supreme Court who is about to retire should not be assigned any important case since two years before his retirement, as a judge who is to retire is for sale.
- (e) Judiciary has no guts, no honesty and is not powerful enough to punish wealthy people.

After juxtaposing the news report with the audio and video recording as well as the transcript of the speech, the High Court found that there was 'inkling' in Rajendra Sail's speech about his thoughts regarding the judgment and the judges. The court came to the conclusion that the attending circumstances, i.e., the recordings of the speech as well as the transcript goes to show that he had conversation with the correspondent and the contemptuous statements reported in the news report were in fact uttered by him. The High Court also concluded that the comments made by him did not amount to fair and reasonable criticism of the judgment and that the contents of the news report scandalized the court. The High Court, by the impugned judgment and order, refused to accept the apology tendered by the contemnors and held the appellants guilty of contempt of court and sentenced each of them to under go simple imprisonment for six months.

The principles relating to the law of contempt are well settled. It has been repeatedly held that the rule of law is the foundation of the democratic society. The judiciary is the guardian of the rule of law. The confidence, which the people repose in the courts of justice, cannot be allowed to be tarnished, diminished or wiped out by contemptuous behaviour of any person. If the judiciary is to perform its duties and functions effectively and true to the spirit with which they are sacredly entrusted, the dignity and authority of the courts have to be respected and protected at all costs. The foundation of the judiciary is the trust and the confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the court by creating distrust in its working, the edifice of the judicial system gets eroded. It is for this purpose that the courts are entrusted with extraordinary powers of punishing for contempt of court, those who indulge

in acts, which tend to undermine the authority of law and bring it in disrepute and disrespect by scandalising it. When the court exercises this power, it does not do so to vindicate the dignity and honour of the individual Judge who is personally attacked or scandalised, but to uphold the majesty of the law and of the administration of justice.

The Law as it stands today is same as has been aptly put by Lord Atkin in *Andre Paul Terence Ambard v. Attorney-General* [AIR 1936 PC 141]:

“no wrong is committed by any member of the public who exercises the ordinary right of criticizing in good faith in private or public the public act done in the seat of justice. The path of criticism is a public way: the wrongheaded are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men”.

In *Aswini Kumar Ghose & Anr. v. Arabinda Bose & Anr.* [AIR 1953 SC 75] it was held that the Supreme Court is never over-sensitive to public criticism; but when there is danger of grave mischief being done in the matter of administration of justice, the animadversion cannot be ignored and viewed with placid equanimity. The path of criticism is a public way: the wrong-headed are permitted to err therein; provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.

In *Brahma Prakash Sharma & Ors. v. The State of U.P.* [AIR 1954 SC 10] it was held that, if the publication of the disparaging statement is calculated to interfere with the due course of justice or proper administration of law by such court, it can be punished summarily as contempt is a wrong done to the public. It will be injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the Judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice, or if it is likely to cause embarrassment in the mind of the Judge himself in the discharge of his judicial duties. It is well established that it is not necessary to prove affirmatively that there has been an actual interference with the administration of justice by reason of such defamatory statement; it is enough if it is likely, or tends in any way, to interfere with the proper administration of law.

In *Perspective Publications Pvt. Ltd. & Anr. v. The State of Maharashtra* [AIR 1971 SC 221], a bench of three judges after referring to the leading cases on the subject held that :

“(1) The summary jurisdiction by way of contempt must be exercised with great care and caution and only when its exercise is necessary for the proper administration of law and justice.

(2) It is open to anyone to express fair, reasonable and legitimate criticism of any act or conduct of a Judge in his judicial capacity or even to make a proper and fair comment on any decision given by him because “justice is not a cloistered virtue and she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men”.

(3) A distinction must be made between a mere libel of defamation of a Judge and what amounts to a contempt of the court. The test in each case would be whether the impugned publication is a mere defamatory attack on the Judge or whether it is calculated to interfere with the due course of justice or the proper administration of law by his court. It is only in the latter case that it will be punishable as contempt. Alternatively the test will be whether the wrong is done to the Judge personally or it is done to the public. The publication of a disparaging statement will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties."

In *Shri C.K. Daphtary & Ors. v. Shri O. P. Gupta & Ors.* [(1971) 1 SCC 626] it was said that, a scurrilous attack on a Judge in respect of a judgment or past conduct has adverse effect on the due administration of justice. This sort of attack in a country like ours has the inevitable effect of undermining the confidence of the public in the Judiciary. If confidence in the Judiciary goes, the due administration of justice definitely suffers. There can be no justification of contempt of Court.

In *R. C. Cooper v. Union of India* [(1970) 2 SCC 298] giving a word of caution to those who embark on the path of criticizing the judgment of the Court, it was said:

"there is no doubt that the Court like any other institution does not enjoy immunity from fair criticism. This Court does not claim to be always right although it does not spare any effort to be right according to the best of the ability, knowledge and judgment of the Judges. They do not think themselves in possession of all truth or hold that whenever others differ from them, it is so far error. No one is more conscious of his limitations and fallibility than a Judge but because of his training and the assistance he gets from learned counsel he is apt to avoid mistakes more than others.... We are constrained to say also that while fair and temperate criticism of this Court or any other Court even if strong, may not be actionable, attributing improper motives, or tending to bring Judges or Courts into hatred and contempt or obstructing directly or indirectly with the functioning of Courts is serious contempt of which notice must and will be taken. Respect is expected not only from those to whom the judgment of the Court is acceptable but also from those to whom it is repugnant. Those who err in their criticism by indulging in vilification of the institution of Courts, administration of justice and the instruments through which the administration acts, should take heed for they will act at their own peril. We think this will be enough caution to persons embarking on the path of criticism."

In *In re. S. Mulgaokar*, [(1978) 3 SCC 339] a three judge bench held, the judiciary is not immune from criticism but when that criticism is based on obvious distortion or gross misstatement and made in a manner which is designed to lower the respect of the judiciary and destroy public confidence in it, it cannot be ignored.

In *P. N. Duda v. P. Shiv Shanker & Ors.* [(1988) 3 SCC 167] it has been held that administration of justice and Judges are open to public criticism and public scrutiny. Judges have their accountability to the society and their accountability must be judged by the conscience and oath to their office i.e. to defend and uphold the Constitution and the laws without fear and favour. Any criticism about the judicial system or the Judges which hampers the administration of

justice or which erodes the faith in the objective approach of the Judges and brings administration of justice to ridicule must be prevented. The contempt of court proceedings arise out of that attempt. Judgments can be criticized, motives to the Judges need not be attributed, it brings the administration of justice into deep disrepute. Faith in the administration of justice is one of the pillars on which democratic institution functions and sustains. In the free market place of ideas criticism about the judicial system or Judges should be welcome so long as such criticism does not impair or hamper the administration of justice. In a democracy Judges and courts alike are, therefore, subject to criticism and if reasonable argument or criticism in respectful language and tempered with moderation is offered against any judicial act as contrary to law or public good, no court would treat criticism as a contempt of court.

In Re. Roshan Lal Ahuja [1993 Supp.(4) SCC 446], a three judge bench held, Judgments of the court are open to criticism. Judges and courts are not unduly sensitive or touchy to fair and reasonable criticism of their judgments. Fair comments, even if, outspoken, but made without any malice or attempting to impair the administration of justice and made in good faith in proper language don't attract any punishment for contempt of court. However, when from the criticism a deliberate, motivated and calculated attempt is discernible to bring down the image of the judiciary in the estimation of the public or to impair the administration of justice or tend to bring the administration of justice into disrepute the courts must bester themselves to uphold their dignity and the majesty of law. No litigant can be permitted to overstep the limits of fair, bona fide and reasonable criticism of a judgment and bring the courts generally in disrepute or attribute motives to the Judges rendering the judgment. Perversity, calculated to undermine the judicial system and the prestige of the court, cannot be permitted for otherwise the very foundation of the judicial system is bound to be undermined and weakened and that would be bad not only for the preservation of rule of law but also for the independence of judiciary. Liberty of free expression is not to be confused with a licence to make unfounded, unwarranted and irresponsible aspersions against the Judges or the courts in relation to judicial matters. No system of justice can tolerate such an unbridled licence. Of course "Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men", but the members of the public have to abstain from imputing improper motives to those taking part in the administration of justice and exercise their right of free criticism without malice or in any way attempting to impair to administration of justice and refrain from making any comment which tends to scandalize the court in relation to judicial matters. If a person committing such gross contempt of court were to get the impression that he will get off lightly it would be a most unfortunate state of affairs. Sympathy in such a case would be totally misplaced mercy has no meaning. His action calls for deterrent punishment to that it also serves as an example to others and there is no repetition of such contempt by any other person.

In Re. Ajay Kumar Pandey [(1996) 6 SCC 510], it has been held, any threat of filing a complaint against the Judge in respect of the judicial proceedings conducted by him in his own Court is a positive attempt to interfere with the due course of administration of justice. In order that the Judges may fearlessly and independently act in the discharge of their judicial functions, it is necessary that they should have full liberty to act within the sphere of their activity. If, however, litigants and their counsel start threatening the Judge or launch prosecution against him for what

he has honestly and bona fide done in his Court, the judicial independence would vanish eroding the very edifice on which the institution of justice stands.

In *Dr. D.C. Saxena v Hon'ble the Chief Justice of India* [(1996) 5 SCC 216] the Court while dealing with the meaning of the word 'scandalising', held that it is an expression of scurrilous attack on the majesty of justice which is calculated to undermine the authority of the courts and public confidence in the administration of justice. The malicious or slanderous publication inculcates in the mind of the people a general disaffection and dissatisfaction on the judicial determination and indisposes their mind to obey them. If the people's allegiance to the law is so fundamentally shaken it is the most vital and most dangerous obstruction of justice calling for urgent action.

The court further held that, "Scandalising the court, therefore, would mean hostile criticism of Judges as Judges or judiciary. Any personal attack upon a Judge in connection with the office he holds is dealt with under law of libel or slander. Yet defamatory publication concerning the Judge as a Judge brings the court or Judges into contempt, a serious impediment to justice and an inroad on the majesty of justice.

Any caricature of a Judge calculated to lower the dignity of the court would destroy, undermine or tend to undermine public confidence in the administration of justice or the majesty of justice. It would, therefore, be scandalising the Judge as a Judge, in other words, imputing partiality, corruption, bias, improper motives to a Judge is scandalisation of the court and would be contempt of the court. Even imputation of lack of impartiality or fairness to a Judge in the discharge of his official duties amounts to contempt. The gravamen of the offence is that of lowering his dignity or authority or an affront to the majesty of justice. When the contemnor challenges the authority of the court, he interferes with the performance of duties of Judge's office or judicial process or administration of justice or generation or production of tendency bringing the Judge or judiciary into contempt. Section 2(c) of the Act, therefore, defines criminal contempt in wider articulation that any publication, whether by words, spoken or written, or by signs, or by visible representations, or otherwise of any matter or the doing of any other act whatsoever which scandalises or tends to scandalise, or lowers or tends to lower the authority of any court; or prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner, is a criminal contempt. Therefore, a tendency to scandalise the court or tendency to lower the authority of the court or tendency to interfere with or tendency to obstruct the administration of justice in any manner or tendency to challenge the authority or majesty of justice, would be a criminal contempt. The offending act apart, any tendency if it may lead to or tends to lower the authority of the court is a criminal contempt. Any conduct of the contemnor which has the tendency or produces a tendency to bring the Judge or court into contempt or tends to lower the authority of the court would also be contempt of the court."

In *J. R. Parashar, Advocate & Ors. v Prasant Bhushan, Advocate & Ors.* [(2001) 6 SCC 735] the court has observed: "to ascribe motives to a Judge is to sow the seed of distrust in the minds of the public about the administration of justice as a whole and nothing is more pernicious in its consequences than to prejudice the mind of the public against Judges of the court who are responsible for implementing the law. Judges do not defend their decisions in public and if

citizens disrespect the persons laying down the law, they cannot be expected to respect the law laid down by them. The only way the Judge can defend a decision is by the reasoning in the decision itself and it is certainly open to being criticized by anyone who thinks that it is erroneous”.

In re, Arundhati Roy [(2002) 3 SCC 343] the court held, fair criticism of the conduct of a Judge, the institution of the judiciary and its functioning may not amount to contempt if it is made in good faith and in public interest. To ascertain the good faith and the public interest, the courts have to see all the surrounding circumstances including the person responsible for comments, his knowledge in the field regarding which the comments are made and the intended purpose sought to be achieved. All citizens cannot be permitted to comment upon the conduct of the courts in the name of fair criticism which, if not checked, would destroy the institution itself. Litigant losing in the court would be the first to impute motives to the Judges and the institution in the name of fair criticism, which cannot be allowed for preserving the public faith in an important pillar of democratic set-up i.e. judiciary.

A question whether there is contempt of court or not is a serious one. The court is both the accuser as well as the judge of the accusation. The court has to act with as great circumspection. It is only when a clear case of contemptuous conduct not explainable otherwise, arises that the contemnor must be punished.

In S. Abdul Karim, Appellant v. M.K. Prakash & Ors. [(1976) 1 SCC 975] a three judge bench held, the broad test to determine whether there is contempt of court or not, is to see whether the act complained of was calculated to obstruct or had an intrinsic tendency to interfere with the course of justice and the due administration of law. The standard of proof required for establishing a charge of 'criminal contempt' is the same as in any other criminal proceeding. Even if it could be urged that mens rea as such, is not an indispensable ingredient of the offence of contempt, the courts are loath to punish a contemnor, if the act or omission complained of, was not willful.

In M.R. Parashar & Ors. v. Dr. Farooq Abdullah & Ors. [(1984) 2 SCC 343] contempt petition was filed against the Chief Minister of Jammu and Kashmir for making certain contemptuous statements against the judiciary and the Editor and the correspondent of a newspaper in which those statements were published correspondent. The Chief Minister denied to have made the statements, as the Editor asserted that the reports of the speeches published in his newspaper are true. The court held that in the absence of any preponderant circumstances which, objectively, compel the acceptance of the word of one in preference to the word of the other, it was unable to record a positive finding that the allegation that the Chief Minister made the particular statements is proved beyond a reasonable doubt.

In Mrityunjay Das & Anr. v. Sayed Hasibur Rahaman & Ors. [(2001) 3 SCC 739] the court held that a proceeding under the extraordinary jurisdiction of the court in terms of the provisions of the Contempt of Courts Act is quasi-criminal, and as such, the standard of proof required is that of a criminal proceeding and the breach shall have to be established beyond reasonable doubt. The Court quoted with approval the following observations of Lord Denning in *Bramblevale Ltd. Re* [(1969) 3 All ER 1062 (CA)]:

“A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the timehonoured phrase, it must be proved beyond reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence.... Where there are two equally consistent possibilities open to the court, it is not right to hold that the offence is proved beyond reasonable doubt.”

This legal position has been reiterated in the subsequent line of cases namely, *Chhotu Ram v. Urvashi Gulati & Anr.* [(2001) 7 SCC 530]; *Anil Ratan Sarkar v HIRAK GHOSH* [(2002) 4 SCC 21]; *Radha Mohan Lal v. Rajasthan High Court* (Jaipur Bench) [(2003) 3 SCC 427]; *Bijay Kumar Mahanty v. Jadu Alias Ram Chandra Sahoo* [AIR 2003 SC 657]. With this factual and legal background, we would consider the submissions made in support of these appeals.

The learned counsel appearing for the editor, printer and publisher and the Chief sub-editor has very candidly not made any attempt to justify the actions of the newspaper in publishing the news report. Learned counsel has only argued for acceptance of the apology. Learned counsel submits that the appellants tendered apology on 6th August, 1998 by publishing it prominently in the front page of Hitavada, even before the receipt of notice of initiation of contempt action. It was pointed out that the notice of contempt though issued on 13th June, 1998 was received only on 11th August, 1998. The letters of apology were sent to the Chief Justice of the High Court and to the concerned judges as well as to the Madhya Pradesh High Court Bar Association before receipt of contempt notice. The counsel further submits that the act of newspaper functionaries of having immediately tendered the apology admitting their mistake shows that there was no intention to scandalise the judiciary but it was case of genuine error on their part.

The reach of media, in present times of 24 hours channels, is to almost every nook and corner of the world. Further, large number of people believe as correct which appears in media, print or electronic. It is also necessary to always bear in mind that the judiciary is the last resort of redressal for resolution of disputes between State and subject, and high and law. The confidence of people in the institute of judiciary is necessary to be preserved at any cost. That is its main asset. Loss of confidence in institution of judiciary would be end of Rule of law. Therefore, any act which has such tendency deserves to be firmly curbed. For rule of law and orderly society, a free responsible press and independent judiciary are both indispensable. Both have to be, therefore, protected. The judgments of courts are public documents and can be commented upon, analyzed and criticized, but it has to be in dignified manner without attributing motives. Before placing before public, whether on print or electronic media, all concerned have to see whether any such criticism has crossed the limits as aforesaid and if it has, then resist every temptation to make it public. In every case, it would be no answer to plead that publication, publisher, editor or other concerned did not know or it was done in haste. Some mechanism may have to be devised to check the publication which has the tendency to undermine the institution of judiciary. Regarding the general mechanism to be devised, it may be noted that in United Kingdom, Robertson & Nicol on Media Law expresses the view that media's self regulation has failed in United Kingdom. According to the author, blatant examples of unfair and unethical media behaviour like damaging reputation by publishing falsehoods, invasion of privacy and conducting partisan campaigns towards individuals and organisations have led to

demands for more statutory controls, which media industries have sought to avoid by trumpeting the virtues of “self regulation”. The media industry has established tribunals that affect to regulate media ethics through adjudicating complaints by members of the public who claim to have been unfairly treated by journalists and editors. Complaints about newspapers and journals may be made to the Press Complaints Commission, a private body funded by newspaper proprietors. The Press Complaints Commission has formulated a Code of Practice to be followed by the press. It has no legal powers, but its adjudications will be published by the paper complained against, albeit usually in small print and without prominence. The Press Complaints Commission has been regarded as public relations operation, funded by media industries to give the impression to Parliament that the media organizations can really put their houses in ethical order without the need for legislation. Similarly the National Union of Journalists has a code for its members, which they are all expected to follow. However, the code is seldom enforced. Having noted the views as aforesaid, in the present case, it is enough to only note that we too have Press Council. The only aspect, we wish to emphasize is that the present matter reinforces the need to ensure that the right of freedom of media is exercised responsibly. It is for media itself and other concerned to consider as how to achieve it. Regarding the institution like judiciary which cannot go public, media can consider having an internal mechanism to prevent these types of publications. There can be an efficient and stringent mechanism to scrutinize the news reports pertaining to such institutions which because of the nature of their office cannot reply to publications which have tendency to bring disrespect and disrepute to those institutions. As already noted such publications are likely to be believed as true. Such a mechanism can be the answer to pleas like the one in the present case by Editor, Printer and Publisher and correspondent that either they did not know or it was done in a hurry and similar pleas and defences.

The power and reach of the media, both print as well as electronic is tremendous. It has to be exercised in the interest of the public good. A free press is one of very important pillar on which the foundation of Rule of Law and democracy rests. At the same time, it is also necessary that freedom must be exercised with utmost responsibility. It must not be abused. It should not be treated as a licence to denigrate other institutions. Sensationalism is not unknown. Any attempt to make news out of nothing just for the sake of sensitization has to be deprecated. When there is temptation to sensationalize particularly at the expense of those institutions or persons who form the nature of the office cannot reply, such temptation has to be resisted and if not it would be the task of the law to give clear guidance as to what is and what is not permitted. While the media can, in the public interest, resort to reasonable criticism of a judicial act or the judgment of a court for public good or report any such statements; it should refrain from casting scurrilous aspersions on, or impute improper motives or personal bias to the judge. Nor should they scandalize the court or the judiciary as a whole, or make personal allegations of lack of ability or integrity against a judge. It should be kept in mind that Judges do not defend their decisions in public and if citizens disrespect the persons laying down the law, they cannot be expected to respect the law laid down by them. The only way the Judge can defend a decision is by the reasoning in the decision itself and it is certainly open to being criticized by anyone who thinks that it is erroneous. This court on an earlier occasion in *Re Harijai Singh & Anr.* [(1996) 6 SCC 466] held the Editor, Printer and Publisher and Reporter guilty of publishing a false report against a senior judge of the Supreme Court. The Court expressed its displeasure at the

irresponsible conduct and attitude on the part of the editor, publisher and the reporter who failed to make reasonable enquiry or a simple verification of the alleged statement. The Court held that this cannot be regarded as a public service, but a disservice to the public by misguiding them with false news. However, the Court accepted the unconditional apology tendered by the editor, printer and publisher and reporter with a warning that they should be careful in future.

Reverting to the present case, we have noted hereinbefore the stand of Editor, Printer and Publisher and Chief Sub-editor including the fact that they had accepted their mistakes at the earliest and tendered unconditional apologies, Reporter has also tendered his unconditional apology pleading that as a trainee, he was not aware of the legal implications. Having regard to the facts and legal principles above noticed, their apologies deserve to be accepted with a caution that in future they should be more careful and responsible in exercise of their duty towards the public, in providing fair, accurate and impartial information. In this view, sentence awarded to them is set aside.

Learned counsel appearing for the appellant, Rajendra Sail also submits that the apology tendered by his client too deserves to be accepted. He submits that the statements made by Rajendra Sail should be understood in the context in which the same were made. The context pointed out is that Rajendra Sail was a close associate of Mr. Shankar Guha Niyogi, who was murdered and he was a key prosecution witness in the murder trial; he was emotionally disturbed because of the judgment of the High Court; the news report was intended to malign his image and he had lodged a complaint against this with the Press Council of India. Learned counsel further submits that Rajendra Sail neither made statements nor gave interview attributed to him and that the conclusions reached by the High Court that he did not deny having termed the decision of the High Court as rubbish is not sustainable. Learned counsel further contends that the charge that was communicated to the appellant was only about the contents of the news report and the contemptuous statements extracted in the judgment of the High Court were not part of the news report. The audio and video recordings on which conclusions of the High Court are based were never put to him, the same were not part of the record and no opportunity was granted to rebut the contents of the audio and video recording and, therefore, the contents thereof cannot be taken as proof of the statements contained in the news report. The appellant tendered an unconditional apology during the course of the arguments and urged for its acceptance.

The counsel appearing for the Madhya Pradesh High Court Bar Association, supporting the impugned judgment, submits that having regard to the nature of scandalous statements that were made, it is not a case where the apology should be accepted. In support of his contention he relied on the following decisions, *Prem Surana v. Additional Munsif & Judicial Magistrate & Anr.* [(2002) 6 SCC 722]; *M.C. Mehta v. Union of India & Ors.* In *The Matter Of: M/s. Ashok Chhabra & Co.* [(2003) 5 SCC 376].

The issue as to whether the alleged statements amount to contempt or not does not present any difficulty in the present case. If the conclusions reached by the High Court are correct, there can be little doubt that it is serious case of scandalizing the Court and not a case of fair criticism of a judgment. Undoubtedly, judgments are open to criticism. No criticism of a judgment, however vigorous, can amount to contempt of Court, provided it is kept within the limits of reasonable courtesy and good faith. Fair and reasonable criticism of a judgment which is a

public document or which is a public act of a Judge concerned with administration of justice would not constitute contempt. Such a criticism may fairly assert that the judgment is incorrect or an error has been committed both with regard to law or established facts. It is one thing to say that a judgment on facts as disclosed is not in consonance with evidence or the law has not been correctly applied. But when it is said that the Judge had a pre-disposition to acquit the accused because he had already resolved to acquit them or has a bias or has been bribed or attributing such motives, lack of dispassionate and objective approach and analysis and prejudging of the issues, the comments that a judge about to retire is available for sale, that an enquiry will be conducted as regards the conduct of the judge who delivered the judgment as he is to retire within a month and a wild allegation that judiciary has no guts, no honesty and is not powerful enough to punish wealthy people would bring administration of justice into ridicule and disrepute.

The speech that judgment is rubbish and deserves to be thrown in a dustbin cannot be said to be a fair criticism of judgment. These comments have transgressed the limits of fair and bonafide criticism and have a clear tendency to affect the dignity and prestige of the judiciary. It has a tendency to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the Judge and to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice, it is also likely to cause embarrassment in the mind of the Judge himself in the discharge of his judicial duties. When there is danger of grave mischief being done in the matter of administration of justice, the animadversion cannot be ignored and viewed with placid equanimity. If the criticism is likely to interfere with due administration of justice or undermine the confidence which the public reposes in the Courts of law as Courts of justice, the criticism would cease to be fair and reasonable criticism but would scandalise Courts and substantially interfere with administration of justice. Having perused the record, we are unable to accept the contention urged on behalf of Mr. Rajendra Sail that on facts the conclusions arrived at by the High Court are not sustainable. Once this conclusion is reached, clearly the publication amounts to a gross contempt of court. It has serious tendency to undermine the confidence of the society in the administration. The news report was based on the speech delivered by Rajendra Sail and the subsequent interview given to the correspondent. The correspondent has asserted that the news report was based on the speech delivered by Rajendra Sail and the subsequent interview. Rajendra Sail has, however, denied having made the statement or having given interview to the correspondent. There are preponderant circumstances, which objectively compel us to conclude that the said statements were in fact made by Rajendra Sail and the news report has reported the same. Whether Rajendra Sail gave interview to the correspondent or not, the speech itself, seen in the light of the audio and video recording of the speech and the transcript of the speech speaks for itself and has the effect of lowering the dignity and authority of the court and an affront to the majesty of justice.

The contention that no opportunity was given to rebut the contents of the audio and video recording of the speech cannot be accepted because the court has, in fact, directed supply of copies of transcript of the speech prepared from the audio and video recording and had given opportunity to file objections to it, which has not been availed by Rajendra Sail. Having regard to the aforesaid facts of the case, the High Court has refused to accept the apology tendered by

Rajendra Sail. The contention that statements should be understood in the context in which they have been made as he was emotionally disturbed because of the judgment of the High court cannot be accepted. It is borne out from record that Rajendra Sail is a law graduate and has been in public life for considerable time and has in fact approached the court on several occasions by filing public interest litigations in different matters. With this background, he should have been cautious and moderate and should have known the limits upto which he could go while criticizing the judgment of the High Court. The contemptuous statements cannot be regarded as an ill-tempered or emotional outburst of an uninformed person. Having given the serious and anxious consideration to the facts of the case and submissions made, we feel that the acceptance of apology and sympathy in a case like this would be uncalled for.

The sentence awarded to Rajendra Sail by the High Court having regard to nature of contempt cannot be said to be unjustified. But having regard to his background and the organization to which he belongs which, it is claimed, brought before various courts including this court many public interest litigation for general public good, we feel that ends of justice would be met if sentence of six month is reduced to sentence of one week simple imprisonment. We order accordingly.

In view of the above, sentence awarded to the appellants other than Rajendra Sail is set aside and their apologies accepted and their appeals allowed accordingly. The sentence of Rajendra Sail is reduced to one week and to that extent impugned judgment and order of the High Court is modified and appeal disposed of accordingly.

***Sanjoy Narayan, Editor-In-Chief, Hindustan v. Hon. High Court of
Allahabad through Registrar General***

2011 (9) SCALE 532

- Mukundakam Sharma, J. (for himself and Anil R. Dave, J.):** 2. This appeal is directed against the order dated 04.04.2011 passed by the Allahabad High Court.
3. The appellants being aggrieved by the aforesaid order had filed this appeal on which we issued notice. On service of the notice, the respondent has also entered appearance through counsel.
4. We have heard the counsel appearing for the parties. The appellants have now filed an affidavit which is on record tendering unqualified apology for the publication of article in question in Hindustan Times on 20.09.2010 out of which contempt proceedings arise.
5. The media, be it electronic or print media, is generally called the fourth pillar of democracy. The media, in all its forms, whether electronic or print, discharges a very onerous duty of keeping the people knowledgeable and informed.
6. The impact of media is far-reaching as it reaches not only the people physically but also influences them mentally. It creates opinions, broadcasts different points of view, brings to the fore wrongs and lapses of the Government and all other governing bodies and is an important tool in restraining corruption and other ill-effects of society. The media ensures that the individual actively participates in the decision-making process. The right to information is fundamental in encouraging the individual to be a part of the governing process. The enactment of the Right to Information Act is the most empowering step in this direction. The role of people in a democracy and that of active debate is essential for the functioning of a vibrant democracy.
7. With this immense power, comes the burden of responsibility. With the huge amount of information that they process, it is the responsibility of the media to ensure that they are not providing the public with information that is factually wrong, biased or simply unverified information. The right to freedom of speech is enshrined in Article 19(1)(a) of the Constitution. However, this right is restricted by Article 19(2) in the interest of the sovereignty and integrity of India, security of the State, public order, decency and morality and also Contempt of Courts Act and defamation.
8. The unbridled power of the media can become dangerous if check and balance is not inherent in it. The role of the media is to provide to the readers and the public in general with information and views tested and found as true and correct. This power must be carefully regulated and must reconcile with a person's fundamental right to privacy. Any wrong or biased information that is put forth can potentially damage the otherwise clean and good reputation of the person or institution against whom something adverse is reported. Pre-judging the issues and rushing to conclusions must be avoided.
9. This is exactly what has happened in the present case. The then Chief Justice of the Allahabad High Court who has otherwise proved himself to be a competent and good Judge wherever he was posted during his career was brought under a cloud by the reporting which is the subject matter of this petition. His image was sought to be tarnished by a newspaper report which was

apparently based on surmises and conjectures and not based on facts and figures. The dignity of the courts and the people's faith in administration must not be tarnished because of biased and unverified reporting. In order to avoid such biased reporting, one must be careful to verify the facts and do some research on the subject being reported before a publication is brought out.

10. We are glad that the persons against whom contempt proceedings were initiated for a wrong and incorrect reporting about the then Chief Justice as aforesaid have understood their mistake and have expressed their repentance through their advocate and also themselves by filing an unqualified apology before us for the wrong done.

11. On going through the impugned order also we find that apology tendered before the Allahabad High Court was not accepted only because it was felt that the same was not unqualified. Now, by filing an affidavit they have tendered unconditional apology.

12. The judiciary also must be magnanimous in accepting an apology when filed through an affidavit duly sworn, conveying remorse for such publication. This indicates that they have accepted their mistake and fault. This Court has also time and again reiterated that this Court is not hypersensitive in matter relating to Contempt of Courts Act and has always shown magnanimity in accepting the apology. Therefore, we accept the aforesaid unqualified apology submitted by them and drop the proceeding.

13. With the aforesaid observations, we order for closure of the proceedings initiated against the appellants herein under the Contempt of Courts Act by keeping the affidavit filed by the appellants on record with a direction to the appellants to publish the apology as stated in the affidavit in the first page of Lucknow edition of Hindustan Times to be published on 01.09.2011 and also at such other place, wherever there was any such publication, in a daily issue of the newspaper at some prominent place of the newspaper.

14. We appreciate the gesture of the counsel appearing for the parties and also for the fact they endorse the same view as expressed in this order.

15. The appeal is disposed of in terms of the aforesaid directions and observations.

Rajeev Dhawan v. Gulshan Kumar Mahajan & Ors.

Contempt P. (Crl.) 2/1994, (2014) 41 SCD 785

R.M. Lodha, CJI (for himself and Anil R. Dave, Sudhansu Jyoti Mukhopadhaya, Dipak Misra, Shiva Kirti Singh, JJ.):

As a result of the incidents at Ayodhya on 06.12.1992, the President of India issued a Proclamation under Article 356 of the Constitution of India assuming to himself all the functions of the Government of Uttar Pradesh, dissolving the U.P. Vidhan Sabha. Initially, the Acquisition of Certain Area at Ayodhya Ordinance, 1993 (No.8 of 1993) was promulgated. The said Ordinance was later on replaced by Acquisition of Certain Area at Ayodhya Act, 1993 (No.33 of 1993) (for short, the 1993 Act). On the same day, i.e. on 07.01.1993, when Act No.33 of 1993 was enacted, Special Reference (being Special Reference No.1 of 1993) was made to this Court by the President of India under Article 143 (1) of the Constitution of India. The constitutional validity of the 1993 Act and the maintainability of the Special Reference No.1 of 1993 were being examined by the Constitution Bench of this Court. It is alleged that the Vishwa Hindu Parishad (VHP), which was banned at that time, held Dharam Sansad in the first week of April, 1994 and after the Dharam Sansad was over, its President, Vishnu Hari Dalmia and Joint General Secretary, Giriraj Kishore made certain derogatory statements concerning this Court in the news conference. The statements to the media made by Vishnu Hari Dalmia and Giriraj Kishore were published in Indian Express in its edition of 10.04.1994. Dr. Rajeev Dhawan, designated Senior Advocate filed Contempt Petition (Crl.) before this Court against Vishnu Hari Dalmia and Giriraj Kishore, President and Joint General Secretary of the Vishwa Hindu Parishad and Indian Express by invoking the jurisdiction of this Court under Article 129 of the Constitution of India. It is averred that the statements made by Vishnu Hari Dalmia and Giriraj Kishore and published in Indian Express were malicious and tantamount to scandalizing this Court and lowering its authority. In the contempt petition, the petitioner had drawn the attention to the following extracts from Indian Express news report: “VHP warns SC not to ‘exceed limits’” Addressing to media persons here on Saturday Vishnu Hari Dalmia and Giriraj Kishore VHP President and joint general Secretary respectively assailed the apex Court for attempting to “arrogate the power of the executive.” “The Ayodhya issue had so far eluded a solution only because of the delay in pronouncing the judgment.” “Justice delayed is justice denied”. “The judiciary has no jurisdiction over the Ram Janam Bhoomi”. Kishore cautioned the court not to “overstep its limits”. “He (Kishore) remarked that the Supreme Court had lost its prestige because of the delay in adjudicating the Ayodhya dispute”. The above report in Indian Express is attributed to Express News Service.

2. It is also averred that Giriraj Kishore also gave a statement in Khabardar India (11-17 April, 1994) that the Government influences the Court and quotes an anonymous Minister to have said, he has the Court in one pocket and leaders in another. The contempt petition also states that the news item in the Indian Express constitutes a gross criminal contempt for which the authors of the statement, namely, Vishnu Hari Dalmia and Giriraj Kishore, the Editor and Publisher of the Indian

Express, the persons in-charge of the Express News Service and the reporters, are answerable to this Court.

3. On 12.04.1994, upon motion by Dr. Rajeev Dhawan before the Constitution Bench presided over by the Chief Justice, the Contempt Petition was taken on board. The Constitution Bench, on that day, passed the following order:

This application is moved by Dr. Rajeev Dhawan, a learned advocate drawing attention of the Court to certain statements attributed to Sri Giriraj Kishore published in the newspaper Indian Express of 10th April, 1994 and in the Periodical styled "Khabardar India" of 11-17th April, 1994, which, it is contended, tend to lower the image of the Court in the mind of the public and constitute an affront to the dignity and authority of this Court. The utterances of Sri Giriraj Kishore, if true, might amount to criminal contempt.

In the first instance we direct issue of notice to Sri Giriraj Kishore and to the Editor, Printer, Publisher as well as the Reporter of the particular news item of the said issue of Indian Express. For the present we defer initiation of proceedings against Sri Vishnu Hari Dalmia against whom also the petitioner seeks action. That will be considered after the returns are filed by Sri Giriraj Kishore and the Editor, Printer, Publisher and reporter of the Newspaper. So far as the second publication, viz. "Khabardar India" referred to in Annexure-II to the petition is concerned, Dr. Dhawan has not been able to furnish the names or addresses of the Editor, Printer, Publisher and the reporter of the publication, as, according to the submission, these particulars are not discernable from the publication. Dr. Dhawan shall furnish these particulars after which notices will go to them. However, in regard to the statement in Annexure-II attributed to Sri Giriraj Kishore, he will file his return. After the returns are filed the question whether the Court will initiate *suo motu* contempt proceedings shall be considered. Notices are returnable by 26th April, 1994.

4. On 13.04.1994, the petitioner Dr. Rajeev Dhawan filed a memo setting out the names and addresses of the editor, printer and publisher of the periodical "Khabardar India". The cause title of the contempt petition was amended and the following were impleaded as contemners: (1) Gulshan Kumar Mahajan, Owner, Publisher, Printer and Editor of Khabardar India, (2) Pradeep Thakur, Reporter, Khabardar India, (3) Giriraj Kishore, (4) Prabhu Chawla, Editor, Indian Express (5) V.K. Kapur, Printer and Publisher, Indian Express and (6) Bhaskar Roy, Reporter, Express News Service.

5. On 13.04.1994, the Court issued notice to show cause (but no cognizance was taken on that date) to the editor, printer, publisher and reporter of Khabardar India as well making the notice returnable on 26.04.1994.

6. On 26.04.1994, the Court noted that all six respondents were served. On behalf of respondent Nos.4, 5 and 6, counter affidavits were filed, which were taken on record. The counsel for respondent Nos.1 and 2 and so also counsel for respondent No.3 sought time, which was granted to file their counter affidavits. In the course of proceedings before the Constitution Bench on 26.04.1994, Dr. Rajeev Dhawan sought to bring to the notice of the Court that even after notices

were served on respondent No.3, he had continued to make provocative utterances holding the process of Court to contempt. He referred to certain newspaper publications. The Court observed that after respondent No.3 had filed his counter affidavit, it would be open to the petitioner to place on record any statement or conduct attributable to respondent No.3. The matter was then kept for 06.05.1994.

7. On 06.05.1994, the Court took suo motu cognizance of criminal contempt against respondent No.1, Gulshan Kumar Mahajan, owner, publisher, printer and editor of Khabardar India, respondent No.2, Pradeep Thakur, Reporter, Khabardar India and respondent No.3 Giriraj Kishore. The Court directed that appropriate notices in the prescribed form shall be served on the three contemnors by the Registry, fixing the date for their personal appearance in Court. Shri Dipankar P. Gupta, learned Solicitor General (as he then was) was requested to assist the Court as prosecutor in the proceedings for criminal contempt. The Court directed that before issue of the notice accompanied by the charges, the Registry will have the matter shown to the Prosecutor (Solicitor General). Insofar as, respondents 4, 5 and 6 are concerned, the Court kept the question for examination separately. The order of 06.05.1994 reads as under:

“We have heard learned counsel for the persons to whom show-cause notices had been ordered as to why proceedings of criminal contempt should not be initiated against them on the Courts own motion. We have perused the counter-affidavits filed by them. On a consideration, we find at the outset that there is no justification for issue of any show-cause notice or initiating proceedings against Sri Vishnu Hari Dalmia. The proceedings as against Sri Vishnu Hari Dalmia are dropped. Suo motu proceedings for criminal contempt of Court are directed to be initiated against the first-accused, Sri Gulshan Kumar Mahajan, Owner, Publisher, Printer & Editor of Khabardar India, against the second- accused, Sri Pradeep Thakur, Reporter, Khabardar India; and the thirdaccused, Sri Giriraj Kishore. Appropriate notices in the prescribed form shall be served on them by the Registry, fixing the date for their personal appearance in Court.

Sri Dipankar P. Gupta, learned Solicitor General, is requested to assist the Court as Prosecutor in the proceedings for criminal contempt. Before issue of the notices accompanied by the charges, the Registry will have the matter shown to the Prosecutor.

So far as Respondent Nos. 4, 5 & 6 are concerned, we propose to examine the question whether in the interest of maintaining an appropriate balance between the fundamental right under Article 19(1)(a) of the Constitution on the one hand, and the need to protect the authority and dignity of courts on the other, the Court should initiate similar proceedings for criminal contempt against respondents 4, 5 and 6 particularly in the light of the fact that these respondents had carried the publication pertaining to the Press-interview of accused No. 3, Sri Giriraj Kishore in the newspaper along with a comment on the impropriety of such utterances and statements, followed-up by an Editorial in the Newspaper condemning such conduct. This aspect shall be examined separately.

8. The matters remained dormant for almost two decades. On 25.03.2014, when the matters were called by the Constitution Bench, Mr. Pallav Sisodia, learned senior counsel appearing for

contemner No.3, Giriraj Kishore submitted that notices for personal appearance accompanied by charges, as directed by the Court are not yet served on the contemner. In light of this, the Constitution Bench sought clarification from the office regarding service on the contemnors and also directed advocate on record for contemner No.3 to keep present Giriraj Kishore in the Court on the next day, i.e., 26.03.2014.

9. In compliance of the order dated 25.03.2014, the office submitted its report on 26.03.2014 which reads as follows:

It is submitted that in pursuance of Honble Courts order dated 6.5.1994 notices to the Contemnors i.e. Pradeep Thakur (R-2), Giriraj Kishore (R-3), and Gulshan Kumar Mahajan (R-1) were issued on 20.6.1994 to appear in person before the Honble Court on 8th August, 1994. The copy of the said notices were also sent to the counsel for the contemnors which were acknowledged by the counsel for the contemnors. However, no AD Cards in respect of the notices sent to the contemnors have been received.

It is further submitted that the matters mentioned above were not to be listed on 8th August, 1994 so the notices were again sent on 6.8.1994 to the contemnors with its copy to the counsel for the contemnors through Registered A/D cover. The said notices were served on the contemnor No.1 on 8.8.94, contemnor no.2 on 8.8.94 and contemnor no.3 on 12.8.94.

10. On 26.03.2014, contemner No.3, Giriraj Kishore was brought to the Court on wheel chair by his attendant. Learned senior counsel for the contemner No.3 reiterated that notice for personal appearance accompanied by charges as directed by the Court on 06.05.1994 has not been served on the contemner. He also submitted that contemner No.3 is 96 years and is not able to respond due to severe physical and mental illness. The attendant accompanying contemner No.3, Giriraj Kishore, on the query of the Court, informed that contemner No.3 is not in a position to respond to the query because of hearing impairment and feeble mental condition.

11. One thing is clear from the record that the notice for personal appearance accompanied by charges as directed by this Court in the order dated 06.05.1994, after cognizance of contempt was taken, has not been served on contemner No.3 so far. In a situation such as this, the question that arises immediately for our consideration is, whether the Court should direct the service of notice accompanied by charges now. Dr. Rajeev Dhawan vehemently contended that the backdrop to these cases is the destruction of the Babri Masjid on 06.12.1992. According to him, this had resulted in injury to the secular fabric of India. He submitted that tension persisted as the Vishwa Hindu Parishad held a Sansad on 03-04.04.1994 while hearings were taking place before this Court. Contemner No. 3 made contemptuous statements about the Court at that time and, therefore, matter of this gravity should not be left undecided.

12. We appreciate the gravity of the subject matter highlighted by Dr. Rajeev Dhawan. We are also not oblivious of the fact that the Court was not satisfied prima facie with the initial response filed by contemner No. 3, Giriraj Kishore and ordered on 06.05.1994 to initiate the contempt proceedings against respondent Nos. 1 to 3. But, the fact of the matter is that despite the order passed on

06.05.1994, the notice accompanied by charges on contemner No. 3 has not been served so far. In this view of the matter, at this distance of time, when the subject matter remained dormant for almost two decades and now contemner No.3 is 96 years and he is not able to respond to the charges due to old age and illness, we do not think that this is a fit case where we should deal with the matter further. Now, since contempt proceedings are not being pursued further to find out criminality against the author (contemner No.3) who made the offending statements, we are of the view that contempt matter does not deserve to be pursued as against contemner Nos. 1 and 2 as well. The contemner Nos.1 and 2 have also tendered unconditional apology. Insofar as contemner Nos.4 to 6 are concerned, the Court has not yet taken cognizance of criminal complaint against them. In what has been said above, we think the contempt matters deserve to be closed. We order accordingly.

Media Regulation: Regulation of the Broadcasting Sector
In Re: Destruction of Public & Private Properties v. State of A.P. & Ors.
(2009) 5 SCC 119

Arijit Pasayat, J. (for himself and Lokeshwar Singh Panta and P. Sathasivam, JJ.):

1. Taking a serious note of various instances where there was large scale destruction of public and private properties in the name of agitations, bandhs, hartals and the like, *suo motu* proceedings were initiated by a Bench of this Court on 5.6.2007. Dr. Rajiv Dhawan, Senior counsel of this Court agreed to act as Amicus Curiae. After perusing various reports filed, two Committees were appointed; one headed by a retired Judge of this Court Justice K.T. Thomas. The other members of this Committee were Mr. K. Parasaran, Senior Member of the legal profession, Dr. R.K. Raghvan, Ex-Director of CBI, and Mr. G.E. Vahanavati, the Solicitor General of India and an officer not below the rank of Additional Secretary of Ministry of Home Affairs and the Secretary of Department of Law and Justice, Government of India. The other committee was headed by Mr. F.S. Nariman, a senior Member of the legal profession. The other members of the Committee were the Editor-in-Chief of the Indian Express, the Times of India and Dainik Jagaran, Mr. Pranay Roy of NDTV and an officer not below the rank of Additional Secretary of Ministry of Home Affairs, Information and Broadcasting and Secretary, Department of Law and Justice, Government of India, and Mr. G.E. Vahanavati, Solicitor General and learned Amicus Curiae.

4. The report submitted by Justice K.T. Thomas Committee has made the following recommendations:

(i) The Prevention of Damage of Public Property Act, 1984, (hereinafter called the “PDPP Act”) must be so amended as to incorporate a rebuttable presumption (after the prosecution established the two facets) that the accused is guilty of the offence.

(ii) The PDPP Act to contain provision to make the leaders of the organization, which calls the direct action, guilty of abetment of the offence.

(iii) The PDPP Act to contain a provision for rebuttable presumption.

(iv) Enable the police officers to arrange videography of the activities damaging public property.

In respect of (iv) The Committee considered other means of adducing evidence for averting unmerited acquittals in trials involving offences under PDPP Act. We felt that one of the areas to be tapped is evidence through videography in addition to contemporaneous material that may be available through the media, such as electronic media. With the amendments brought in the Evidence Act, through Act 21 of 2000 permitting evidence collected through electronic devices as admissible in evidence.

To effectuate the modalities for preventive action and adding teeth to enquiry/ investigation, following guidelines are to be observed:

As soon as there is a demonstration organized:

(VI) In the event that demonstrations turn violent, the officer-in-charge shall ensure that the events are videographed through private operators and also request such further information from the media and others on the incidents in question.

31. So far as the role of media is concerned the Mr. F.S. Nariman Committee has suggested certain modalities which are essentially as follows:

a) The Trusteeship Principle

- Professional journalists operate as trustees of public and their mission should be to seek the truth and to report it with integrity and independence.

b) The Self-Regulation Principles

- A model of self-regulation should be based upon the principles of impartiality and objectivity in reporting; ensuring neutrality; responsible reporting of sensitive issues, especially crime, violence, agitations and protests; sensitivity in reporting women and children and matters relating to national security; respect for privacy.

c) Content Regulations

- In principle, content regulation except under very exceptional circumstances, is not to be encouraged beyond vetting of cinema and advertising through the existing statutes. It should be incumbent on the media to classify its work through warning systems as in cinema so that children and those who are challenged adhere to time, place and manner restraints. The media must also evolve codes and complaint systems. But prior content control (while accepting the importance of codes for self restraint) goes to the root of censorship and is unsuited to the role of media in democracy.

d) Complaints Principle

- There should be an effective mechanism to address complaints in a fair and just manner.

e) Balance Principle

- A balance has to be maintained which is censorial on the basis of the principles of proportionality and least invasiveness, but which effectively ensures democratic governance and self-restraint from news publications that the other point of view is properly accepted and accommodated.

32. It is felt that the appropriate methods have to be devised norms of self-regulation rather than external regulation in a respectable and effective way both for the broadcasters as well as the industry. It has been stated that the steps constitute a welcome move and should be explored further. The proposed norms read as follows:

“The NBA believes that media that is meant to expose the lapses in government and in public life cannot be obviously be regulated by government, else it would lack credibility. It is a fundamental paradigm of freedom of speech that media must be free from governmental control in the matter of “content” and that censorship and free speech are sworn enemies. It, therefore, falls upon the journalistic profession to evolve institutional checks and safeguards, specific to the electronic media, that can define the path that would conform to the highest standards of rectitude and journalistic ethics and guide the media in the discharge of its solemn Constitutional duty. There are models of governance evolved in other countries which have seen evolution of the electronic media,

including the news media, much before it developed in India. The remarkable feature of all these models is “self-governance”, and a monitoring by a “jury of peers”.”

33. The Committee has recommended the following suggestions:

- (i) India has a strong, competitive print and electronic media
- (ii) Given the exigencies of competition, there is a degree of sensationalism, which is itself not harmful so long as it preserves the essential role of the media *viz*: to report news as it occurs – and eschew comment or criticism. There are differing views as to whether the media (particularly the electronic media) has exercised its right and privilege responsibly. But generalisations should be avoided. The important thing is that the electronic (and print) media has expressed (unanimously) its wish to act responsibly. The media has largely responsible and more importantly, it wishes to act responsibly.
- (iii) Regulation of the media is not an end in itself; and allocative regulation is necessary because the ‘air waves’ are public property and cannot technically be free for all but have to be distributed in a fair manner. However, allocative regulation is different from regulation *per se*. All regulation has to be within the framework of the constitutional provision. However, a fair interpretation of the constitutional dispensation is to recognize that the principle of proportionality is built into the concept of reasonableness whereby any restrictions on the media follow the least invasive approach. While emphasizing the need for media responsibility, such an approach would strike the correct balance between free speech and the independence of the media.
- (iv) Although the print media has been placed under the supervision of the Press Council, there is need for choosing effective measures of supervision - supervision not control.
- (v) As far as amendments mooted or proposed to the Press Council Act, 1978 this Committee would support such amendments as they do not violate Article 19(1) (a) - which is a preferred freedom.
- (vi) Apart from the Press Council Act, 1978, there is a need for newspapers and journals to set up their own independent mechanism.
- (vii) The pre censorship model used for cinema under the Cinematography Act, 1952 or the supervisory model for advertisements is not at all appropriate, and should not be extended to live print or broadcasting media.
- (viii) This Committee wholly endorses the need for the formation of
 - (a) principles of responsible broadcasting
 - (b) institutional arrangements of self regulation But the Committee emphasized the need not to drift from self regulation to some statutory structure which may prove to be oppressive and full of litigative potential.
- (ix) The Committee approved of the NBA model as a process that can be built upon both at the broadcasting service provider level as well as the industry level and recommend that the same be incorporated as guidelines issued by this Court under Article 142 of the Constitution of India - as was done in *Vishaka’s* case.

34. The suggestions are extremely important and they constitute sufficient guidelines which need to be adopted. But leave it to the appropriate authorities to take effective steps for their implementation. At this juncture we are not inclined to give any positive directions.

X v. Union of India and Ors.

W.P.(CRL) 1082/2020 & CrI. M.A. Nos.9485/2020, 10986-8

Anup Jairam Bhambhani, J.:

1. **“The internet never sleeps; and the internet never forgets”** The true enormity of this fact has dawned over the course of hearings conducted in the present matter, when it transpired that despite orders of this court, even the respondents who were willing to comply with directions issued to remove offending content from the world-wide- web, e-Expressed their inability to fully and effectively remove it in compliance with court directions; while errant parties merrily continued to re-post and re-direct such content from one website to another and from one online platform to another, thereby cocking- a-snook at directions issued against them in pending legal proceedings.

2.As submitted by Mr. Sarthak Maggon, learned counsel appearing for the petitioner, the principal grievance of the petitioner is that her photographs and images that she had posted on her private social media accounts on 'Facebook' and 'Instagram' have been taken without her knowledge or consent and have been unlawfully posted on a pornographic website called 'www.Xhamster.com' by an unknown entity called 'Desi Collector' whereby the petitioner's photographs and images have become offensive by association. While certain other details of the petitioner and the photographs taken from her social media accounts have been recited in the petition, the **same are not being recorded here for reasons of privacy and confidentiality**. Petitioner claims that her social media accounts had the requisite 'privacy settings' activated and yet these accounts were compromised, and her photographs and images were taken and placed on the pornographic website. It is the petitioner's contention that even though her photographs and images are otherwise unobjectionable, by placing the same on a pornographic website, the errant respondents have ex-facie committed the offence of publishing and transmitting material that appeals to the prurient interests, and which has the effect of tending to deprave and corrupt persons, who are likely to see the photographs, which is an offence under section 67 of the Information Technology Act 2000 ('IT Act', for short). The petitioner also contends that the errant parties have attached captions to her photographs, which act falls within the mischief of other penal provisions of the IT Act and the Indian Penal Code 1860 ('IPC', for short).

3. When the petitioner filed the present writ petition, she claimed she had already filed a complaint on the National Cyber-Crime Reporting Portal as well as to the jurisdictional police but to no avail; and by reason of inaction on the part of the authorities; the photographs had received some 15000 views within a week of being posted.

4.Since the particulars of respondents Nos. 5 and 6, namely the pornographic website and the unknown entity, which it is claimed was responsible for placing the petitioners photographs on that website, were not available in the petition, or even their address, no notice was issued to the said respondents in the beginning. Considering the nature of the matter, this court proposes to pass the order in present proceedings, it was not considered necessary to await the service of the said two respondents.

5.In the course of preliminary hearings in the matter it transpired that the specialised cybercrime unit of the Delhi Police, namely the Cyber Prevention Awareness and Detection Unit (CyPAD), submitted before this court that while it was ready and willing to comply with the court directions of removing/disabling access to the offending content relating to the petitioner, by reason of technological limitations and impediments, it could not assure the court that it would be able to entirely efface the offending content from the world-wide-web. On the other hand, the petitioner complained in the course of the hearings, that while this court was seized of the matter and interim orders for immediate removal of the offending content from the errant website had been directed, in brazen and blatant disregard of such directions, the errant respondents and other mischief-makers had re- directed, re-posted and re-published the offending content onto other websites and online platforms, thereby rendering the orders of the court ineffective.

6. This court accordingly perceived that the issue of making effective and implementable orders in relation to a grievance arising from offending content placed on the world-wide-web, needed to be examined closely; and a solution to the problem needed to be crafted.

7. Addressing the foregoing issue required examination of our own statutory landscape, the technological limitations and reality and also as to how such matters have been addressed internationally. This court therefore appointed Dr Pavan Duggal, Advocate, who specialises in cyber-law and cyber-crime, as Amicus Curiae to assist in addressing the issues involved.

8. It may be noted that the issue of removing offending content is equally, if not more, significant at the time a matter is heard initially on a prayer for interim relief, for the reason that if the court is not in a position to pass effective and implementable orders and is unable to ensure that such orders are complied with at the interim stage, subsequent adjudication of the matter could well be rendered infructuous.

9. The court cannot permit itself to resign to the cat-and-mouse game of errant parties evading court orders by re-posting offending content across the world-wide-web, in an act of defiance and contumacy.

10. In this backdrop vide order dated 07.08.2020 this court framed certain queries to get answers as to what would be the implementable and effective directions that should, and could, be issued by a court if it finds that certain content appearing on the world-wide-web is illegal or offending and ought to be removed. As observed above, the queries arose since despite directions issued by this court to remove certain content from the world-wide-web, the concerned respondents reverted, in effect, to say that technologically it is impossible, & the aggrieved party & the court would simply have to contend with an errant party or a mischief-maker continuing to re-post and re-direct offending content onto other platforms and websites on the world-wide-web despite the court ordering its removal. The respondents said that the only option for an aggrieved party would be to keep coming back to court each time and getting fresh orders for removal of offending content from each such online platform and website.

11. The queries framed were to the following effect:

i. Where a party seeks relief from the court to the effect that certain offending or illegal content be removed from the world-wide-web, what directions are required to be passed by a court to make its order implementable and effective; and to which parties are such directions required to be issued;

ii. What steps are required to be taken by law enforcement agencies to implement such directions issued by a court to ensure that despite court orders/directions offending content does not 'resurface' or remain available on the world-wide-web at the instance of errant parties; and such parties do not succeed in brazenly evading compliance of such orders/directions with impunity.

Submissions of Learned Amicus Curiae (Dr. Pavan Duggal)

12. In response to the foregoing queries, by way of his written submissions dated 16.09.2020 and 21.10.2020 as further elaborated

Learned Amicus Curiae has first drawn attention of this court to the following provisions of the Information Technology Act, 2000 as amended by Information Technology (Amendment) Act, 2008; and to the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules 2009 ('2009 Rules', for short) and Information Technology (Intermediaries Guidelines) Rules 2011 ('2011 Rules', for short), which provisions are being extracted herein- below for ease of reference:

Information Technology Act, 2000:

"1. Short title, extent, commencement and application. -- ...

(2) It shall extend to the whole of India and, save as otherwise provided in this Act, it applies also to any offence or contravention thereunder committed outside India by any person.

Section 2. Definitions (1) In this Act, unless the context otherwise requires, --

(o) "**data**" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer;

(v) "**information**" includes data, message, text, images, sound, voice, codes, computer programmes, software and data bases or micro film or computer generated micro fiche;

(w) "**intermediary**", with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes;

Section 67. Punishment for publishing or transmitting obscene material in electronic form, Section 67A. Punishment for publishing or transmitting of material containing sexually explicit act, etc., in electronic form, Section 67B. Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form, Section 2(1)(t) electronic record, Section 67C. Preservation and retention of information by intermediaries, Section 75. Of the Act to apply for offences or contravention committed outside India, Section 79. Exemption from liability of intermediary in certain cases, Section 81 of the Act to have overriding effect Section 85. Offences by companies, For the purpose of this section, (i) "**Company**" means any , body-corporate and includes a firm or other association of individuals; and (ii) "**Director**", in relation to a firm, means a partner in the firm." Are applicable, So Learned Amicus Curiae draw the attention of court.

Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009:

"10. Process of order of court for blocking of information - In case of an order from a competent court in India for blocking of any information or part thereof generated, transmitted, received, stored or hosted in a computer resource, the Designated Officer shall, immediately on receipt of certified copy of the court order, submit it to the Secretary, Department of Information Technology and initiate action as directed by the court."

(Emphasis supplied) Information Technology (Intermediaries Guidelines) Rules 2011:

"3. Due diligence to be observed by intermediary.-- The intermediary shall observe following due diligence while discharging his duties, namely:- (1) The intermediary shall publish the rules and regulations, privacy policy and user agreement for access or usage of the intermediary's computer resource by any person. (2) Such rules and regulations, terms and conditions or user agreement shall inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information

(b) Removal of access to any information, data or communication link by an intermediary shall act within thirty six hours and where applicable, work with user or owner of such information to disable such information that is in contravention of sub-rule (2). Further the intermediary shall preserve such information and associated records for at least ninety days for investigation purposes.

(5) The Intermediary shall inform its users that in case of non-compliance, user agreement and privacy policy for access or usage of intermediary computer resource, the Intermediary has the right to

immediately terminate the access or usage rights to use computer resources The intermediary shall strictly follow the provisions of the Act or any other laws for the time being in force.

(7)When required by lawful order, the intermediary shall provide information or any such assistance to Government Agencies who are lawfully authorised for investigative, protective, cyber security activity.

Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ('2021 Rules', for short) superseding the 2011 Rules.

Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021

"2. Definitions: (1) In these rules, unless the context otherwise requires-(j) '**Grievance**' includes any complaint; whether regarding any content, any duties of an intermediary or publisher under the Act, or other matters pertaining to the computer resource of an intermediary or publisher, as the case may be;(v) '**significant social media intermediary**' means a social media intermediary having number of registered users in India above such threshold as notified by the Central Government;(w) '**Social media intermediary**' means an intermediary who primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services; (x)'**user**' means any person who accesses or avails any computer resource of an intermediary or a publisher for the purpose of hosting, publishing, sharing, transacting, viewing, displaying, downloading or uploading information and includes other persons jointly participating in using such computer resource and addressee and originator;

3. (1) **Due diligence by an intermediary:** An intermediary, including social media intermediary and significant social media intermediary, shall observe the following due diligence while discharging its duties, namely:--(a) The intermediary shall prominently publish on its website, mobile based application or both, as the case may be, the rules and regulations, privacy policy and user agreement for access or usage of its computer resource by any person;(b)the rules and regulations, privacy policy or user agreement of the intermediary shall inform the user of its computer resource not to host, display, upload, modify, publish, transmit, store, update or share any information that,(i)belongs to another person and to which the user does not have any right;(ii)is defamatory, obscene, pornographic, paedophilic, invasive of another's privacy, including bodily privacy, insulting or harassing on the basis of gender, libellous, racially or ethnically objectionable, relating or encouraging money laundering or gambling, or otherwise inconsistent with or contrary to the laws in force;(iii)is harmful to child;(iv)Infringes any patent, trademark, copyright or other proprietary rights;(v) violates any law for the time being in force;(vi) deceives or misleads the addressee about the origin of the message or knowingly and intentionally communicates any information which is patently false or misleading in nature but may reasonably be perceived as a fact;(vii)Impersonates another person;(viii)threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign States, or public order, or causes incitement to the commission of any cognisable offence or prevents investigation of any offence or is insulting other nation;(ix)Contains software virus or any other computer code, file or program designed to interrupt, destroy or limit the functionality of any computer resource;(x) is patently false and untrue, and is written or published in any form, with the intent to mislead or harass a person, entity or agency for financial gain or to cause any injury to any person;(c)an intermediary shall periodically inform its users, at least once every year, that in case of non-compliance with rules and regulations, privacy policy or user agreement for access or usage of the computer resource of such intermediary, it has the right to terminate the access or usage rights of the users to the computer resource immediately or remove non-compliant information or both, as the case may be;(d)An intermediary, on whose computer resource the information is stored, hosted or published, upon receiving actual knowledge in the form of an order by a court of competent jurisdiction or on being notified by the Appropriate Government or its agency under clause (b) of sub-section (3) of section 79 of the Act, shall not host, store or publish any unlawful information, which is prohibited under any law for the time being in force in relation to the interest of the sovereignty and integrity of India; security of the State; friendly relations with foreign States; public order; decency or morality; in relation to contempt of court; defamation; incitement to an offence relating to the above, or any information which is prohibited under any law for the time being in force: Provided that any notification made by the Appropriate Government

or its agency in relation to any information which is prohibited under any law for the time being in force shall be issued by an authorised agency, as may be notified by the Appropriate Government: Provided further that if any such information is hosted, stored or published, the intermediary shall remove or disable access to that information, as early as possible, but in no case later than **thirty-six hours** from the receipt of the court order or on being notified by the Appropriate Government or its agency, as the case may be Provided also that the removal or disabling of access to any information, data or communication link within the categories of information specified under this clause, under clause (b) on a voluntary basis, or on the basis of grievances received under sub-rule (2) by such intermediary, shall not amount to a violation of the conditions of clauses (a) or (b) of sub-section (2) of section 79 of the Act;

(e)the temporary or transient or intermediate storage of information automatically by an intermediary in a computer resource within its control as an intrinsic feature of that computer resource, involving no exercise of any human, automated or algorithmic editorial control for onward transmission or communication to another computer resource shall not amount to hosting, storing or publishing any information referred to under clause (d); (f)The intermediary shall periodically, and at least once in a year, inform its users of its rules and regulations, privacy policy or user agreement or any change in the rules and regulations, privacy policy or user agreement, as the case may be; (g) Where upon receiving actual knowledge under clause (d), on a voluntary basis on violation of clause (b), or on the basis of grievances received under sub-rule (2), any information has been removed or access to which has been disabled, the intermediary shall, without vitiating the evidence in any manner, preserve such information and associated records for one hundred and eighty days for investigation purposes, or for such longer period as may be required by the court or by Government agencies who are lawfully authorised; (h) Where an intermediary collects information from a user for registration on the computer resource, it shall retain his information for a period of one hundred and eighty days after any cancellation or withdrawal of his registration, as the case may be; (i) the intermediary shall take all reasonable measures to secure its computer resource and information contained therein following the reasonable security practices and procedures as prescribed in the Information Technology (Reasonable Security Practices and Procedures and

Sensitive Personal Information) Rules, 2011;

(j)the intermediary shall, as soon as possible, but not later than seventy two hours of the receipt of an order, provide information under its control or possession, or assistance to the Government agency which is lawfully authorised for investigative or protective or cyber security activities, for the purposes of verification of identity, or for the prevention, detection, investigation, or prosecution, of offences under any law for the time being in force, or for cyber security incidents: Provided that any such order shall be in writing stating clearly the purpose of seeking information or assistance, as the case may be; (k)The intermediary shall not knowingly deploy or install or modify technical configuration of computer resource or become party to any act that may change or has the potential to change the normal course of operation of the computer resource than what it is supposed to perform thereby circumventing any law for the time being in force: Provided that the intermediary may develop, produce, distribute or employ technological means for the purpose of performing the acts of securing the computer resource and information contained therein;

(l)The intermediary shall report cyber security incidents and share related information with the Indian Computer Emergency Response Team in accordance with the policies and procedures as mentioned in the Information Technology

(The Indian Computer Emergency Response Team and Manner of Performing Functions and Duties) Rules, 2013.

(2) Grievance redressal mechanism of intermediary: (a)The intermediary shall prominently publish on its website, mobile based application or both, as the case may be, the name of the Grievance Officer and his contact details as well as mechanism by which a user or a victim may make complaint against violation of the provisions and the Grievance Officer shall -(i)acknowledge the complaint within twenty

four hours and dispose off such complaint within a period of fifteen days from the date of its receipt; (ii) Receive and acknowledge any order, notice or direction issued by the Appropriate Government, any competent authority or a court of competent jurisdiction. (b) The intermediary shall, within twenty-four hours from the receipt of a complaint made by an individual or any person on his behalf, in relation to any content which is prima facie in the nature of any material which exposes the private area of such individual, shows such individual in full or partial nudity or shows or depicts such individual in any sexual act or conduct, or is in the nature of impersonation in an electronic form, including artificially morphed images of such individual, take all reasonable and practicable measures to remove or disable access to such content which is hosted, stored, published or transmitted by it: (c) The intermediary shall implement a mechanism for the receipt of complaints under clause (b) of this sub-rule which may enable the individual or person to provide details, as may be necessary, in relation to such content or communication link.

"4. Additional due diligence to be observed by significant social media intermediary.-- (1) In addition to the due diligence observed under rule 3, a significant social media intermediary shall, within three months from the date of notification, the following additional due diligence while discharging its duties, namely:-- (a) appoint a Chief Compliance Officer who shall be responsible for ensuring compliance with the Act and rules made thereunder and shall be liable in any proceedings relating to any relevant third-party information, data or communication link made available or hosted by that intermediary where he fails to ensure that such intermediary observes due diligence while discharging its duties under the Act and rules made thereunder:

Provided that no liability under the Act or rules made thereunder may be imposed on such significant social media intermediary without being given an opportunity of being heard.

Explanation.--For the purposes of this clause Chief Compliance Officer means a key managerial personnel or such other senior employee of a significant social media intermediary who is resident in India;

(b) Appoint a nodal contact person for 24X7 coordination with law enforcement agencies and officers to ensure compliance to their orders or requisitions made in accordance with the provisions of law or rules made thereunder

Explanation.--For the purposes of this clause nodal contact person means the employee of a significant social media intermediary, other than the Chief Compliance Officer, who is resident in India;

(c) Appoint a Resident Grievance Officer, who shall, subject to clause (b), be responsible for the functions, referred to in sub-rule (2) of rule 3.

Explanation.--For the purposes of this clause, Resident Grievance Officer means the employee of a significant social media intermediary, who is resident in India;

(d) Publish periodic compliance report every month mentioning the details of complaints received and action taken thereon, and the number of specific communication links or parts of information that the intermediary has removed or disabled access to in pursuance of any proactive monitoring conducted by using automated tools or any other relevant information as may be specified.

(2) A significant social media intermediary providing services primarily in the nature of messaging shall enable the identification of the first originator of the information on its computer resource as may be required by a judicial order passed by a court of competent jurisdiction or an order passed under section 69 by the Competent Authority as per the Information Technology (Procedure and Safeguards for interception, monitoring and decryption of information) Rules, 2009, which shall be supported with a copy of such information in electronic form:

Provided that an order shall only be passed for the purposes of prevention, detection, investigation, prosecution or punishment of an offence related to the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, or public order, or of incitement to an offence relating

to the above or in relation with rape, sexually explicit material or child sexual abuse material, punishable with imprisonment for a term of not less than five years:

(3)A significant social media intermediary that provides any service with respect to information or transmits that information on behalf of another person on its computer resource- (a) for direct financial benefit in a manner that increases its visibility or prominence, or targets the receiver of that information; or (b) to which it owns a copyright, or has an exclusive license, or in relation with which it has entered into any contract that directly or indirectly restricts the publication or transmission of that information through any means other than those provided through the computer resource of such social media intermediary, shall make that information clearly identifiable to its users as being advertised, marketed, sponsored, owned, or exclusively controlled, as the case may be, or shall make it identifiable as such in an appropriate manner.

Proceedings have since been stayed by the Hon'ble Supreme Court which is seized of transfer petitions calling such matters before itself, it is necessary to clarify that no view is being expressed in the present matter as to the constitutional vires or any similar aspects of the 2021 Rules.

Judicial Precedents in Foreign Jurisdictions:

30. Having noticed the basic statutory architecture in India relevant to the questions under consideration, it would be useful at this stage to examine how courts in foreign jurisdictions have viewed the position of 'intermediaries' such as internet service providers and search engines. This is especially relevant since search engines and other big technology companies, which run the internet as it were, operate on an international scale; and there is no reason why intermediaries should be treated differently in India as compared to how they are treated in foreign jurisdictions.

31. In this backdrop, certain extracts from orders/judgements of foreign courts are placed below, which are self-explanatory, both as to the context and the view taken by such courts.

32. Explaining that an 'equitable obligation of confidence' arises upon an intermediary; and holding that in certain cases the court may acquire statutory jurisdiction even over a foreign defendant, the Hon'ble Supreme Court of New South Wales, Australia in its decision in **X. vs. Twitter Inc.**¹ has ruled as under:

"The Plaintiff's Claim

17. The jurisprudential basis of the plaintiff's claim against the defendants is uncontroversial. There is no necessity to prove that Twitter was 'knowingly concerned' in the user's breach of duty as against the plaintiff. The cause of action against Twitter is direct. It operates independently of the claim against the person originally responsible for the 'leak'. Where a third party such as Twitter comes into possession of confidential information and is put on notice of the character of the information and the circumstances in which it was unlawfully obtained, it becomes subject to an equitable obligation of confidence. It is liable to be restrained from publishing the information."

"29. Hinging off that definition of Offending Material, the substance of the plaintiff's proposed final injunctive orders requires that the defendants:

(a) Be restrained from publishing the Offending Material anywhere in the world on the Twitter platform, their website or otherwise;

(b) The Offending Material to be removed everywhere in the world from the twitter platform and their websites;"

"Discretion 36. I accept the plaintiff's submission that there must be a mechanism to filter information on the Twitter service. Content relating to issues of national security and classified intelligence is an obvious example. In the absence of evidence and submissions from the defendants, and in the circumstances of this case, I do not consider it unreasonable or inappropriate to make orders that impose

a requirement for the 'application of some degree of filtering, or checking, to ensure that the information either does not get posted or, if it is posted, it is removed'.

"42. there is a public interest in making the proposed orders; in demonstrating that wrongful conduct will be remedied as effectively as can be achieved; and in ensuring that the plaintiff's rights are respected to the extent that it is possible to do so. The plaintiff should not be left without a remedy.

"108. This Court is of the opinion that any injunction order passed by the Court has to be effective. The removal and disablement has to be complete in respect of the cause over which this Court has jurisdiction. It cannot be limited or partial in nature, so as to render the order of this Court completely toothless. If geo-blocking alone is permitted in respect of the entire content, there cannot be any dispute that the offending information would still reside in the global platforms of the Defendants, and would be accessible from India, not only through VPN and other mechanisms, but also by accessing the international websites of these platforms. It is not unknown that the Canadian, European and American websites of Google, Facebook, You Tube and Twitter can be accessed in India through various technological means. This would thus result in partial disabling and partial removal.

"109. Orders of Courts are meant to be implemented fully and effectively. While the Defendant-platforms are raising issues in respect of comity of Courts, conflict of laws and the right of freedom of speech and expression under Article 19(1)(a), what is to be borne in mind is also the rights of privacy, the right of reputation of a citizen, national security, national integrity, threats to sovereignty, etc. The balance is always hard to seek, however, Courts can only endeavour to strike the balance. Ld. Counsels for the parties have rightly raised various concerns on both sides. This Court has to implement the statute in its letter and spirit. In case of uploads which take place from outside India, the unlawful act would be the dissemination of such content in India, and thus in those cases the platforms may resort to geo-blocking."

"112. Under these circumstances, the following directions are issued to the platforms:

(i) The Defendants are directed to take down, remove block, and restrict/disable access, on a global basis, to all such videos/web links/URLs in the list annexed to the plaint, which have been uploaded from I.P. addresses within India. (ii) Insofar as the URLs/links in the list annexed to the Plaint which were uploaded from outside India are concerned, the defendants are directed to block access and disable them from being viewed in the Indian domain and ensure that users in India are unable to access the same. (iii) Upon the Plaintiffs discovering that any further URLs contain defamatory/offending content as discussed in the present order, the Plaintiffs shall notify the platforms, which shall then take down/block access to the said URLs either on a global basis, or for the India domain, depending on from where the content has been uploaded in terms of (i) and (ii) above. (iv) If the Defendant - platforms, upon receiving notice from the Plaintiffs are of the opinion that the material/content is not defamatory or violative, they shall intimate the Plaintiffs and the Plaintiffs would seek their remedies in accordance with law

38. In **YouTube LLC & Anr. vs. Geeta Shroff** a single Judge of this court issued the following directions :

"17. The Court would note that it was never the case of Google that the contents of the offending post had been uploaded from a place outside India. It held that the contents have been uploaded from India, hence they were ordered to be removed from the internet so as to restore the position as it was prior to the uploading of the contents. The impugned order went on to hold that the contents which were uploaded from India, if transposed outside the jurisdiction of the country, cannot be said to be beyond the jurisdiction of India, and it could well be blocked or removed following the path by which it was uploaded. The Court is of the view that in the first instance, the injunction order dated 04.06.2015, which has not been challenged, has attained finality. It holds that on the basis of the pleadings and/or lack of denial from Google that the offending post had been uploaded from India, Google was required to remove it so as to restore status **quo ante**."

39. Then again, in ABC vs. DEF & Ors. another single Judge of this court said :

"20. The defendants No.5 to 8 namely Facebook Inc, Snapchat Inc, Yahoo Inc and Instagram Inc are also directed to remove any other material which the plaintiff may report as objectionable qua her i.e. photographs relating to her or any other content relating to the plaintiff from any other account. The counsel for the plaintiff on behalf of the plaintiff states that the plaintiff will complain to the defendants No.5 to 8 only qua material relatable to this suit and violating her privacy."

40. Most importantly, the role, duties and obligations of intermediaries under the IT Act have been authoritatively delineated by our Hon'ble Supreme Court in Shreya Singhal vs. Union of India, where it has been held as under:

"Section 79 and the Information Technology (Intermediary Guidelines) Rules, 2011

117. Section 79 belongs to Chapter XII of the Act in which intermediaries are exempt from liability if they fulfil the conditions of the Section 79 of the Act.

Submissions of Delhi Police

42. The submission of the Delhi Police that to ensure successful removal of offensive and unlawful content from the world-wide-web and to prevent such content being re-posted, re-transmitted or re-published on the world-wide-web, directions ought to be issued to the concerned intermediaries under section 79(3)(b) of the IT Act for removal of such content as identified through unique identifiers such as the URL (Uniform Resource Locator), Account ID, Handle name, Internet Protocol Address, hash value, pixel matching, structural similarity index etc. of the content. Further directions ought to be issued to intermediaries under section 79(3)(a) of the IT Act read with section 107 of the IPC and rule 3(2) of the 2011 Rules, to prevent further posting, transmission or publication of 'identified unlawful content'. Police said that it has become commonplace, that law enforcement agencies issue notices under section 91 of the Cr.P.C. and/or Rule 3(7) of the 2011 Rules calling upon intermediaries to furnish information; and also to remove identified unlawful content,

Submissions of Google LLC

46. Mr. Sajan Poovayya, learned senior counsel appearing on behalf of Google LLC/respondent No. 7, has in the first instance, submitted that though Google LLC has no information on the actual nature of the offending content that is in question in the present proceedings, it has no opposition to removing access to the offending content as may be directed by this court. Mr. Poovayya, has explained in detail the exact business and role of Google LLC as the incorporated entity that inter alia owns the search engine called 'Google Search', alternatively also called just 'Google'. It has been submitted that intermediaries that run search engines are not 'publishers' and that they merely 'index' existing information on-line and to that extent have only a limited role, owing to the automated manner of functioning of search engines. It has also been emphasized that the legal framework mandates that the internet be kept free from editorial intervention.

47. As regards the issue of removal of content or blocking access is concerned, it has been submitted that the role of the search engine is 'reactive' and is limited to disabling access to specific URLs, once these are reported by governmental agencies or ordered by court; and that their role is not '**proactive**'. It is submitted that search engines cannot be tasked with adjudicating the legitimacy of content that may be searched through them. It has further been submitted that prior restraint or blanket ban or censorship of content cannot be ordered since the same would be contrary to the freedom of speech and expression guaranteed by the Constitution and may even have a chilling effect on fundamental rights;

48. Learned senior counsel appearing on behalf of Google LLC has highlighted the difference between '**publisher websites**' and '**search engines**', to say that content is actually hosted on a given website or online platform, which website or online platform is controlled by a webmaster or owner; and it is the concerned website/online platform/ webmaster/owner that is the 'publisher' of such content; and that Google Search does not publish nor host nor control any content but only 'indexes' it. It is further

submitted that search engines only access a small portion of the world-wide-web and 'private networks' 'walled gate' applications or other protected systems cannot even be assessed by search engines.

49. Further, explaining the manner in which Google Search operates, it is submitted that the search engine uses automatic software known as 'crawlers' that visit a web-page and analyse the text and non-text content on it. A 'crawler' sorts the information on a web-page into an 'index', which is a purely passive and automated process, by which similar content is grouped together. It is explained that an 'index' on a search engine is akin to a library catalogue that explains where books on a particular topic are located in a library and the catalogue itself does not contain the information, but merely points to its location, like a book on a shelf in the library. Each search result comprises a 'title' (which is the clickable hyperlink to the relevant webpage), the URL of the relevant web-page and a snippet (which is an automatically generated excerpt from the relevant web-page).

50. It has been further submitted before this court that Google Search also has the facility of searching for specific 'images' as opposed to specific 'text'. Google Image Search is a feature of Google Search that displays image-based results in response to a user's query instead of text-based results.

51. Learned senior counsel explains that unlike text-based search results, image-based search results are much more difficult to identify and retrieve since an image search employs complex algorithms that use information about an image such as the name of the image file as stored on a web-page.

53. Learned senior counsel has further explained that the forgoing options for making content non-searchable are publicly available at <https://developers.google.com/search/docs/advanced/crawling/control-what-you-share>. However, it is submitted that these methods for making content non-searchable can only be initiated by a web-master/owner independently and not by a search engine like Google.

55. It is further stated that Google also has a Grievance Officer, whose details may be taken from "https://www.google.com/intl/en_in/contact/grievance-officer.html". and it is assured that complaints received on this web form are acted upon on priority basis.

62. The remedy here is not to target intermediaries but to ensure that infringing Material is removed in an orderly and reasonable manner. A further balancing act is required which is that of freedom of speech and privatized censorship.

62. In conclusion, Google LLC has suggested that to make orders issued by this court effective, the following directions may be passed:

"i. At the outset, a direction may be passed to the website hosting the alleged content to remove/disable access to the URL of the impugned content. Once the impugned content is removed from the actual websites, the same will be organically removed from the search engines. ii. For the purpose of removal from the search engine, the court or an appropriate government agency can, upon holding the content to be unlawful, share the specific URL of the impugned content for the de-listing/cache removal."

63. In the opinion of this court, Google LLC's objection to orders of prior restraint or blanket ban of content is wholly unnecessary and misplaced, inasmuch as,

Submissions of Ministry of Electronics & Information Technology

65. In a Power Point Presentation made before this court by the Ministry of Electronics and Information Technology ('MeitY'), has made the following suggestions as regards directions that can be passed for removing offending content: (a) Direct the intermediary social media platforms to remove offending content OR (b) Direct the "appropriate government" or its "agency" (c) grant the right to the Petitioner (expressly written in order) to directly approach or send requests through a specific email to all social media platforms/appropriate government/police to seek removal of unlawful content." Furthermore, the MeitY has suggested that the petitioner may lodge a complaint before the "Appropriate Government or its Agency or Police" or before the "Grievance Officer" of the online platform. The Ministry says that

the 'Online Cyber-Crime Reporting Portal' available at www.cybercrime.gov.in, which was primarily intended for reporting pornography/child pornography or gang rape content, has now widened its scope to include all cyber crimes; and that therefore, any aggrieved person can report any unlawful content through this portal as well; ii. That in a case such as the present one, the provisions of section 66E of the IT Act, which is a penal provision relating to punishment for violation of privacy and Rules 3(2)(b), 3(2)(e), iii. That law enforcement agencies have a role in protecting the individual's privacy and, for that reason, the recommendation by the learned Amicus Curiae for direct action by courts is not what the Legislature intended.

Submissions of Facebook Inc. / Instagram

72. Relying upon short affidavit dated 04.09.2020 filed on behalf of Facebook Inc./respondent No.4, which also owns the social media platform 'Instagram', Mr. Parag Tripathi, learned senior counsel has submitted that Facebook has a robust privacy policy and also adopts global best practices to protect the privacy of its users to permit a safe online experience. He points-out that though it is the petitioner's allegation that her photographs and images were taken from her Facebook/Instagram social media accounts, the petitioner does not claim any relief against Facebook/Instagram. He further submitted that Facebook/Instagram users have various privacy settings available to them, by which they may restrict access to their content and lock their profile so that others cannot view their photographs or posts nor zoom into and download their profile pictures, unless otherwise permitted by the user. It is submitted that Facebook now also has features called 'Profile Picture Guard' and 'Audience selector', which give even more control to users over their profile pictures and other content available on their social media accounts. It is stated that similar features are also available on the Instagram social media platform.

73. Facebook submitted that it actively collaborates with other stakeholders for removal of unlawful online content; and complies with the mandate as contained inter alia in *Shreya Singhal* (supra). In any case, Mr. Tripathi submitted, that Facebook has in the past, and is also ready and willing in future, to cooperate with an aggrieved party and with law enforcement agencies to remove offending content in accordance with applicable law, and most certainly pursuant to any court order made in that regard.

87. In the first instance therefore, an intermediary cannot be heard to say that it is unable to remove or disable access to offending content despite such actual knowledge as contemplated in law. That being said however, this court cannot ignore the difficulties expressed by the intermediaries in the present case, in identifying and removing offending content, which intermediaries, this court thinks, effectively represent the perspective and point-of-view of several other intermediaries who are similarly placed.

88. To be fair, none of the respondent intermediaries has at all taken a stand before this court that they are not ready or willing to remove offending content if directed by a court order or by an appropriate governmental agency. The intermediaries have only said that it may not be possible to identify the offending content appearing in various disguises and corrupted avatars; and further that, it would be too onerous and impractical to place upon them the responsibility to keep on a lookout for offending content re-surfacing in the various different disguises and corrupted avatars at the instance of mischief-makers, on a continuing basis.

89. In the opinion of this court, for an order directing the removal or access disablement of offending content to be effective even within India, a search engine must block the search results throughout the world since no purpose would be served by issuing such an order if it has no realistic prospect of preventing irreparable harm to a litigant. To borrow the words of the Hon'ble Supreme Court of Canada in *Google Inc. v. Equustek Solutions Inc.* et al. (supra), as also observed by others courts in other jurisdictions, the de-indexing of offending content globally does not require the search engine to "take any steps around the world, it requires it to take steps only where its Search engine is controlled. (viii) The court may direct the aggrieved party to make a complaint on the National Cyber-Crime Reporting Portal (if not already done so), to initiate the process provided for grievance redressal on that portal;

(ix) Most importantly, the court must refer to the provisions of section 79(3)(a) and (b) read with section 85 of the IT Act and Rule 7 of the 2021 Rules, whereby an intermediary would forfeit the exemption from liability enjoyed by it under the law if it were to fail to observe its obligations for removal/access disablement of offending content despite a court order to that effect.

Directions in this matter:

92. In line with the above suggested template of directions, in the present case this court is satisfied that the action of the petitioner's photographs and images having been taken from her Facebook and Instagram accounts and having been posted on the website www.Xhamster.com; and then having been re-posted onto other websites and online platforms, amounts prima facie to an offence under section 67 of the IT Act in addition to other offences under the IPC; and that appropriate directions are required to be issued directing the State and other respondents to forthwith remove and/or disable access to the offending content from the world-wide-web to the maximum extent possible.

Accordingly the following directions are issued:

(i) The petitioner is directed to furnish in writing to the Investigating Officer of the subject FIR, all available information relating to the offending content, including the Image URL and Web URL pertaining to the offending image files, within 24 hours of receipt of a copy of this judgment, if not already done so; (ii) The Delhi Police/CyPAD Cell are directed to remove/disable access to the offending content, the Web URL and Image URL of which would be furnished by the petitioner as above, from all websites and online platforms, forthwith and in any event within 24 hours of receipt of information from the petitioner. It may be recorded that the Delhi Police have stated before this court that the offending content has already been removed from respondent No. 5 website www.Xhamster.com; (iii) A direction is issued to the search engines Google Search, Yahoo Search, Microsoft Bing and Duck Duck Go, to globally de-index and de-reference from their search results the offending content as identified by its Web URL and Image URL, including de-indexing and de-referencing all concerned web-pages, sub-pages or sub-directories on which the offending content is found, forthwith and in any event within 24 hours of receipt of a copy of this judgment along with requisite information from the Investigating Officer as directed below; (iv) A further direction is issued to the search engines Google Search, Yahoo Search, Microsoft Bing, Duck Duck Go, to endeavour to use automated tools, to proactively identify and globally disable access to any content which is exactly identical to the offending content, that may appear on any other websites/online platforms; (v) The Investigating Officer is directed to furnish in writing the Web URL and Image URL of the offending content to the other entities to whom directions have been issued by this court in the present matter, along with a copy of this judgment, within 24 hours of receipt of such copy; (vi) The Delhi Police are directed to obtain from the concerned website, namely www.Xhamster.com and from the search engines Google Search, Yahoo Search, Microsoft Bing, Duck Duck Go (and any other search engines as may be possible) all information and associated records relating to the offending content such as the URL, account ID, handle name, Internal Protocol Address, hash value and other such information as may be necessary, for investigation of case FIR No. 286/2020 dated 18.07.2020 registered under section 354A IPC and 66C IT Act at P.S.: Dwarka South, forthwith and in any event within 72 hours of receipt of a copy of this judgment, if not already done so; (vii) Furthermore, the petitioner is granted liberty to issue written communication to the Investigating Officer for removal/access disablement of the same or similar offending content appearing on any other website/online platform or search engine(s), whether in the same or in different context; with a corresponding direction to the Investigating Officer to notify such website/online platform or search engine(s) to comply with such request, immediately and in any event within 72 hours of receiving such written communication from the petitioner; (viii) Notwithstanding the disposal of the present petition by this order, if any website, online platform, search engine(s) or law enforcement agency has any doubt or grievance as regards compliance of any request made by petitioner as aforesaid, such entity shall be at liberty to approach this court to seek clarification in that behalf.

93. It is made clear that non-compliance with the foregoing directions would make the non-compliant party liable to forfeit the exemption, if any, available to it generally under section 79(1) of the IT Act

and as specified by Rule 7 of the 2021 Rules; and shall make such entity and its officers liable for action as mandated by section 85 of the IT Act. 94. In view of the directions issued herein above, no further orders are called for in the present petition, which is accordingly disposed of.

95. Other pending applications, if any, also stand disposed of.

96. This court records its deep appreciation for the invaluable assistance rendered in the matter by the learned Amicus Curiae Dr. Pavan Duggal.

97. A copy of this judgment is communicated to counsel for the petitioner and counsel for all the named respondents, as per the amended memo of parties immediately via e-mail, for compliance by the concerned parties.

Media, Advertisement and Law
Protection of Minors from Harmful and Disturbing Material

Ajay Goswami v. Union of India

AIR 2007 SC 493

Dr. A.R. Lakshmanan, J. (for himself and Tarun Chatterjee, J.): The Petitioner is a lawyer by profession. Respondent No.1 is Union of India, respondent No.2 is a statutory body, respondent Nos. 3 & 4 are the leading national daily newspapers and respondent No.5 & 6 are news agencies. The present petition involves a substantial question of law and public importance on the fundamental right of the citizens, regarding the freedom of speech and expression as enshrined under Article 19(1)(a) of the Constitution of India. The petitioner's grievance is that the freedom of speech and expression enjoyed by the newspaper industry is not keeping balance with the protection of children from harmful and disturbing materials. Article 19(1)(a) guarantees freedom of speech and expression of individual as well as press. It acknowledges that the press is free to express its ideas but on the same hand, individual also has right to their own space and right not to be exposed against their will to other's expressions of ideas and actions. By way of this petition, the petitioner requested the Court to direct the authorities to strike a reasonable balance between the fundamental right of freedom of speech and expression enjoyed by the press and the duty of the Government, being signatory of United Nations Convention on the Rights of the Child, 1989 and Universal Declaration of Human Rights, to protect the vulnerable minors from abuse, exploitation and harmful effects of such expression. The petitioner requested the Court to direct the concerned authorities to provide for classification or introduction of a regulatory system for facilitating climate of reciprocal tolerance, which may include:

- (a) an acceptance of other people's rights to express and receive certain ideas and actions; and
- (b) accepting that other people have the right not to be exposed against their will to one's expression of ideas and actions. The reciprocal tolerance is further necessary considering the growing tendency among youngsters and minors in indulging in X-rated jokes, SMS and MMS.

The Lawyer Petitioner who appeared in person submitted that he filed this petition to seek protection from this Court to ensure that minors are not exposed to sexually exploitative materials, whether or not the same is obscene or is within the law. The real objective is that the nature and extent of the material having sexual contents should not be exposed to the minors indiscriminately and without regard to the age of minor. The discretion in this regard should vest with parents, guardians, teachers or experts on sex education. The petitioner is not in any way seeking restrain on the freedom of press or any censorship prior to the publication of article or other material. The petitioner is only seeking for the regulation at the receiving end and not at the source. Whatever is obscene is not protected by any law and there are numerous avenues for the redressal of grievance for the publication of any obscene material. However, all sex oriented material are not always obscene or even indecent or immoral. The effect of words or written material should always judged

from the standards of reasonable strong minded, firm and courageous man i.e. an average adult human being. No attempt has been made till date to define any yardstick for the minors whose tender minds are open for being polluted and are like plain state on which any painting can be drawn.

1. Is the material in newspaper really harmful for the minors?

These articles etc. may not be obscene within the four corners of law but certainly have tendencies to deprave and corrupt the minds of young and adolescent who by reasons of their physical and mental immaturity needs special safeguards and care. He invited our attention to some of the clippings annexed along with the petition. These clipping are only examples and such examples not only confine to newspapers mentioned herein but is of general nature. The double meaning jokes cannot in any way leave healthy impact on the tender minds of the teenagers. The photographs certainly are part of news from around the world and India. However, the tone and tenor of the article as a whole and the way some of the photographs are published and described may not be in the interest of the minors. The photographs annexed at page 24 of the paper book and the caption below them such as “the center of attention”, “double jeopardy” “butt of course” leave much for the thoughts of minors. If the minor is of an age where he/she cannot understand the meaning, he/she would like to know from others and if the minor has come to an age where he/she is able to understand this would certainly energize his grey cells in the brain and would titillate him/her. What kind of culture and message the article titled “moan for more” or “get that zing bag into your sex life” convey? Is it really necessary for a child to read at a very early stage the concept of masturbation, ejaculation, penetration etc. as is normally discussed by so called sex experts in columns of newspapers? At what age should we start telling our children where to have sex and how to break their monotony? News item on MMS clipping is certainly not obscene but do we really need to show the nude photographs with only small black stripes on the private parts to our children without even bothering of its effect? In Times of India dated 1.8.2005 an article titled “Porn In potter VI” was published, copy of which is annexed with the petition. The author has tried to read and suggest sexual messages in these lines. Children who were reading the book might not have any such inclination. However, after reading newspaper their mind would certainly wander to an area which the author might not have even conceived. No doubt, we are not living an era of Gandhari but certainly we have culture and respect for elders and some decorum and decency towards children. Undoubtedly, such kind of stuff is available freely on internet, movies, televisions etc. but are the families and the community environment really ready to accept it *in toto* or are they passive receiver of the same without any control or check. Are these articles really making our children morally healthy? Moral values should not be allowed to be sacrificed in the guise of social change or cultural assimilation.

2. Whether the minors have got any independent right enforceable under Article 32 of the Constitution?

The right of the minor flows from Article 19(1)(a), Article 21 read with Article 39(f) of the Constitution of India and United Nation Convention on the Rights of the Child. In a recent judgment delivered by this court in the matter of Director General, Directorate General of Doordarshan &

Ors. Vs. Anand Patwardhan & Anr. (C.A.No. 613 of 2005), to which one of us was a member, Dr. Justice AR. Lakshmanan, observed as under:

“...one of the most controversial issue is balancing the need to protect society against the potential harm that may flow from obscene material, and the need to ensure respect for freedom of expression and to preserve a free flow of information and idea.”

It was further observed by this Court:

“The Indian Penal Code on obscenity grew out of the English Law, which made court the guardian of public morals. It is important that where bodies exercise discretion, which may interfere in the enjoyment of constitutional rights, that discretion must be subject to adequate law.”

“The judge should thereafter place himself in the position of a reader of every age group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have in the minds of the readers.”

It was observed by this Court in the matter of *Lakshmikant Pandey v. Union of India*, (1984) 2 SCC 244 as follows:

“It is obvious that in a civilized society the importance of child welfare cannot be over-emphasized, because the welfare of the entire community, its growth and development, depend on the health and well-being of its children. Children are a “supremely important national asset” and the future well being of the nation depends on how its children grow and develop. The great poet Milton put it admirably when he said: “Child shows the man as morning shows the day” and the Study Team on Social Welfare said much to the same effect when it observed that “the physical and mental health of the nation is determined largely by the manner in which it is shaped in the early stages”. The child is a soul with a being, a nature and capacities of its own, who must be helped to find them, to grow into their maturity, into fullness of physical and vital energy and the utmost breadth, depth and height of its emotional, intellectual and spiritual being; otherwise there cannot be a healthy growth of the nation. Now obviously children need special protection because of their tender age and physique mental immaturity and incapacity to look-after themselves. That is why there is a growing realization in every part of the globe that children must be brought up in an atmosphere of love and affection and under the tender care and attention of parents so that they may be able to attain full emotional, intellectual and spiritual stability and maturity and acquire self-confidence and self-respect and a balanced view of life with full appreciation and realization of the role which they have to play in the nation building process without which the nation cannot develop and attain real prosperity because a large segment of the society would then be left out of the developmental process. In India this consciousness is reflected in the provisions enacted in the Constitution. Clause (3) of Article 15 enables the State to make special provisions inter alia for children and Article 24 provides that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment. Clauses (e) and (f) of Article 39 provide that the State shall direct its policy towards securing inter alia that the tender age of children is not abused, that citizens are not forced by economic necessity to enter avocations unsuited to their age and strength and that children are given facility to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against

exploitation and against moral and material abandonment. These constitutional provisions reflect the great anxiety of the constitution makers to protect and safeguard the interest and welfare of children in the country. The Government of India has also in pursuance of these constitutional provisions evolved a National Policy for the Welfare of Children. This Policy starts with a goal-oriented perambulatory introduction:

The nation's children are a supremely important asset. Their nurture and solicitude are our responsibility. Children's programme should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skills and motivations needed by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve our larger purpose of reducing inequality and ensuring social justice. The National Policy sets out the measures which the Government of India proposes to adopt towards attainment of the objectives set out in the perambulatory introduction and they include measures designed to protect children against neglect, cruelty and exploitation and to strengthen family ties "so that full potentialities of growth of children are realised within the normal family neighbourhood and community environment .."

Further this Court in *Unnikrishnan, J.P & Ors v. State of Andhra Pradesh & Ors.*, (1993) 1 SCC 645 upheld the right to education for children of age of 14 as fundamental right. In para 165, this Court observed as follows: "It is thus well established by the decisions of this Court that the provisions of Parts III and IV are supplementary and complementary to each other and that Fundamental Rights are but a means to achieve the goal indicated in Part-IV. It is also held that the fundamental Rights must be construed in the light of the Directive Principles. It is from the above stand- point that Question No. 1 has to be approached".

This judgment to that extent was not overruled even by larger Bench. This Court in the case of *Unnikrishnan (supra)* relied upon numerous judgments. In *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala & Another*, (1973) 4 SCC 225, this court observed as follows:

"...The fundamental rights and the directive principles constitute the 'conscience' of our Constitution. To ignore Part IV is to ignore the sustenance provided for in the Constitution, the hopes held out to the Nation and the very ideals on which our Constitution is built here is no anti-thesis between the fundamental rights and the directive principles. One supplements the other. Both Parts III and IV have to be balanced and harmonized then alone the dignity of the individual can be achieved. They (fundamental rights and directive principles) were meant to supplement each other.

Mathew, J., while adopting the same approach remarked: (SCC pp. 875-76, para 1700) The object of the people in establishing the Constitution was to promote justice, social and economic, liberty and equality. The modus operandi to achieve these objectives is set out in Part III and IV of the Constitution. Both parts III and IV enumerate certain moral rights. Each of these parts represent in the main the statements in one sense of certain aspirations whose fulfillment was regarded as essential to the kind of society which the Constitution-makers wanted to build. Many of the articles, whether in Part III or IV, represents moral rights which they have recognized as inherent in every

human being in this country. The tasks of protecting and realizing these rights is imposed upon all organs of the state, namely, legislative, executive and judicial. What then is the importance to be attached to the fact that the provisions of Part III are enforceable in a court and the provisions in Part IV are not? Is it that the rights reflected in the provisions of Part III are somehow superior to the moral claims and aspirations reflected in the provisions of Part IV or not? I think not. Free and compulsory education under Article 25, Freedom from starvation is as important as right to life. Nor are the provisions in Part III absolute in the sense that the rights represented by them can always be given full implementation..."

This Court also cited observation in *Brown v. Board of Education* 347 US 483 (1954) wherein it was emphasized in the following words:

"Today, education is perhaps the most important function of State and a local government. It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful any child may reasonably be expected to succeed in life if he is denied the opportunity of education."

This Court in the case of *M.C. Mehta v. State of T.N. and Ors.*, (1996) 6 SCC 756 observed that: "Of the aforesaid provisions, the one finding place in Article 24 has been a fundamental right ever since 28th January, 1950. Article 45 too has been raised to high pedestal by *Unnikrishnan*, which was decided on 4th February, 1993. Though other articles are part of directive principles, they are fundamental in the governance of our country and it is the duty of all the organs of the State (*a la* Article 37) to apply these principles. Judiciary, being also one of the three principal organs of the State, has to keep the same in mind when called upon to decide matters of great public importance. Abolition of child labour is definitely a matter of great public concern and significance. It would be apposite to apprise ourselves also about our commitment to world community. For the case at hand it would be enough to note that India has accepted the convention on the Rights of the Child, which was concluded by the UN General Assembly on 20th November, 1989. This Convention affirms that children's right require special protection and it aims, not only to provide such protection, but also to ensure the continuous improvement in the situation of children all over the world, as well as their development and education in conditions of peace and security. Thus, the Convention not only protects the child's civil and political right, but also extends protection to child's economic, social, cultural and humanitarian rights."

3. Maintainability of Petition In view of the above facts and circumstances and legal proposition

Mr. Ajay Goswami, the petitioner-in-person submitted that:

- i) Newspapers are publishing sex-oriented material which may not be obscene otherwise but still caters to prurient interest of the minor.
- ii) Minors have got fundamental right under Article 19(1)(a), Article 21 read with Article 39(f) of the Constitution and United Nation Convention on the Rights of the Child. As freedom of speech and expression also includes the expressions of the minors which need care as the minor due to

their tender age and mental immaturity are not capable of deciding themselves as to what is in the interest of their growth morally & culturally, so that they can assume their responsibility within the community.

iii) The right also flows from Article 21 as the right to live shall also include right to education as pronounced in the judgments of this Court. By necessary corollary, it shall also mean right to proper education which may be decided by the parents, teachers and other experts and newspapers cannot be allowed to disturb that by their indeterminate access of the offending article to the minors regardless of their age.

iv) The State which has the duty to protect the minors by appropriate legislation or executive orders has failed in its duty. The Press Council of India which was constituted for preserving the freedom of press and maintaining and improving the standards of newspapers and news agency is a powerless body. No guidelines have been framed for the minors and adolescents in particular, which can be enforced in Court of law. The Council itself feels the necessity of some strong and effective measure to correct it.

v) The citizens of this country can only pray to this Court to prevent injustice being done to them. This Court under Article 32 read with Article 142 can issue guidelines to ensure the growth of the children in a healthy and moral atmosphere which is exploited by the newspapers. Mr. Ajay Goswami relied on two judgments of this Court. In *Comptroller & Auditor General of India & anr. v. K.S. Jagnathan*, (1986) 2 SCC 679, this Court held as under: "In order to prevent injustice resulting to the concerned parties, the Court may itself pass an order to give directions which the government or the public authority should have passed or given had it properly and lawfully exercised its discretion."

Similarly in *Vineet Narain & Ors. v. U.O.I.* (1998) 1 SCC 226, this Court held as under:

"There are ample powers conferred by Article 32 read with Article 142 to make orders which have the effect of law by virtue of Article 141 and there is mandate to all authorities to act in aid of the orders of this Court as provided in Article 144 of the Constitution. In a catena of decisions of this Court, this power has been recognized and exercised, if need be, by issuing necessary directions to fill the vacuum till such time the legislature steps in to cover the gap or the executive discharges its role."

"Where there is inaction by the legislature it is the duty of executive to fill the vacuum and where there is inaction even by executive for whatever reasons judiciary must step in."

Concluding his arguments, Mr. Ajay Goswami, petitioner-in-person made the following proposals:

- i) Guidelines in detail may be issued to all the newspapers regarding the matter which may not be suitable for the reading of minors or which may require parents or teachers discretion.
- ii) Newspapers should have self-regulatory system to access the publication in view of those guidelines.
- iii) In case the newspapers publish any material which is categorized in the guidelines the newspaper be packed in some different form and should convey in bold in front of newspapers of the existence of such material.

iv) This would give discretion to the parents to instruct the news-vendor whether to deliver such newspaper or not.

OR In the alternative, he suggested a Committee be appointed to suggest ways and means for regulating the access of minors to adult oriented sexual, titillating or prurient material. Mr. Harish Chandra, learned senior counsel appearing for Union of India - respondent No.1 in reply to the arguments of the petitioner submitted that publishing as well as circulating of obscene and nude/semi-nude photographs of women already constitutes a penal offence under the provisions of the Indecent Representation of Women (Prohibition) Act, 1986, administered by the Department of Women & Child Development, Ministry of Human Resources Development. Relevant Sections 3 & 4 of the Indecent Representation of Women (Prohibition) Act, 1986 are reproduced hereunder for ready reference:

“3. Prohibition of advertisements containing indecent representation of woman:

No person shall publish, or cause to be published or arrange or take part in the publication or exhibition or, any advertisement which contains indecent representation of women in any form.

4. Prohibition of publication or sending by post of books, pamphlets etc. containing indecent representation of women – No person shall produce or cause to be produced, sell, let to hire, distribute or circulate or send by post any book, pamphlet, paper, slide, film, writing drawing, painting, photographs, representation or figure of women in any form, provided that nothing in this section shall apply to:

(a) any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure:

(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure is in the interest of science, literature, art or learning or other object of general concern; or

(ii) which is kept or used bona fide for religious purposes;

(b) any representation sculptured, engraved, painted or otherwise represented on or in -

(i) any ancient monument within the meaning of the Ancient Monument and Archaeological Sites and Remains Act, 1958 (24 of 1958)

(ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purposes;

(c) any film in respect of which the provisions of Part II of the Cinematograph Act, 1952 (37 of 1952), will be applicable.”

Section 6 of the Indecent Representation of Women (Prohibition) Act, 1986 provides the penalty for committing such offences in contravention of Sections 3 & 4 of the said Act. Section 6 reads as follows:

“6. Penalty- Any person who contravenes the provisions of Sections 3 & 4 shall be punishable on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and in the event of a second or subsequent conviction with imprisonment for a term of not less than six months but which may extend to five years and also with a fine not less than ten thousand rupees but which may extend to one lac rupees.”

It was further submitted that sale, letting, hiring, distributing, exhibiting, circulating of obscene books and objects of young persons under the age of twenty years also constitutes a penal offence under Sections 292 and 293 of the Indian Penal Code and is punishable on first conviction with imprisonment of either description for a term which may extend to two thousand rupees and in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to seven years, and also with fine which may extend to five thousand rupees. Concluding his submissions, he submitted that there are laws in existence which prohibit publishing, circulating and selling obscene books and objects to young persons and it is the responsibility of the "Press" to adhere to and comply with these laws and not to abuse the freedom of speech and expression (freedom of press) guaranteed under Article 19(1)(a) of the Constitution of India.

Mr. P.H. Parekh, learned counsel appearing for respondent No.2 – Press Council of India, submitted that the Press Council enjoys only limited authority, with its power limited to giving directions, censure etc. to the parties arraigned before it, to publish particulars relating to its enquiry and adjudication etc. The powers of the Council in so far its authority over the press is concerned are enumerated under Section 14 of the Press Council Act, 1978. However, it has no further authority to ensure that its directions are complied with and its observations implemented by the erring parties. Lack of punitive powers with Press Council has tied its hands in exercising control over the erring publications. Learned counsel further submitted that despite various requests to the Central Government from the year 1999 to amend the Press Council Act, 1978, the same has not been amended. Recently, on 1.6.2006, under clause 18(d), an advertisement policy was issued by the Directorate of Audio Visual Publicity under the Central Government Advertisement Policy stating that the newspapers will be suspended from empanelment by DG, DAVP with immediate effect if it indulged in unethical practices or anti-national activities as found by the Press Council of India. Learned counsel further submitted that as the issue which arise in the present petition requires urgent action, it will be appropriate that this Court may formulate certain guidelines as suggested by the Press Council vide its letter dated 6.1.2002 for amendment by way of incorporation of two provisions viz., Section 14(2)(a) and Section 14(2)(b) in the Press Council Act, 1978 till the law made by the legislature amending the Press Council Act, 1978 as per the various judgments passed by this Court which are as follows:

1. *Vishaka & Ors. v. State of Rajasthan & Ors.* (1997) 6 SCC 241
2. *Vineet Narain & Ors. v. U.O.I. & Ors.*, (1998) 1 SCC
3. *Union of India v. Association for Democratic Reforms and Anr.* (2002) 5 SCC 294

Learned counsel submitted that this Court may consider to issue appropriate guidelines.

Learned counsel appearing for respondent no. 3 (Times of India) contented that legislations, rules and regulations already exists within the Indian legal framework to check publication of obscene materials and articles. Section 292 of the Indian Penal Code prohibits and punishes selling, hiring, exhibition, circulation, possession, importation, exportation of obscene material. Sections 3 and 4 of the Indecent Representation of Women Act also imposes a prohibition on the publication or sending by post of books, pamphlets etc, selling, hiring, distributing and circulating any material

that contains indecent representation of women in any form. Section 6 of the said Act, also provides for punishment in the case of non-compliance to sections 3 and 4 of the Act. Further he submitted that the Press Council of India is constituted duly under the Constitution of India for regulating the functions and activities of the Press. Sections 13 (2) (c), 14 (1) and 14 (2) of the Press Council of India Act empowers the Press Council to impose serious checks on the Newspaper, News Agency, an editor or a journalist who flouts the norms as formulated by the Press Council and is against societal norms of decency. Learned Counsel also submitted that the Indian Constitution under Article 19 (1) (a) guarantees every citizen the right to freedom of speech and expression and respondent being a leading Newspaper has the right to express its views and various news of National and International relevance in its edition and any kind of unreasonable restriction on this right will amount to the violation of the right guaranteed by the Indian Constitution. Learned Counsel referred to a recent judgment of this Court, *Director General of Doordarshan and Ors. v. Anand Patwardhan (supra)*, it was observed that the basic test for obscenity would be:

“(a) whether the average person applying contemporary community standards would find that the work, taken as a whole appeal to the prurient interest;

(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically, defined by the applicable state law,

(c) whether the work taken as a whole, lacks serious literary, artistic, political or scientific value.”

In *Shri Chandrakant Kalyandas Kakodkar v. The State of Maharashtra and Others*, [1962 (2) SCC 687], this Court observed that:

“12. The concept of obscenity would differ from country to country depending on the standards of morals of contemporary society. What is considered as a piece of literature in France may be obscene in England and what is considered in both countries as not harmful to public order and morals may be obscene in our country. But to insist that the standard should always be for the writer to see that the adolescent ought not to be brought into contact with sex or that if they read any references to sex in what is written whether that is the dominant theme or not they would be affected, would be to require authors to write books only for the adolescent and not for the adults.” Learned counsel referred to the case of *Samaresh Bose and Another v. Amal Mitra and Another*, (1985) 4 SCC 289, this court observed that:

“The decision of the Court must necessarily be on an objective assessment of the book or story or article as a whole and with particular reference to the passages complained of in the book, story or article. The Court must take an overall view of the matter complained of as obscene in the setting of the whole work, but the matter charged as obscene must also be considered by itself and separately to find out whether it is so gross and its obscenity so pronounced that it is likely to deprave and corrupt those whose minds are open to influence of this sort and into whose hands the book is likely to fall.”

Learned counsel also referred to American jurisprudence and stated that even nudity per se is not obscenity. In 50 Am Jur 2 d, para 22 at page 23,

“Articles and pictures in a newspaper must meet the Miller’s test’s Constitutional standard of obscenity in order for the publisher or distributor to be prosecuted for obscenity. Nudity alone is not enough to make a material legally obscene.”

In *Alfred E Butler v. State of Michigan*, 1 Led 2d 412, the U.S. Supreme Court has held that:

“The state insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig.”

Further the learned counsel submitted that, the Times of India, respondent no.3, is one of the leading newspapers and its popularity only stands to show that the pictures published in it are not objectionable and also that respondent while publishing any news article has any intention to cater to the prurient interest of anybody. Also the respondent no.3 has an internal regulatory system to ensure that no objectionable photograph or matter gets published.

Mr. Gopal Jain, learned counsel appearing for Hindustan Times respondent no.4, practically adopted the arguments put forth by respondent no.3. In addition, respondent no.4 drew our attention to the Guidelines under the “Norms of Journalistic Conduct” which lays down guidelines for newspapers/ journalists to maintain standards with regard to obscenity and vulgarity.

Norm 17 reads as follows:

“Obscenity and vulgarity to be eschewed

i) Newspapers/journalists shall not publish anything which is obscene, vulgar or offensive to public good taste.

ii) Newspapers shall not display advertisements which are vulgar or which, through depiction of a woman in nude or lewd posture, provoke lecherous attention of males as if she herself was a commercial commodity for sale.

iii) Whether a picture is obscene or not, is to be judged in relation to three tests: namely

a) Is it vulgar and indecent?

b) Is it a piece of mere pornography?

c) Is its publication meant merely to make money by titillating the sex feelings of adolescents and among whom it is intended to circulate? In other words, does it constitute an unwholesome exploitation for commercial gain?

Other relevant considerations are whether the picture is relevant to the subject matter of the magazine. That is to say, whether its publication serves any preponderating social or public purpose, in relation to art, painting, medicine, research or reform of sex.

iv) The globalisation and liberalization does not give licence to the media to misuse freedom of the Press and to lower the values of the society. The media performs a distinct role and public purpose which require it to rise above commercial consideration guiding other industries and businesses. So far as that role is concerned, one of the duties of the media is to preserve and promote our cultural heritage and social values.

v) Columns such as ‘Very Personal’ in a newspaper replying to personal queries of the readers must not become grossly offensive presentations, which either outrage public decency or corrupt public moral.”

Learned Counsel contented that, the test of judging should be that of an ordinary man of common sense and prudence and not an "out of the ordinary hypersensitive man". In the case of K.A. Abbas, Hidayatullah, C.J. opined: "If the depraved begins to see in these things more than what an average person would, in much the same way, as it is wrongly said, a Frenchman sees a woman's legs in everything, it cannot be helped."

Learned counsel further explained the procedure followed by Hindustan Times before the publication of any advertisement, "Advertisements are scrutinized by the advertising department and in the event the advertising department is in doubt, the assistance of the legal department is resorted to. The departments are manned by qualified persons who are well acquainted with the Norms and Guidelines issued by the Press Council."

Further the learned counsel submitted that, keeping in mind special educational needs of the school-going students a supplement called "HT Next- School Times" is published by Hindustan Times. The respondent does not send any other supplement other than this to educational institutions along with the main paper. Thus, it was stated that respondent realizes its responsibility towards children and at the same time it would be inappropriate to deprive the adult population of the entertainment which is well within the acceptable levels on the ground that it may not be appropriate for the children. In conclusion, it was urged that any step to ban publishing of certain news-pieces or pictures would fetter the independence of free-press.

We have given our careful consideration to the entire material placed before us and the rival submissions made by learned counsel appearing for the respective parties.

Maintainability of Writ Petition:

Before proceeding further, we feel better to reproduce the prayers made in the writ petition which read as follows:

"1) Issue writ in the nature of writ of mandamus/order or direction to the respondent Nos. 1 & 2 for laying down rules/regulations to ensure that minor is not exposed to sexually explicit material whether or not the same is obscene or is within the law without express consent of the parents, guardians or the experts on sex education.

2) Respondent Nos. 1 & 2 be directed to constitute an expert committee to look into the problem of unwanted exposure to the minor through press and to lay down appropriate rules and regulations for the same."

The maintainability of the writ petition was also raised as a preliminary issue by learned counsel appearing for some of the respondents and, in particular, respondent Nos. 3 and 4. Learned counsel for respondent No.3 pointed out that there can be no mandamus for legislation and in support of the said submission, he relied on the judgment of this Court in *Networking of Rivers: In Re* [2004 (11)

SCC 360] wherein this Court held.

"It is not open to this Court to issue any direction to Parliament to legislate but the Attorney General submits that the Government will consider this aspect and, if so advised, will bring an appropriate legislation."

He also cited *Common Cause v. Union of India & Ors.*, 2003 (8) SCC 250. This Court held:

“From the facts placed before us it cannot be said that the Government is not alive to the problem or is desirous of ignoring the will of Parliament. When the legislature itself had vested the power in the Central Government to notify the date from which the Act would come into force, then the Central Government is entitled to take into consideration various facts including the facts set out above while considering whether the Act should be brought into force or not. No mandamus can be issued to the Central Government to issue the notification contemplated under Section 1 (3) of the Act to bring the Act into force, keeping in view the facts brought on record and the consistent view of this Court.”

We have already noticed the prayer in the present writ petition. In our view, the prayer No.1 cannot at all be countenanced inasmuch as sufficient protection in the form of legislations, rules, regulations and norms have already been laid down under the Press Council Act, 1978, I.P.C. etc. Prayer No.2 equally is vague and no case has been made out for constituting an Expert Committee.

LEGISLATIONS AGAINST OBSCENITY:

Section 13 of the Press Council Act, 1978 specifies the objects and functions of the council.

Section 13(2) (c) states: ...to ensure on the part of newspapers, news agencies and journalists, the maintenance of high standards of public taste and foster a due sense of both the rights and responsibilities of citizenship”;

Section 14(1) states: Where, on receipt of a complaint made to it or otherwise, the Council has reason to believe that a newspaper or news agency has offended against the standards of journalistic ethics or public taste or that an editor or working journalist has committed any professional misconduct, the Council may, after giving the newspaper, or news agency, the editor or journalist concerned an opportunity of being heard, hold an inquiry in such manner as may be provided by regulations made under this Act and, if it is satisfied that it is necessary so to do, it may, for reasons to be recorded in writing, warn, admonish or censure the newspaper, the news agency, the editor or the journalist or disapprove the conduct of the editor or the journalist, as the case may be :

Provided that the Council may not take cognizance of a complaint if in the opinion of the Chairman, there is no sufficient ground for holding an inquiry.

Section 14(2) states: If the Council is of the opinion that it is necessary or expedient in public interest so to do, it may require any newspaper to publish therein in such manner as the Council thinks fit, any particulars relating to any inquiry under this section against a newspaper or news agency, an editor or a journalist working therein, including the name of such newspaper, news agency, editor or journalist.

Section 292 of the Indian Penal Code reads:- “Sale, etc., of obscene books, etc._ (1) For the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt person, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it].

[(2)] Whoever-

(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or

having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section, shall be punished on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a 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 five thousand rupees.

[Exception- This section does not extend to-

(a) any book, pamphlet, paper, writing, drawing, painting, representation or figure-

(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art of learning or other objects of general concern, or

(ii) which is kept or used bona fide for religious purposes;

(b) any representation sculptured, engraved, painted or otherwise represented on or in-

(i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958), or

(ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.]”

Sections 4 and 6 of the Indecent Representation of Women Act, 1986 are also in existence.

In view of the availability of sufficient safeguards in terms of various legislations, norms and rules and regulations to protect the society in general and children, in particular, from obscene and prurient contents, we are of the opinion that the writ at the instance of the petitioner is not maintainable. Article 19(1)(a) deals with freedom of speech and expression. In the matter of *Virendra v. State of Punjab & Another*, [AIR 1957 SC 896] this Court held:

“It is certainly a serious encroachment on the valuable and cherished right to freedom of speech and expression if a newspaper is prevented from publishing its own views or the views of its

correspondents relating to or concerning what may be the burning topic of the day. Our social interest ordinarily demands the free propagation and interchange of views but circumstances may arise when the social interest in public order may require a reasonable subordination of the social interest in free speech and expression to the needs of our social interest in public order. Our Constitution recognises this necessity and has attempted to strike a balance between the two social interests. It permits the imposition of reasonable restrictions on the freedom of speech and expression in the interest of public order and on the freedom of carrying on trade or business in the interest of the general public. Therefore, the crucial question must always be: Are the restrictions imposed on the exercise of the rights under Arts. 19(1)(a) and 19(1)(g) reasonable in view of all the surrounding circumstances? In other words are the restrictions reasonably necessary in the interest of public order under Art. 19(2) or in the interest of the general public under Art. 19(6)?"

Test of obscenity:

This Court has time and again dealt with the issue of obscenity and laid down law after considering the right of freedom and expression enshrined in Article 19(1)(a) of the Constitution of India, its purport and intent, and laid down the broad principles to determine/ judge obscenity. In a recent judgment *Director General, Directorate General of Doordarshan & Ors. v. Anand Patwardhan & Anr.* reported in JT 2006(8) SC 255 (Dr. AR. Lakshmanan and L.S. Panta, JJ) This Court has referred to the *Hicklin test* laid down in 1868-3 QB 360 and observed: (refer above to the quoted para from the judgment)

In *Shri Chandrakant Kalyandas Kakodkar v. The State of Maharashtra and Others*, 1969 (2) SCC 687. This Court has held:

"In early English writings authors wrote only with unmarried girls in view but society has changed since then to allow litterateurs and artists to give expression to their ideas, emotions and objectives with full freedom except that it should not fall within the definition of 'obscene' having regard to the standards of contemporary society in which it is read. The standards of contemporary society in India are also fast changing. The adults and adolescents have available to them a large number of classics, novels, stories and pieces of literature which have a content of sex, love and romance. As observed in *Udeshi's case (supra)* if a reference to sex by itself is considered obscene, no books can be sold except those which are purely religious. In the field of art and cinema also the adolescent is shown situations which even a quarter of a century ago would be considered derogatory to public morality, but having regard to changed conditions are more taken for granted without in anyway tending to debase or debauch the mind. What we have to see is that whether a class, not an isolated case, into whose hands the book, article or story falls suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thought aroused in their minds. The charge of obscenity must, therefore, be judged from this aspect."

In *Samaresh Bose & Anr. v. Amal Mitra & Anr. (supra)*, this Court held as under:

"In England, as we have earlier noticed, the decision on the question of obscenity rests with the jury who on the basis of the summing up of the legal principles governing such action by the learned Judge decides whether any particular novel, story or writing is obscene or not. In India, however, the responsibility of the decision rests essentially on the Court. As laid down in both the decisions

of this Court earlier referred to, “the question whether a particular article or story or book is obscene or not does not altogether depend on oral evidence, because it is the duty of the Court to ascertain whether the book or story or any passage or passages therein offend the provisions of Section 292 I.P.C.” In deciding the question of obscenity of any book, story or article the Court whose responsibility it is to adjudge the question may, if the Court considers it necessary, rely to an extent on evidence and views of leading literary personage, if available, for its own appreciation and assessment and for satisfaction of its own conscience. The decision of the Court must necessarily be on an objective assessment of the book or story or article as a whole and with particular reference to the passages complained of in the book, story or article. The Court must take an overall view of the matter complained of as obscene in the setting of the whole work, but the matter charged as obscene must also be considered by itself and separately to find out whether it is so gross and its obscenity so pronounced that it is likely to deprave and corrupt those whose minds are open to influence of this sort and into whose hands the book is likely to fall. Though the Court must consider the question objectively with an open mind, yet in the matter of objective assessment the subjective attitude of the Judge hearing the matter is likely to influence, even though unconsciously, his mind and his decision on the question. A Judge with a puritan and prudish outlook may on the basis of an objective assessment of any book or story or article, consider the same to be obscene. It is possible that another Judge with a different kind of outlook may not consider the same book to be obscene on his objective assessment of the very same book. The concept of obscenity is moulded to a very great extent by the social outlook of the people who are generally expected to read the book. It is beyond dispute that the concept of obscenity usually differs from country to country depending on the standards of morality of contemporary society in different countries. In our opinion, in judging the question of obscenity, the Judge in the first place should try to place himself in the position of the author and from the view point of the author the judge should try to understand what is it that the author seeks to convey and whether what the author conveys has any literary and artistic value. The Judge should thereafter place himself in the position of a reader of every age group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have in the minds of the readers. A Judge should thereafter apply his judicial mind dispassionately to decide whether the book in question can be said to be obscene within the meaning of Section 292 I.P.C. by an objective assessment of the book as a whole and also of the passages complained of as obscene separately. In appropriate cases, the Court, for eliminating any subjective element or personal preference which may remain hidden in the subconscious mind and may unconsciously affect a proper objective assessment, may draw upon the evidence on record and also consider the views expressed by reputed or recognised authors of literature on such questions if there be any for his own consideration and satisfaction to enable the Court to discharge the duty of making a proper assessment”.

Per se nudity is not obscenity:

The American Courts, from time to time, have dealt with the issues of obscenity and laid down parameters to test obscenity. It was further submitted that while determining whether a picture is

obscene or not it is essential to first determine as to quality and nature of material published and the category of readers.

In 50 Am Jur 2 d, para 22 at page 23 reads as under: "Articles and pictures in a newspaper must meet the Miller test's constitutional standard of obscenity in order for the publisher or distributor to be prosecuted for obscenity. Nudity alone is not enough to make material legally obscene. The possession in the home of obscene newspaper is constitutionally protected, except where the such materials constitute child poronography."

Contemporary Society:

It was also submitted that in order to shield minors and children the State should not forget that the same content might not be offensive to the sensibilities of adult men and women. The incidence of shielding the minors should not be that the adult population is restricted to read and see what is fit for children.

In Alfred E Butler vs. State of Michigan, 1 Led 2d 412, U.S. Supreme Court held as under:

"The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig."

There should be no suppression of speech and expression in protecting children from harmful materials: In *Janet Reno v. American Civil Liberties Union*, 138 Led 2d 874, it has been held that: "The Federal Government's interest in protecting children from harmful materials does not justify an unnecessarily broad suppression of speech addressed to adults, in violation of the Federal Constitution's First Amendment; the Government may not reduce the adult population to only what is fit for children, and thus the mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into the statute's validity under the First Amendment, such inquiry embodies an overarching commitment to make sure that Congress has designed its statute to accomplish its purpose without imposing an unnecessarily great restriction on speech."

In 146 Led 2d 865, *United States v. Playboy Entertainment Group, Inc.*, it has been held that:

"In order for the State to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. What the Constitution says is that these judgments are for the individual to make, not for the government of decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us."

Literary merit and "prepondering social purpose" Where art and obscenity are mixed, what must be seen is whether the artistic, literary or social merit of the work in question outweighs its "obscene" content. This view was accepted by this Court in *Ranjit D. Udeshi v. State of Maharashtra*. AIR 1965 SC case:

"Where there is propagation of ideas, opinions and information of public interest or profit the approach to the problem may become different because then the interest of society may tilt the

scales in favour of free speech and expression. It is thus that books on medical science with intimate illustrations and photographs, though in a sense immodest, are not considered to be obscene but the same illustrations and photographs collected in book form without the medical text would certainly be considered to be obscene. Where art and obscenity are mixed, the element of art must be so prepondering as to overshadow the obscenity or make it so trivial/inconsequential that it can be ignored; Obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech.”

Contemporary Standards in judging as to whether a particular work is obscene, regard must be had to contemporary mores and national standards. While the Supreme Court in India held *Lady Chatterley’s Lover* to be obscene, in England the jury acquitted the publishers finding that the publication did not fall foul of the obscenity test. This was heralded as a turning point in the fight for literary freedom in UK. Perhaps “community mores and standards” played a part in the Indian Supreme Court taking a different view from the English jury. The test has become somewhat outdated in the context of the internet age which has broken down traditional barriers and made publications from across the globe available with the click of a mouse. Judging the work as a whole it is necessary that publication must be judged as a whole and the impugned should also separately be examined so as to judge whether the impugned passages are so grossly obscene and are likely to deprave and corrupt.

Opinion of literary/artistic experts

In *Ranjit Udeshi (supra)* this Court held that the delicate task of deciding what is artistic and what is obscene has to be performed by courts and as a last resort by the Supreme Court and therefore, the evidence of men of literature or others on the question of obscenity is not relevant. However, in *Samresh Bose v. Amal Mitra (supra)* this Court observed:

“In appropriate cases, the court, for eliminating any subjective element or personal preference which may remain hidden in the subconscious mind and may unconsciously affect a proper objective assessment, may draw upon the evidence on record and also consider the views expressed by reputed or recognized authors of literature on such questions as if there by any of his own consideration and satisfaction to enable the court to discharge the duty of making a proper assessment.”

Clear and Present Danger In *S.Ragarajan v. P. Jagjivam Ram*, while interpreting Article 19(2), this Court borrowed from the American test of clear and present danger and observed:

“...the commitment to freedom demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have a proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably like the equivalent of a ‘spark in a power keg’.”

Test of Ordinary Man

The test for judging a work should be that of an ordinary man of common sense and prudence and not an “out of the ordinary or hypersensitive man.” As Hidayatullah, C.J. remarked in *K.A. Abbas*:

“If the depraved begins to see in these things more than what an average person would, in much the same way, as it is wrongly said, a Frenchman sees a woman's legs in everything, it cannot be helped.”

An additional affidavit was filed on behalf of the Press Council of India on 7.8.2006. Inviting our attention to the said affidavit, Mr. P.H. Parekh submitted that Section 14 of the Press Council Act, 1978 empowers the Press Council only to warn, admonish or censure newspapers or news agencies and that it has no jurisdiction over the electronic media and that the Press Council enjoys only the authority of declaratory adjudication with its power limited to giving directions to the answering respondents arraigned before it to publish particulars relating to its enquiry and adjudication. It, however, has no further authority to ensure that its directions are complied with and its observations implemented by the erring parties. Lack of punitive powers with the Press Council of India has tied its hands in exercising control over the erring publications.

Mr. P.H. Parekh further submitted that prompted by the continued flouting of its observation/directions by some of the Press of the country, the Press Council has recommended to the Government between 1999-2003 to amend the provisions of Section 14(1) of the Press Council Act, 1978 to arm the Council with the authority to recommend to the Government de-recognition of newspapers for Government advertisement or withdrawal of the accreditation granted to a journalist which facilitates performance of his function and also entitles him to claim concession in railways etc. or to recommend de-recognition of a newspaper for the period deemed appropriate for the proposals made. The Press Council of India is yet to receive any response from the Government. The counsel has also filed the copies of the letters written by Justice K. Jayachandra Reddy dated 17.12.2002 and 06.12.2003 issued by the Press Council to the Government of India for extending punitive powers and the amendments proposed by the Council have been annexed to the main writ petition. In our opinion, the present scenario provides for a regulatory framework under which punishment is prescribed for flouting the standards set by the Press Council of India by newspapers/print media. Further, respondent Nos. 3 & 4 have a self-regulatory mechanism in place and they have to strictly adhere to the standards set by the Press Council Act, 1978. According to them, the advertisement, news articles and photographs are scrutinized by the advertising department and in the event the advertising department is in doubt, the assistance of the legal department is resorted to. It is also their case that the said departments are manned by qualified persons who are well acquainted with the Norms and Guidelines issued by the press Council. It was also submitted that respondent No.4, as among others, consistently rejected the publication of liquor and sexually exploitative advertisements, which may offend the sensibilities of families and in contravention it was further submitted that respondent No.4, keeping in mind, special educational needs of school going children publishes a supplement called “HT Next School Times” every Monday and the respondent does not send any supplement to schools other than “HT Next School Times” along with the main paper. Further, the respondent publishes “HT Next” which is a newspaper positioned mainly for the youth. This paper too keeps in mind the special needs of the youth of today. The market segment that the respondent's paper wishes to cater and caters to sections of society interested in business and is keen on gathering information on all fronts of life.

It was further submitted that the newspaper intends to give a holistic perspective of the world to an individual. It was submitted that the respondent's paper has consistently over the last few decades had a large circulation and consistent increase in its circulation each year has not been due to publishing of its supplement "HT City". In view of the foregoing legal propositions the pictures in dispute had been published by the respondents with the intent to inform readers of the current entertainment news from around the world and India. The respondent's newspaper seeks to provide a wholesome reading experience offering current affairs, sports, politics as well as entertainment news to keep its readers abreast of all the latest happenings in the world. The pictures that have been published should not be viewed in isolation rather they have to be read with the news reports next to them. In the event, that a particular news item or picture offends any person they may avail of the remedies available to them under the present legal framework. Any steps to impose a blanket ban on publishing of such photographs, in our opinion, would amount to prejudging the matter as has been held in the matter of *Fraser v. Evans*, 1969 (1) QB 549.

The definition of obscenity differs from culture to culture, between communities within a single culture, and also between individuals within those communities. Many cultures have produced laws to define what is considered to be obscene, and censorship is often used to try to suppress or control materials that are obscene under these definitions. The term obscenity is most often used in a legal context to describe expressions (words, images, actions) that offend the prevalent sexual morality. On the other hand the Constitution of India guarantees the right of freedom to speech and expression to every citizen. This right will encompass an individual's take on any issue. However, this right is not absolute, if such speech and expression is immensely gross and will badly violate the standards of morality of a society. Therefore, any expression is subject to reasonable restriction. Freedom of expression has contributed much to the development and well-being of our free society. This right conferred by the Constitution has triggered various issues. One of the most controversial issues is balancing the need to protect society against the potential harm that may flow from obscene material, and the need to ensure respect for freedom of expression and to preserve a free flow of information and idea.

Be that as it may, the respondents are leading newspapers in India they have to respect the freedom of speech and expression as is guaranteed by our constitution and in fact reaches out to its readers in any responsible and decent manner. In our view, any steps to ban publishing of certain news pieces or pictures would fetter the independence of free press which is one of the hallmarks of our democratic setup. In our opinion, the submissions and the propositions of law made by the respective counsel for the respondents clearly established that the present petition is liable to be dismissed as the petitioner has failed to establish the need and requirement to curtail the freedom of speech and expression. The Times of India and Hindustan Times are leading newspapers in Delhi having substantial subscribers from all sections. It has been made clear by learned counsel appearing for the leading newspapers that it is not their intention to publish photographs which cater to the prurient interest. As already stated, they have an internal regulatory system to ensure no objectionable photographs or matters get published. We are able to see that respondent Nos. 3 & 4 are conscious of their responsibility towards children but at the same time it would be

inappropriate to deprive the adult population of the entertainment which is well within the acceptable levels of decency on the ground that it may not be appropriate for the children. An imposition of a blanket ban on the publication of certain photographs and news items etc. will lead to a situation where the newspaper will be publishing material which caters only to children and adolescents and the adults will be deprived of reading their share of their entertainment which can be permissible under the normal norms of decency in any society.

We are also of the view that a culture of 'responsible reading' should be inculcated among the readers of any news article. No news item should be viewed or read in isolation. It is necessary that publication must be judged as a whole and news items, advertisements or passages should not be read without the accompanying message that is purported to be conveyed to the public. Also the members of the public and readers should not look for meanings in a picture or written article, which is not conceived to be conveyed through the picture or the news item.

We observe that, as decided by the American Supreme Court in *United States v. Playboy Entertainment Group, Inc*, 146 L ed 2d 865, that, "in order for the State to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." Therefore, in our view, in the present matter, the petitioner has failed to establish his case clearly. The petitioner only states that the pictures and the news items that are published by the respondents 3 and 4 'leave much for the thoughts of minors'. Therefore, we believe that fertile imagination of anybody especially of minors should not be a matter that should be agitated in the court of law. In addition we also hold that news is not limited to Times of India and Hindustan Times. Any hypersensitive person can subscribe to many other Newspaper of their choice, which might not be against the standards of morality of the concerned person.

We, therefore, dismiss the writ petition but however observed that the request made by the Press Council of India to amend the Section should be seriously looked into by the Government of India and appropriate amendments be made in public interest.

Guidelines For Regulating Content of Government Advertisements

Common Cause v. Union of India

(2015) 42 SCD 686

Ranjan Gogoi, J. (for himself and Pinaki Chandra Ghose, J.): 1. Common Cause and Centre for Public Interest Litigation, two registered bodies, have approached this Court under Article 32 of the Constitution seeking an appropriate writ to restrain the Union of India and all State Governments from using public funds on Government advertisements which are primarily intended to project individual functionaries of the Government or a political party. The writ petitioners have also prayed for laying down of appropriate guidelines by this Court to regulate Government action in the matter so as to prevent misuse/ wastage of public funds in connection with such advertisements.

2. In the above stated writ petitions the writ petitioners while conceding the beneficial effect of government advertisements which convey necessary information to the citizens with regard to various welfare and progressive measures as also their rights and entitlements, however, had contended that in the garb of communicating with the people, in many instances, undue political advantage and mileage is sought to be achieved by personifying individuals and crediting such individuals or political leaders (who are either from a political party or government functionaries) as being responsible for various government achievements and progressive plans. According to the petitioners such practice becomes rampant on the eve of the elections. Such advertisements not only result in gross wastage of public funds but constitute misuse of governmental powers besides derogating the fundamental rights of a large section of the citizens as guaranteed by Article 14 and 21 of the Constitution of India.

3. The writ petitions, filed as public interest litigations, were resisted by the Union of India primarily on the ground that the issues sought to be raised pertain to governmental policies and executive decisions in respect of which it may not be appropriate for this Court to lay down binding guidelines under Article 142. The decision of this Court in *Manzoor Ali Khan & Anr. v. Union of India & Ors.* and a pronouncement of the Delhi High Court in *Umesh Mohan Sethi v. Union of India & Anr.* have been relied upon by the Union in support of its above stated stand.

4. The issues arising in the writ petitions were considered by this Court in an earlier round of exhaustive hearings. By order dated 23.04.2014, this Court, on consideration of the respective stands of the parties and by relying on the principles laid down in the decisions specifically referred to in the aforesaid order dated 23.04.2014, inter alia, held that there is no dispute that primary cause of government advertisement is to use public funds to inform the public of their rights, obligations, and entitlements as well as to explain Government policies, programmes, services and initiatives. It was further held that only such government advertisements which do not fulfill the above requisites will fall foul of the area of permissible advertisements. This Court acknowledged the fact that the dividing line between permissible advertisements that are a part of government messaging

and advertisements that are politically motivated may at times gets blurred. As the materials laid before the Court by the parties were found to be inadequate for the purpose of evolving what would be the best practices keeping in view the prevailing scenario in other jurisdictions across the globe, this Court felt the necessity of constituting a Committee consisting of (1.) Prof. (Dr.) N.R. Madhava Menon, former Director, National Judicial Academy, Bhopal (2.) Mr. T.K. Viswanathan, former Secretary General, Lok Sabha and (3.) Mr. Ranjit Kumar, Senior Advocate to go into the matter and submit a report to the Court.

5. In terms of the order of this Court, the Committee was duly constituted and after full deliberations in the matter, a report had been submitted by the Committee suggesting a set of guidelines for approval of this Court. It is the plea of the petitioner that the said guidelines should be approved by this Court and directions be issued under Article 142 of the Constitution of India for enforcement of the said guidelines until an appropriate legislation in this regard is brought into effect by the Parliament.

6. The contents of the guidelines suggested by the court appointed Committee may be usefully extracted hereinbelow:

GUIDELINES ON CONTENT REGULATION OF GOVERNMENT ADVERTISING

These Guidelines shall be called the Government Advertisement (Content Regulation) Guidelines 2014.

They shall come into force with effect from.....

2. APPLICATION:

(1) These Guidelines shall apply to all Government advertisements other than Classified Advertisements.

(2) These Guidelines shall apply to the content of all Government Advertising till a suitable legislation is enacted by the Government to prevent the misuse of public funds on advertisements to gain political mileage as distinct from legitimate Government messaging.

(3) These Guidelines shall apply to all

(a) institutions of Government;

(b) public sector undertakings;

(c) local bodies and other autonomous bodies/organizations established under a Statute.

3. DEFINITIONS:

In these Guidelines unless the context otherwise requires:

Classified Advertisements include public notices, tenders, recruitment notices, statutory notifications.

DAVP Guidelines means the existing guidelines of the Directorate of Advertising and Visual Publicity of the Ministry of Information and Broadcasting dealing with the eligibility and empanelment procedures and rates of payment and such other matters;

Government means Central Government, State Governments/Union Territory Administrations and also includes local bodies, public sector undertakings and other autonomous bodies/organizations established under a Statute.

Government advertising means any message, conveyed and paid for by the government for placement in media such as newspapers, television, radio, internet, cinema and such other, media but does not include classified advertisements; and includes both copy (written text/audio) and creatives (visuals/video/multi media) put out in print, electronic, outdoor or digital media.

OBJECTS:

The objects of these Guidelines are:

to prevent arbitrary use of public funds for advertising by public authorities to project particular personalities, parties or governments without any attendant public interest, neither to belittle the need nor to deny the authority of the Union and State Governments and its agencies to disseminate information necessary for public to know on the policies and programmes of Government but only to exclude the possibility of any misuse of public funds on advertisement campaigns in order to gain political mileage by the political establishment; to address the gap in the existing DAVP Guidelines which only deal with the eligibility and empanelment of newspapers/ journals or other media, their rates of payment, and such like matters and not on how to regulate the content of Government advertisements; to ensure that all government activities satisfy the test of reasonableness and public interest, particularly while dealing with public funds and property; to ensure that government messaging is well co-ordinate, effectively managed in the best democratic traditions and is responsive to the diverse information needs of the public.

5. GOVERNMENT ADVERTISEMENT TO INFORM CITIZENS:

Subject to these Guidelines Government may place advertisements or purchase advertising space or time in any medium to inform citizens about their rights and responsibilities, about government policies, programmes, services or initiatives, or about dangers or risks to public health, safety or the environment.

6. THE FIVE PRINCIPLES OF CONTENT REGULATION:

While placing advertisements or purchasing advertising space in any media, the Government shall be guided by the following principles, namely:

Advertising Campaigns to be related to Government responsibilities:

While it is the duty of the Government to provide the public with timely, accurate, clear, objective and complete information about its policies, programmes, services and initiatives since the public has a right to such information, the content of government advertisements should be relevant to the

governments constitutional and legal obligations as well as the citizens rights and entitlements. Advertisement materials should be presented in an objective, fair and accessible manner and be designed to meet the objectives of the campaign: The material shall be presented in a fair and objective manner and shall be capable of fulfilling the intended objectives; Government shall exercise due caution while deciding the content, layout, size and design of the message including the target area and the creative requirement of the intended communication in order to ensure that the maximum reach and impact are achieved in the most cost effective manner; Content of advertisement must enable the recipients of the information to distinguish between facts and analysis and where information is presented as a fact, it should be accurate and verifiable;

Pre-existing policies, products, services and initiatives should not be presented as new unless there has been a substantial change or modification of such policies, products or services;

Content of advertisement should provide information in a manner that accommodates special needs of disadvantaged individuals or groups identified as being within the target audience;

Multiple formats may be used to ensure equal access;

Every effort shall be made to pre-test the material in case of large scale campaign with target audiences.

Advertisement materials should be objective and not directed at promoting political interests of ruling party:

Display material must be presented in objective language and be free of political argument or partisan standpoint:

Government advertising shall maintain political neutrality and avoid glorification of political personalities and projecting a positive impression of the party in power or a negative impression of parties critical of the government.

Advertisement materials must not Mention the party in government by name; directly attack the views or actions of others in opposition; include party political symbol or logo or flag; aim to influence public support for a political party, candidate for election; or refer to link to the websites of political parties or politicians.

Government advertisement materials should avoid photographs of political leaders and if it is felt essential for effective Government messaging, only the photographs of the President/Prime Minister or Governor/Chief Minister should be used;

Government advertisements shall not be used at patronizing media houses or aimed at receiving favourable reporting for the party or person in power Advertisement Campaigns be justified and undertaken in an efficient and cost-effective manner:

Since it is the responsibility of government to safeguard the trust and confidence in the integrity and impartiality of public services and hence it should be the policy of governments to use public funds in such a manner as to obtain maximum value for taxpayers money;

Advertisement Campaigns must be justified and undertaken in an efficient and cost-effective manner;

The Government shall decide and announce beforehand, a list of personalities on whose birth or death anniversaries, advertisements could be released every year and specify which Ministry/Department could release the same;

Avoid the issue of multiple advertisements by different departments and PSUs of the same Government in Commemorative Advertisements and shall issue a single advertisement only;

(d) Though advertising by governments should remain regulated all the time, it is particularly important to scrupulously follow these principles before and during the elections. As far as possible, during the period prior to elections, only those advertisements required by law (such as public health and safety advisories or job and contract advertisements) alone be released by governments;

(e) Advertisement campaigns should only be need based; and

(f) In case of large volume advertisement campaigns, post-campaign impact assessment is necessary to be included in the planning process itself and shall identify the indicators to measure success when the campaign has ended.

(5) Government advertising must comply with legal requirements and financial regulations and procedures:

Governments shall ensure that all Advertisements comply with:-

relevant laws regarding privacy, intellectual property rights, election laws and consumer protection laws apart from laws in respect of broadcasting and media; and copyright laws and ownership rights associated with works subject to copyright are fully respected.

COMPLIANCE AND ENFORCEMENT:

The Government shall appoint an Ombudsman who shall be an eminent expert independent of the Government to receive complaints of violations of Guidelines and to recommend action in accordance with the Guidelines.

Heads of government departments and agencies shall be responsible for ensuring compliance with these Guidelines and shall follow a procedure of certification of compliance before advertisements are released to the media.

As part of the performance audit of the Ministry/Department/Agency there shall be separate audit of the compliance of Advertisement Guidelines by the Ministry/Department/Agency concerned; and

The annual report of such ministry/department/agency shall publish the findings of such audit and the money spent on advertising. The regulatory bodies of print and electronic media will be within their powers to impose sanctions against such media groups acting against these Guidelines in seeking or obtaining government advertisements.

8. GENERAL:

(1) These Guidelines shall be in addition to and not in derogation of the existing Guidelines which are in place under the existing Advertisement Policy of Government.

(2) These Guidelines are equally applicable to State Governments and its agencies. The State Governments shall undertake amendments to whatever policies they have in this regard and observe the Guidelines strictly in letter and spirit.

The Ombudsman may recommend suitable changes to the Guidelines to deal with new circumstances and situations.

The Government shall take necessary steps to initiate necessary legislation on the subject, given its importance for democracy, human rights and good governance. Whether the guidelines recommended should commend acceptance and if so whether the same should be made operative and enforceable under Article 142 of the Constitution.

7. In the earlier order dated 23rd April, 2014, this Court, after holding that reasonableness and fairness consistent with Article 14 of the Constitution would be the ultimate test of all State activities proceeded to hold that the deployment of public funds in any Government activity which is not connected with a public purpose would justify judicial intervention. We would like to say something more.

Part IV of the Constitution is as much a guiding light for the Judicial organ of the State as the Executive and the Legislative arms, all three being integral parts of the State within the meaning of Article 12 of the Constitution. A policy certainly cannot be axed for its alleged failure to comply with any of the provisions of Part IV. Neither can the Courts charter a course, merely on the strength of the provisions of the said Part of the Constitution, if the effect thereof would be to lay down a policy. However, in a situation where the field is open and uncovered by any government policy, to guide and control everyday governmental action, surely, in the exercise of jurisdiction under Article 142 of the Constitution, parameters can be laid down by this Court consistent with the objects enumerated by any of the provisions of Part IV. Such an exercise would be naturally time bound i.e. till the Legislature or the Executive, as the case may be, steps in to fulfill its constitutional role and authority by framing an appropriate policy.

8. Article 38 and 39 of the Constitution enjoin upon the State a duty to consistently endeavour to achieve social and economic justice to the teeming millions of the country who even today live behind an artificially drawn poverty line. What can be the surer way in the march forward than by ensuring avoidance of unproductive expenditure of public funds. This is how we view the present matter and feel the necessity of exercise of our jurisdiction under Article 142 of the Constitution to proceed further.

9. It is neither possible nor feasible or even necessary to try and encompass the myriad situations where government advertisements are issued. Indeed, the situations and circumstances; events and occasions on which government advertisements are issued are infinite. Nevertheless, an attempt

can be made to arrive at a broad categorization for the purpose of an illustrative understanding. Advertisements highlighting completion of a fixed period of the Governments Tenure Governments at the Centre as well as in the States often bring out advertisements on completion of a number of days, months and years of governance. In such advertisements, not only the achievements are highlighted even the different tasks which are in contemplation are enumerated. By way of example one of the points highlighted may be supply of electricity to each and every village. Though the achievements of a Government should not be a matter of publicity and really ought to be a matter of perception to be felt by the citizens on the results achieved, such advertisements do have the effect of keeping the citizens informed of the government functioning and therefore would be permissible.

Advertisements announcing projects:

On an everyday basis both the Government at the Centre as well as in different States issue advertisements announcing events like laying of the foundation of different development projects or the inauguration of projects completed. In many of such advertisements the results obtained in the particular field covered by the advertisement and the plan/targets for the future are highlighted. Though such advertisements may look like a report card of the Government there is an element of informative content in such advertisements inasmuch as information is conveyed to the citizens as regards government programmes, policies and achievements.

Advertisements issued on the occasion of birth/death anniversaries and such other events:

Government advertisements are issued in the memory of great personalities who occupy a significant place in our history, such as, the father of the Nation, Mahatma Gandhi. While such persons must certainly be remembered, what, however, would not be justified is several similar, if not identical, advertisements issued by different Departments on the same occasion as is happening today. One single advertisement issued by a Central Agency should be enough to commemorate the anniversaries of the few acknowledged and undisputed public figures whose contribution to the National Cause cannot raise any dispute or debate.

Advertisement issued on certain other occasions, for instance, to mark the centenary year of the Patna High Court does not serve any purpose and must be avoided. Institutions need not be glorified. They must earn glory by contribution and work.

Advertisements announcing policies and benefits for public:

All advertisements that fall within this category would be in public interest. Such advertisements, as for example in respect of the National Savings Schemes informing the public about benefits under the Scheme, are purely informational and make people aware of their rights and entitlements. Similarly, advertisements issued to generate public awareness would also be justified on the touchstone of public interest. By way of illustration, an advertisement issued by the Ministry of Health and Family Welfare informing the public of preventable disease, safeguards to be taken, vaccination programmes for the children, etc. would be highly informative and, therefore, justified.

10. A connected facet of the matter which cannot be ignored is the power of the Government to give/award advertisements to selected media houses and the concomitant issue of freedom of press. Award of advertisements, naturally, brings financial benefit to the particular media house/newspaper group. Patronization of any particular media house(s) must be avoided and award of advertisements must be on an equal basis to all newspapers who may, however, be categorized depending upon their circulation. The D.A.V.P. guidelines do not deal with the said aspect of the matter and hence the necessity of incorporating the same in the present directions to ensure the independence, impartiality and the neutrality of the fourth estate which is vital to the growth and sustenance of democracy will have to be weighed and considered by us.

11. An analysis of the Draft Guidelines as prepared by the Committee set up by this Court in the case may now be made. The applicability of these Guidelines is to all Government advertisements other than classifieds and in all mediums of communication, thereby including internet advertising. The objective of these Guidelines emphasize the Governments responsibility to disseminate information necessary for the public to know about the policies and programmes of Government. It principally spells out five principles to regulate the contents of advertisements, namely,

- i) advertising campaigns are to be related to government responsibilities,
- ii) materials should be presented in an objective, fair and accessible manner and designed to meet objectives of the campaign,
- iii) not directed at promoting political interests of a Party,
- iv) campaigns must be justified and undertaken in an efficient and cost- effective manner, and
- v) advertisements must comply with legal requirements and financial regulations and procedures.

The five broad Content Regulations contained in the draft guidelines framed by the Committee are similar to the provisions found in the Australian guidelines. However, under each broad head specific regulatory parameters have been indicated which seem to embody what would be good practices in the Indian context.

12. While under the first head the requirement of conformity of Government advertisements with dissemination of information relating to Government's constitutional and legal obligations and the corresponding rights and entitlements of citizens is being stressed upon, under the second head objective presentation of the materials contained in an advertisement bearing in mind the target audience has been emphasized. Under the third head, the Guidelines state that advertisement materials must not: (a) mention the party in government by its name, (b) attack the views or actions of other parties in opposition, (c) include any party symbol or logo, (d) aim to influence public support for a political party or a candidate for election or (e) refer or link to the websites of political parties or politicians. It is also stated in the Guidelines that photographs of leaders should be avoided and only the photographs of the President/ Prime Minister or Governor/ Chief Minister shall be used for effective government messaging. The fourth head deals with cost effectiveness of an advertisement campaign and measures to cut down avoidable expenses. A somewhat restricted

range of advertising activity on the eve of the elections is also recommended. Appointment of an Ombudsman to hear complaints of violation of the norms and to suggest amendments thereto from time to time beside special performance audit by the concerned Ministries is also recommended.

13. The Union Government and the State of Bihar have filed their responses to the guidelines suggested by the Committee. The State of Bihar suggests that some of the recommendations of the Committee, details of which need not be noticed, are somewhat vague and require a more precise definition or meaning. The only aspect of the suggestions where the State has responded emphatically is with regard to the recommendation to confine the publication of photographs of the President and the Prime Minister of the country and the Governor and the Chief Minister of the State. According to the State of Bihar such a restriction should not be imposed.

14. The Union in its response to the guidelines of the Committee has been more categorical in suggesting certain changes as well as deletion of some of the recommendations.

15. A consideration of the objections filed by the Union would go to show that the Union seriously disagrees with the recommendations of the Committee in respect of the following matters:

(1) restricted publication of photographs of the Government functionaries and political leaders along with the advertisement etc. (2) appointment of an Ombudsman (3) the recommendation with regard to performance audit by each Ministry.

(4) embargo on advertisements on the eve of the elections.

17. The remaining recommendations of the Committee appear to be comprehensive and based on an analytical approach of the best practices prevailing in other jurisdictions. The said recommendations, in our considered view, would serve public interest by enabling dissemination of information and spreading awareness amongst the citizens not only of the government policies; achievements made and targets to be reached but also the rights and entitlements of the citizens including the availability of a host of welfare measures. The said recommendations, therefore, commend to the Court for acceptance and are accordingly accepted.

18. At this juncture we may very briefly deal with the situation prevailing in other jurisdictions across the globe. While, undoubtedly there can be no blind adherence to the practices followed in other jurisdictions as what may be appropriate to another country may not be ideal in the Indian context, the correct approach will be to discern some of the best practices prevailing in such jurisdictions and thereafter to test the relevance of the same to our own country. Though the recitals contained in the Report of the Committee do mention a consideration of such good practices prevailing in other jurisdictions there is however no discussion or even an indication of the precise contents of the practices that were found by the Committee to be in existence in other countries. It has therefore become necessary for us to deal with the matter though very briefly. In this regard we may usefully, though illustratively, make a reference to certain practices prevailing in Canada, United Kingdom, New Zealand and Australia.

19. Insofar as Canada (Ontario) is concerned, it appears that the object of issuing a government advertisement is: (i) to inform the public of current or proposed government policies, programs or services available to them; (ii) to inform the public of their rights and responsibilities under the law and (iii) to encourage or discourage specific social behaviour in public interest. Such advertisements are not to include the name, voice or image of any functionary of the State and the primary objective of an advertisement ought not to be to foster a positive impression of the ruling government or a negative impression of any person, group or party critical of the government.

20. In some of the foreign jurisdictions there is a mechanism for review of advertisements on fixed parameters even before they are published and publication/issuance thereof only upon passing of the required test. In Australia and United Kingdom, there is an added emphasis on the cost effectiveness of advertising campaigns. In Australia, advertising campaigns of more than a particular pecuniary value i.e. 1 million Australian dollars require to undergo a cost benefit analysis wherein the best options to achieve the intended objective of the campaign has to be determined before launching the same.

21. The good practices adopted in other jurisdictions as noticed above do find adequate reflection in the recommendations of the Committee which further fortify our conviction to adopt the same.

22. This will require the Court to consider the different aspects of a government advertisement campaign highlighted earlier on which we have reserved our comments. The first is with regard to publication of photographs of functionaries of the State and political leaders along with the advertisement issued. There can be no manner of doubt that one government advertisement or the other coinciding with some event or occasion is published practically every day. Publication of the photograph of an individual be a State or party functionary not only has the tendency of associating that particular individual with either the achievement(s) sought to be highlighted or being the architect of the benefits in respect of which information is sought to be percolated. Alternatively, programmes/ targets for the future as advertised carry the impression of being associated with the particular individual(s). Photographs, therefore, have the potential of developing the personality cult and the image of one or a few individuals which is a direct antithesis of democratic functioning.

23. The legitimate and permissible object of an advertisement, as earlier discussed, can always be achieved without publication of the photograph of any particular functionary either in the State or a political party. We are, therefore, of the view that in departure to the views of the Committee which recommended permissibility of publication of the photographs of the President and Prime Minister of the country and Governor or Chief Minister of the State along with the advertisements, there should be an exception only in the case of the President, Prime Minister and Chief Justice of the country who may themselves decide the question. Advertisements issued to commemorate the anniversaries of acknowledged personalities like the father of the nation would of course carry the photograph of the departed leader.

24. Insofar as the recommendation with regard to the appointment of Ombudsman is concerned, we are of the view that for ironing out the creases that are bound to show from time to time in the

implementation of the present directions and to oversee such implementation the government should constitute a three member body consisting of persons with unimpeachable neutrality and impartiality and who have excelled in their respective fields. We could have but we refrain from naming the specific persons and leave the said exercise to be performed by the Union Government.

25. Insofar as performance/ special audit is concerned, we do not feel the necessity of any such special audit inasmuch as the machinery available is adequate to ensure due performance as well as accountability and proper utilization of public money.

26. If Government advertisements adhere to the objects and parameters mentioned above we do not feel the necessity of imposing a special curb on government advertisements on the eve of the elections, as suggested by the Committee.

27. In an earlier part of the present order we had indicated the power of the purse that Government advertisements invariably involve. Needless to say the concepts of fairness and even dispensation to all media/publishing houses will have to be maintained by the Government be it at the Centre or the States.

28. We close the matters on the aforesaid note by approving and adopting the recommendations of the Committee except what has been specifically indicated above with regard to (1) publication of photographs of the Government functionaries and political leaders alongwith the advertisement(s), (2) appointment of an Ombudsman, (3) the recommendation with regard to performance audit by each Ministry, and (4) embargo on advertisements on the eve of the elections.

29. We also make it clear that the present directions issued under Article 142 of the Constitution cannot be comprehensive and there are several aspects of the matter which may have escaped our attention at this stage. In this regard, we would like to clarify that it is not the intention of the Court to attempt to lay down infallible and all comprehensive directions to cover the issue at hand. The gaps, if any, we are confident would be filled up by the executive arm of the government itself inasmuch as the attainment of constitutional goals and values enshrined in Part IV of the Constitution is the conjoint responsibility of the three organs of the State i.e. legislative, executive and the judiciary, as earlier discussed.

Media, Censorship and Gag Orders
Curtailment of Right of Citizen to Exhibit Films on T.V.
Odyssey Communications Pvt. Ltd v. Lokvidayan Sanghatana
(1988) 3 SCC 410

E.S. Venkataramaiah J. (for himself and N.D. Ojha, JJ.): This appeal by special leave is filed against an interim order of injunction issued by the High Court of Bombay, Aurangabad Bench on 13th April, 1988 directing the three respondents; (1) Union of India, (2) Ministry of Information and Broadcasting, Parliament House, New Delhi and (3) State of Maharashtra, not to telecast and show episodes 12 and 13 of a serial entitled 'Honi-Anhoni' pending disposal of Writ Petition No. 479 of 1988 filed by Respondent No. 1, Lokvidayan Sanghatana, a registered social organisation of Pune having its branch at Aurangabad and Respondent No. 2 Mahila Sangharsha Samiti, Aurangabad represented by one of its members Smt. Anagna Patil. The writ petition was in the nature of a public interest litigation. The prayer in the writ petition was that the respondents should be directed not to telecast the serial as such telecasting was not in the public interest.

The serial 'Honi-Anhoni' was being telecast by the Doordarshan, which was run by the Union of India, on every Thursday between 9 p.m. and 9.30 p.m. The 12th episode of the said serial was to be telecast on 14th April, 1988 and the 13th episode was to be telecast on 21st April, 1988. By virtue of the interim order passed on 13th April, 1988, episode No. 12 could not be telecast on 14th April, 1988. Aggrieved by the interim order passed by the High Court the appellant, Odyssey Communication Pvt. Ltd., which was the producer of the serial 'Honi-Anhoni' filed the special leave petition before this Court under Article 136 of the Constitution of India out of which this appeal arises. The said petition came up before this Court for consideration on April 21, 1988. After hearing the learned counsel for the appellant this Court granted special leave to prefer an appeal against the order passed by the High Court and also stayed the operation of the interim order dated 13th April, 1988 passed by the High Court until further orders and permitted the Doordarshan to telecast the serial in question. In view of the above order the 12th episode of the serial was telecast on the 21st of April, 1988. The appeal was heard on the 28th of April, 1988 and this Court reserved judgment on the appeal. At the end of the hearing of the appeal on 28th April, 1988 the Court

expressed that it would set aside the order passed by the High Court against which the appeal had been filed and would give reasons in the course of its judgment. Since the order of stay passed by the Court was allowed to remain in force the 13th episode, which was the last episode of the serial was telecast on the 28th April, 1988.

The grounds mentioned in the writ petition in support of the prayer made in it were that in each and every episode telecast in the serial an obscure and mysterious atmosphere was being created due to the way of the presentation of the episodes and that it had created fear in the minds of the common viewers and especially of children as the serial had the effect of confirming blind faiths,

superstitious beliefs in stories of ghosts, rebirth, precognition etc. and of spreading the unscientific way of thinking and blind beliefs. It was further contended that it was the duty of the State not to encourage blind beliefs amongst the public by telecasting such episodes. It was on the basis of these grounds the High Court was requested to grant the interim order of injunction. The appellant was the producer of the said serial, yet the appellant was not made a party to the writ petition. But on its application the appellant was impleaded as a party on 12.4.1988. On 13.4.1988 the High Court passed the impugned order of temporary injunction. The appellant rushed to this Court immediately thereafter with the above said special leave petition. The appellant has stated before us that the said serial and in particular episodes 12 and 13 did not emphasize superstitious beliefs but on the contrary criticized and condemned superstition and blind faith as was ex facie apparent from the scripts of episodes 12 and 13 produced before this Court. It is stated that at the end of both the episodes a doctor and a professor gave a scientific explanation for the unusual occurrences portrayed therein and considered by people as supernatural phenomena. It is alleged that in the 13th episode after a scientific explanation of what had taken place the viewers were told as follows:

“All those who without thinking spread blind faith ought to feel ashamed of themselves. We request all of you that whenever any unusual occurrences takes place or a seemingly improbable event occurs, before believing in it, to reflect as to whether there is a scientific reason for it or is it purely psychological by nature. If all of us exercise such caution we believe that the malady of blind faith will soon be eradicated by our society.”

The appellant further pleaded that the High Court was in error in issuing the order of injunction without giving a reasonable opportunity to it (the producer), which was likely to be affected by the order, to explain that the writ petitioners had no right to move the Court in the circumstances of the case.

It can no longer be disputed that the right of a citizen to exhibit films on the Doordarshan subject to the terms and conditions to be imposed by the Doordarshan is a part of the fundamental right of freedom of expression guaranteed under Article 19(1)(a) of the Constitution of India which can be curtailed only under circumstances which are set out in clause (2) of Article 19 of the Constitution of India. The right is similar to the right of a citizen to publish his views through any other media such as newspapers, magazines, advertisement hoardings etc. subject to the terms and conditions of the owners of the media. We hasten to add that what we have observed here does not mean that a citizen has a fundamental right to establish a private boardcasting station, or television center. On this question we reserve our opinion. It has to be decided in an appropriate case. The relevant part of Article 19 of the Constitution reads thus:

“19. Protection of certain rights regarding freedom of speech, etc.-(1) All citizens shall have the right-

(a) to freedom of speech and expression; (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub- clause in the interests of the sovereignty and integrity of India, the security of the State,

friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.....”

Freedom of expression is a preferred right which is always very zealously guarded by this Court. It was not the case of the petitioners in the Writ Petition that the exhibition of serial ‘Honi-Anhoni’ was in contravention of any specific law or direction issued by the Government. They had not alleged that the Doordarshan had shown any undue favour to the appellant and the sponsoring institutions resulting in any financial loss to the public exchequer. The objection to the exhibition of the film had, however, been raised by them on the basis that it was likely to spread false or blind beliefs amongst the members of the public. They had not asserted any right conferred on them by any statute or acquired by them under a contract which entitled them to secure an order of temporary injunction against which this appeal is filed. The appellant had denied that the exhibition of the serial was likely to affect prejudicially the well-being of the people. The Union of India and the Doordarshan have pleaded that the serial was being telecast after following the prescribed procedure and taking necessary precaution. In such a situation, the High Court should not have immediately proceeded to pass the interim order of injunction. It was no doubt true that the 12th episode was to be telecast on 14th April, 1988 and the 13th episode was to be telecast on 21st April, 1988. If the petitioners in the writ petition had felt, as they had alleged in the course of the petition, that all the episodes in the serial were offensive they could have approached the High Court as early as possible within the first two or three weeks after the commencement of the exhibition of the serial. But they waited till the exhibition of the 11th episode of the serial was over and filed the petition only in the second week of April, 1988. They had not produced any material apart from their own statements to show that the exhibition of the serial was prima facie prejudicial to the community. The High Court overlooked that the issue of an order of interim injunction in this case would infringe a fundamental right of the producer of the serial. In the absence of any prima facie evidence of grave prejudice that was likely to be caused to the public generally by the exhibition of the serial it was not just and proper to issue an order of temporary injunction. We are not satisfied that the exhibition of the serial in question was likely to endanger public morality. In the circumstances of the case the balance of convenience lay in favour of the rejection of the prayer for interim injunction. What we have stated here is sufficient to dispose of this appeal. The other questions of law which may arise in a case of this nature will have to be dealt with in an appropriate case. We express no opinion on those questions in this case. We are, however, of the opinion that the High Court was in error in the present case in issuing the interim order of injunction against which this appeal is filed. We, therefore, allow this appeal and set aside the interim order of injunction passed by the High Court on the 13th of April, 1988. There is, however, no order as to costs.

S. Rangarajan v. P. Jagjivan Ram

1989 SCC (2) 574

K.J. Shetty, J.: These appeals by leave are from the judgment of the Division Bench of the Madras High Court revoking the 'U-Certificate' issued to a Tamil film called "Ore Oru Gramathile" (In one Village) for public exhibition. Civil Appeal Nos. 1668 and 1669 of 1988 are by the producer of the film and the Civil Appeal nos. 13667 and 133668 of 1988 are by the Union of India.

The story of "Ore Oru Gramathile" can be summarised as follows:

"A Brahmin widower, Shankara Sastry, has a talented daughter Gayathri. He apprehends that she would not be able to get admission to college because she belongs to a Brahmin community. He seeks advice from his close friend Devashayam, a Tehsildar. The Tehsildar who otherwise belongs to a very poor family and whose father was working in a local Church responds with gratitude. He devises a method to help Gayathri because it was through Sastry's father that he got proper education and rose to become a Tahsildar. He prepares a false certificate showing Gayathri as Karuppayee belonging to an Adi Dravida Community and as an orphan. He issues the certificate under the reservation policy of the Government for the benefit of 'backward communities' identified on caste consideration. On the basis of the false certificate, Karuppayee gets admitted to college and enters I.A.S. witness to this arrangement is the brother-in-law of Tahsildar called Anthony who later turns out to be a villain of the piece."

"Years later, Karuppayee, who was working in Delhi is sent to a rural village called Annavayil as a Special Officer for flood relief operations. Her father, Shankara Sastry happens to work in the same village as Block Development Officer. However, both of them pretend not to recognise each other. Karuppayee takes her work seriously and improves the living conditions of people to such an extent that she is held by them in high esteem. By a coincidence, after the death of the Tahsildar, Anthony comes to live in the same village and recognises Karuppayee. He starts blackmailing her and threatens to reveal the fraudulent means by which she got the caste certificate. His attempt is to extract money from her frequently. One evening when he visits Karuppayee's house, he is confronted by Shankara Sastry who puts a halt to his blackmailing. Later Anthony dies of sudden heart attack but not before he informs the Government about the facts relating to Karuppayee. Upon preliminary enquiry, the Government suspends both Karuppayee and her father and eventually they are put on trial in the Court. The people of the village resentful of the action taken against Karuppayee rise as one man and demonstrate before the Court in a peaceful manner for her release. They also send petitions to the Government." "Karuppayee and her father admit in the Court the fact of their having obtained the false caste certificate but they attribute it to circumstances resulting by Government reservation policy on caste basis. They say that they are prepared to undergo any punishment. They contend that some politicians are exploiting the caste consideration and that would be detrimental to national integration. They also argue that the reservation policy should not be based on caste, but could be on economic backwardness. Just about the time when the judgment is to be pronounced the Court receives intimation from Government that in the light of petitions

received from the public, the case against Karup- payee and her father stands withdrawn. Karuppayee goes back to her Government job with jubilant people all round.”

This is the theme of the picture presented. As usual, it contains some songs, dance and side attractions to make the film more delectable.

On August 7, 1987, the producer applied for certificate for exhibition of the film. The examining committee upon seeing the film unanimously refused to grant certificate. The appellant then sought for review by a Revising Committee which consisted of nine members. This Committee reviewed the film. Eight members were in favour of grant of certificate and one was opposed to it. The Chairman of the Censor Board however, referred the film to Second Revising Committee for review and recommendation. This again consisted of nine members and by majority of 5:4 they recommended for issue of ‘U’ certificate subject to deletion of certain scenes. The ‘U’ certificate means for unrestricted public exhibition as against ‘A’ certificate restricted to adults only. The minority expressed the view that the film is treated in an irresponsible manner. The reservation policy of the Government is projected in a highly biased and distorted fashion. They have also stated that the so called appeal in the film “India is One” is a hollow-appeal, which in effect touches caste sensitivity of the Brahmin forward caste. One of the members felt that the impact of the film will create law and order problem. Another member said that the film will hurt the feelings and sentiments of certain sections of the public. But the majority opined that the theme of the film is on the reservation policy of the Government suggesting that the reservation could be made on the basis of economic backwardness. Such a view could be expressed in a free country like India, and it did not violate any guideline. On December 7, 1987, ‘U’ certificate was granted for the exhibition of the film which was challenged before the High Court by way of writ petitions. The writ petitions were dismissed by the Single judge, but the Division Bench upon appeal allowed the writ petitions and revoked the certificate.

The Division Bench largely depended upon the minority view of the Second Revising Committee and also the opinion of the Examining Committee. The producer of the film and the Government of India by obtaining leave have appealed to this Court. The film has since been given National Award by the Directorate of Film Festival of the Government of India. In these appeals, the fundamental point made by Mr. Soli Sorabjee, learned counsel for the producer is about the freedom of free expression guaranteed under our Constitution even for the medium of movies. The counsel argued that the opinion on the effect of the film should not be rested on isolated passages disregarding the main theme and its message. The Film should be judged in its entirety from the point of its overall impact on the public. The writings of the film must be considered in a free, fair and liberal spirit in the light of the freedom of expression guaranteed under our Constitution. The counsel said that the Court is not concerned with the correctness or legality of the views expressed in the film and the Court cannot limit the expression on any general issue even if it is controversial. Mr. Mahajan for the Union of India supported these submissions. Mr. Varghese learned counsel for the contesting respondents did not dispute most of the proposition advanced for the appellants. He was, however, critical about the manner in which the reservation policy of the Government has been condemned and the events and characters shown in the film. He contended that they are

depicted in a biased manner and reaction to the film in Tamil Nadu is bound to be volatile. Before examining these rival contentions, a few general observations may be made as to the utility of movies and the object of the film Censors Board. The motion pictures were originally considered as a form of amusement to be allowed to titillate but not to arouse. They were treated as mere entertainment and not an art or a means of expression. This theory was based on the concept that motion picture was a business "pure and simple originated and conducted for profit, like other spectacles." It was considered strictly as an "amusement industry". It was so held in 1915 by the unanimous decision of the American Supreme Court in *Mutual Film Corporation v. Industrial Commission*, 236 U.S. 230 (1915). It was not without significance since there were no talking pictures then. The talking pictures were first produced in 1926, eleven years after the Mutual decision (Encyclopedia Britannica) (1965 Vol. 15 p. 902). The later decisions of the American Supreme Court have therefore declared that expression by means of motion pictures is included within the free speech and free press guaranty of the First Amendment. (See *Burstyn v. Wilso*, 343 U.S. 495). The First Amendment to the U.S. Constitution provides: "Congress shall make no law ... abridging the freedom of speech, or of the press." This Amendment is absolute in terms and it contains no exception for the exercise of the right. Heavy burden lies on the State to justify the interference. The judicial decisions, however, limited the scope of restriction which the State could impose in any given circumstances. The danger rule was born in *Schenek v. United States*, 249 U.S. 47 (1919). Justice Holmes for a unanimous court, evolved the test of "clear and present danger". He used the danger test to determine where discussion ends and incitement or attempt begins. The core of his position was that the First Amendment protects only utterances that seeks acceptance via the democratic process of discussion and agreement. But "Words that may have all the effect of force" calculated to achieve its goal by circumventing the democratic process are, however, not so protected.

The framework of our Constitution differs from the First Amendment to the U.S. Constitution. Article 19(1)(a) of our Constitution guarantees to all citizens the right to freedom of speech and expression. The freedom of expression means the right to express one's opinion by words of mouth, writing, printing, picture or in any other manner. It would thus include the freedom of communication and the right to propagate or publish opinion. The communication of ideas could be made through any medium, newspaper, magazine or movie. But this right is subject to reasonable restrictions on grounds set out under Article 13(2) of the Constitution. The reasonable limitations can be put in the interest of sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. The Framers deemed it essential to permit imposition of reasonable restrictions on the larger interests of the community and country. They intended to strike a proper balance between the liberty guaranteed and the social interest specified under Article 19(2). [See *Santokh Singh v. Delhi Administration*, (1973) 3 SCR 533]. This is the difference between the First Amendment to the U.S. Constitution and Article 19(1)(a) of our Constitution. The decisions bearing on the First Amendment are, therefore, not useful to us except the broad principles and the purpose of the guaranty.

Movie doubtless enjoys the guaranty under Article 19(1)(a) but there is one significant difference between the movie and other modes of communication. The movie cannot function in a free market place like the newspaper, magazine or advertisement. Movie motivates thought and action and assures a high degree of attention and retention. It makes its impact simultaneously arousing the visual and aural senses. The focusing of an intense light on a screen with the dramatizing of facts and opinion makes the ideas more effective. The combination of act and speech, sight and sound in semi-darkness of the theatre with elimination of all distracting ideas will have an impact in the minds of spectators. In some cases, it will have a complete and immediate influence on, and appeal for every one who sees it. In view of the scientific improvements in photography and production the present movie is a powerful means of communication. It is said:

“...as an instrument of education it has unusual power to impart information, to influence specific attitudes towards objects of social value, to affect emotions either in gross or in microscopic proportions, to affect health in a minor degree through sleep disturbance, and to affect profoundly the patterns of conduct of children.” (See Reader in Public Opinion and Communication Second Edition by Bernard Betelson and Morris Janowitz p. 390). The authors of this Book have demonstrated (at 391 to 401) by scientific tests the potential of the motion pictures in formation of opinion by spectators and also on their attitudes. These tests have also shown that the effect of motion pictures is cumulative. It is proved that even though one movie relating to a social issue may not significantly affect the attitude of an individual or group, continual exposure to films of a similar character will produce a change. It can, therefore, be said that the movie has unique capacity to disturb and arouse feelings. It has as much potential for evil as it has for good. It has an equal potential to instill or cultivate violent or good behaviour. With these qualities and since it caters for mass audience who are generally not selective about what they watch, the movie cannot be equated with other modes of communication. It cannot be allowed to function in a free market place just as does the newspapers or magazines. Censorship by prior restraint is, therefore, not only desirable but also necessary. Here again we find the difference between the First Amendment to the U.S. Constitution and Article 19(1)(a) of our Constitution. The First Amendment does not permit any prior restraint, since the guaranty of free speech is in unqualified terms. This essential difference was recognised by Douglas, J., with whom Black, J., concurred in *Kingsley Corporation v. Regents of the University of New York*, 3 L.Ed. 1512 at 1522. In holding that censorship by “prior restraint” on movies was unconstitutional, the learned Judge said:

“If we had a provision in our Constitution for “reasonable” regulation of the press such India has included in hers, there would be room for argument that censorship in the interests of morality would be permissible. Judges sometimes try to read the word "reasonable" into the First Amendment or make the rights it grants subject to reasonable regulation But its language, in terms that are absolute is utterly at war with censorship. Different questions may arise as to censorship of some news when the nation is actually at war. But any possible exceptions are extremely limited.”

The Cinematograph Act 1952 (“The Act”) which permits censorship on movies is a comprehensive enactment. Section 3 of the Act provides for constitution of Board of Film Censors. Section 4

speaks of examination of films. A film is examined in the first instance by an Examining Committee. If it is not approved, it is further reviewed by a Revising Committee under Section 5. Section 5A states that if after examining a film or having it examined in the prescribed manner, the Board considers that the film is suitable for unrestricted public exhibition, such a certificate is given which is called 'U' certificate. Section 5(a) provides principles for guidance in certifying films. It is significant to note that Article 19(2) has been practically read into Section 5(B)(1). Section 5(C) confers right of appeal to Tribunal against refusal of certificate. Under Section 6, the Central Government has revisional power to call for the record of any proceeding in relation to any film at any stage, where it is not made the subject matter of appeal to the Appellate Tribunal. Under Section 8 of the Act, the Rules called the Cinematograph (Certification) Rules 1983 have been framed. Under Section 5(B)(2) the Central Government has prescribed certain guidelines for the Censors Board. Guideline (1) relates to the objectives of film censorship. The Board shall ensure that: (a) the medium of film remains responsible and sensitive to the values and standards of society; (b) artistic expression and creative freedom are not unduly curbed and (c) censorship is responsive to social change. Guideline (2) requires the Board to ensure that: (i) anti-social activities such as violence not glorified or justified; (ii) the modus operandi of criminal or other visuals or words likely to incite the commission of any offence are not depicted; (iii) pointless or avoidable scenes of violence, cruelty and horror are not shown; (iv) human sensibilities are not offended by vulgarity, obscenity and depravity; (v) the sovereignty and integrity of India is not called in question; (vi) the security of the State is not jeopardized or endangered; (viii) friendly relations with foreign states are not strained; and (ix) Public Order is not endangered.

Guideline (3) also requires the Board to ensure that the film: (i) is judged in its entirety from the point of view of its overall impact and; (ii) is examined in the light of contemporary standards of the country and the people to whom the film relates. It will be thus seen that censorship is permitted mainly on social interest specified under Article 19(2) of the Constitution with emphasis on maintenance of values and standards of society.

Therefore, the censorship by prior restraint must necessarily be reasonable that could be saved by the well accepted principles of judicial review. In *K.A. Abbas v. Union of India*, (1971) 2 SCR 446 a Constitution Bench of this court considered important questions relating to pre-censorship of cinematograph films in relation to the fundamental right of freedom of speech and expression. K.A. Abbas, a noted Indian journalist and film producer produced a short documentary film called "A tale of Four Cities". In that film he sought to contrast the self-indulgent life of the rich in Metropolitan cities with the squalor and destitution of labouring masses who helped to construct the imposing buildings and complexes utilized by the rich. The film also goes on to explore the theme of exploitation of women by men, dealing in particular prostitution. Abbas applied to the Board of Film Censors for a 'U' certificate, permitting unrestricted exhibition of the film. He was informed by the regional officer that the Examining Committee had provisionally concluded that the film should be restricted to adults. The Revising Committee concurred in this result, whereupon Abbas, after exchanging correspondence with the Board, appealed to the Central Government. The Government decided to grant 'U' certificate provided that the scenes in the red light district were

deleted from the film. Abbas challenged the action of the Board mainly on four issues out of which two did not survive when the Solicitor General stated before the Court that the Government would set on foot legislation to effectuate the policies at the earliest possible date. The two issues which survived thereupon were: (a) that pre-censorship itself cannot be tolerated under the freedom of speech and expression; (b) that even if it were a legitimate restraint on the freedom, it must be exercised on very definite principles which leave no room for arbitrary action.

With regard to the power of pre-censorship, Hidayatullah, C.J., observed (at 473-74):

“The task of the censor is extremely delicate..... The standards that we set out for our censors must make a substantial allowance in favour of freedom thus leaving a vast area for creative art to interpret life and society with some of its foibles along with what is good. We must not look upon such human relationships as banned *in toto* and for ever from human thought and must give scope for talent to put them before society. The requirements of art and literature include within themselves a comprehensive, view of social life and not only in its ideal form and the line is to be drawn where the average man moral man begins to feel embarrassed or disgusted at a naked portrayal of life without the redeeming touch of art or genius of social value. If the depraved begins to see in these things more than what an average person would, in much the same way as it is wrongly said, a Frenchman sees a woman's legs in everything, it cannot be helped. In our scheme of things ideas having redeeming social or artistic value must also have importance and protection for their growth.”

Recently, Sabyasachi Mukharji, J., in *Ramesh v. Union of India*, (1988) 1 SCC 868 which is popularly called “TAMAS” case laid down the standard of judging the effect of the words or expression used in the movie. The learned Judge quoting with approval of the observation of Vivian Bose, J., as he then was, in the Nagpur High Court in the case of *Bhagwati Charun Shukla v. Provincial Government*, AIR 1947 Nag 1 (at 676): “That the effect of the words must be judged from the standards of reasonable, strong minded, firm and courageous men, and not those of weak and vacillating. This in our opinion is the correct approach in judging the effect of exhibition of a film or of reading a Book. It is the standard of ordinary reasonable man or as they say in English law, “the man on the top of a Clampham omnibus.”

We affirm and reiterate this principle. The standard to be applied by the Board or courts for judging the film should be that of an ordinary man of common sense and prudence and not that of an out of the ordinary or hypersensitive man. We, however, wish to add a word more. The Censors Board should exercise considerable circumspection on movies affecting the morality or decency of our people and cultural heritage of the country. The moral values in particular, should not be allowed to be sacrificed in the guise of social change or cultural assimilation. Our country has had the distinction of giving birth to a galaxy of great sages and thinkers. The great thinkers and sages through their life and conduct provided principles for people to follow the path of right conduct. There have been continuous efforts at rediscovery and reiteration of those principles. Adi-guru Shankaracharya, Ramanujacharya, Madhwacharya, Chaitanya Maha Prabhu, Swami Ram Krishan Paramhansa, Guru Nanak Sant Kabir and Mahatma Gandhi, have all enlightened our path. If one prefers to go yet further back, he will find “TIRUKKURAL” the ethical code from Tiruvalluvar

teaching which is “a general human morality and wisdom.” Besides, we have the concept of “Dharam” (righteousness in every respect) a unique contribution of Indian civilization to humanity of the world. These are the bedrock of our civilization and should not be allowed to be shaken by unethical standards. We do not, however, mean that the Censors should have an orthodox or conservative outlook. Far from it, they must be responsive to social change and they must go with the current climate. All we wish to state is that the Censors may display more sensitivity to movies which will have a markedly deleterious effect to lower the moral standards of those who see it. Krishna Iyer, J., in *Raj Kapoor v. Laxman*, (1980) 2 SCR 512 in words meaningful expressed similar thought. The learned Judge said (at 517):

“The ultimate censorious power over the Censors belongs to the people and by indifference, laxity or abetment, pictures which pollute public morals are liberally certified, the legislation, meant by Parliament to protect people's good morals, may be sabotaged by statutory enemies within.”

With these prefatory remarks, let us now turn to the reasons which weighed with the High Court to revoke the ‘U’ certificate and rule out the film altogether. The High Court has found fault with the Constitution of the First Revising Committee. It has held that the Revising Committee was constituted hurriedly and its constitution by “delegate Board Member” was illegal and without authority of law. The Committee also showed unusual favour to the producer by reviewing the film with hot haste. In the absence of a First Revising Committee having come into existence as known to law; the High Court said that the constitution of the Second Revising Committee was invalid and inoperative. We do not think that the High Court was justified in reaching this conclusion. Under the rules, the Regional Officer shall appoint an Examining Committee to examine the film. The reports and records relating thereto shall be treated as confidential. The Rule 22 inter alia, states that after screening the film, the Examining Officer shall within three working days send the recommendations of all the members of the Examining Committee to the Chairman. Rule 24(1) provides for constitution of a Revising Committee. It states that on receipt of the record referred to in rule 22, the Chairman may, of his own motion or on the request of the applicant, refer the movie to a Revising Committee. In the instant case, the Chairman did not constitute the first Revising Committee but a member of the Board did. The question is whether the member of the Board was competent to constitute the Revising Committee. Our attention was drawn to the Government order dated January 21, 1987 made under sec. 7(B) of the Cinematograph Act. The order reads:

In exercise of the powers conferred by Sec. 7B of the Cinematograph Act, 1952 (37 of 1952) (hereinafter referred to as the said Act), the Central Government hereby directs that any power, authority or jurisdiction exercisable by the Board of film, Certification (hereinafter referred to as the Board) in relation to matters specified in sec. 4, sub-secs. (3) and (4) of sec. 5, sec. 5-A and sec. 7C of the said Act shall also be exercisable subject to the condition given below by the following members of the Board at the Regional Office indicated against each, with immediate effect and until further orders:

1. Shri Samik Banerjee Calcutta
2. Ms. Maithreyi Ramadhurai Madras
3. Dr. B.K. Chandrashekar Bangalore.....”

This order clearly states that the power of the Board shall also be exercisable by the specified members within their regional office. For Madras region Ms. Maithrayi Ramadhurai has been constituted to exercise such powers. It cannot be contended that the Central Government has no power to delegate the powers or to issue the said order. Sec. 7(B) empowers the Central Government to issue general or special order directing that any power, authority or jurisdiction exercisable by the Board under the Act shall be exercisable also by the Chairman or any other member of the Board. The section further provides that anything done or action taken by the Chairman or other member specified in the order shall be deemed to be a thing done or action taken by the Board. From the provisions of sec. 7B read with the Government order dated January 21, 1987, it becomes clear that the constitution of the First Revising Committee by the member at the Madras Regional Office is not vulnerable to any attack. It is legally justified and unassailable. The conclusion to the contrary reached by the High Court is apparently unwarranted. We also do not find any justification for the observation of the High Court that there was unusual favour shown to the producer by the First Revising Committee in reviewing the film. It is true that the film was reviewed within 2-3 hours of the presentation of the application. But there is no reason to attribute motives either to members of the Committee or to the producer. In matters of certification of films, it is necessary to take prompt action by the respective authorities. The producer who has invested a large capital should not be made to wait needlessly. He has a statutory right to have the validity of, the film determined in accordance with law. It would be, therefore, proper and indeed appreciative if the film is reviewed as soon as it is submitted. There are two other side issues which may be disposed of at this stage. The scene with song No. 2 in reel No. 3 and the comments by the heroine of looking at the photo of Dr. Ambedkar, have come under serious criticism. It is said that the song has the effect of spreading 'Kulachar' which is 'Poisonous message' to the depressed classes not to educate their children. The complaint, if true, is serious. We, therefore, gave our anxious consideration to the grievance. We, as did the High Court, viewed the movie. The cobbler sings the song in question with his grandson who is eager to go to school. The song contains references to Kamaraj, Anna and MGR who without even college education became Chief Ministers. The cobbler asks the grandson: "What are you going to achieve by education? and don't forsake the profession you know and you can educate yourself as a cobbler."

While these and other exchanges are going on between the cobbler and grandson, the heroine comes and insists that the boy should go to school. She promises to contribute Rs.50 as an incentive to the cobbler every month and also to make good his income deprived of by the boy's earning. They agree to her suggestion with "Vanakkam, Vanakkam". The song thus ends with a happy note and the cobbler agrees to send his grandson to school. It is true as pointed out by counsel for the respondents that one or two references in the song are not palatable, but we should not read too much into that writing. It is not proper to form an opinion by dwelling upon stray sentences or isolated passages disregarding the main theme. What is significant to note is that the cobbler ultimately does not insist that his grandson should continue the family pursuits. He accepts the suggestion made by the heroine. It is, therefore, wrong to conclude that the song was intended to convey poisonous message against the interests of depressed classes.

The criticism on the alleged comments on Dr. Ambedkar is equally unsustainable. The confusion perhaps is due to the pronounced accent of an English word in the course of Tamil conversation. The matter arises in this way: Sastry shows the photograph of Dr. Ambedkar to heroine and enquires whether she likes it. Then she makes certain comments. According to the High Court, she states, "Dr. Ambedkar worked for the poor. Not for 'par'." It is said that 'par' in Tamil means equality and if she says 'not for the par', it means that Dr. Ambedkar did not work for equality. If she states like that, it is certainly objectionable since Dr. Ambedkar did everything to have an egalitarian society. But while viewing the film, we could not hear any such word used by the heroine.

On the other hand, we distinctly noted her saying, "Dr. Ambedkar worked for the poor, Not for power.." This being the remark there is no basis for the criticism of the High Court.

The last complaint and really the nub of the case for the respondent is about the reel No. 14 covering the court scene where Karuppayee and Sastry are prosecuted for offence of obtaining a false caste certificate. The reel No. 14 contains almost a dialogue between the prosecution lawyer and Karuppayee. She criticises the reservation policy of the Government. She states that during the British regime, the people enjoyed educational freedom, and job opportunities which were based on merit criteria and not vote caste in a particular constituency. Then the prosecution lawyer puts a question "why do you regret this Madam? Was not 'Bharat Matha' under shackles then?" She replies: "You are right. Then "Bharat Matha" was in chains (Vilangu, is the Tamil word used for shackles which also means animals). Now "Bharat Matha" is under animals' hands." On a further question from the prosecutor she explains that her reference to 'animals' hands is only to those who incite caste, language and communal fanaticism, thus confusing people and making it their profession. She also states that it is the Government and its laws that have made her and her father to tell a lie. The presiding Judge interrupts with a question: "What is wrong in the Government approach? Can you elaborate?" She replies: "That it is wrong not to give credence to her merit and evaluate the same on the basis of her caste and such evaluation would put a bar on the progress." She goes on to explain "Your laws are the barriers Sir. You have made propaganda in nook and corner stating, "Be an Indian, Be an Indian". And if I proudly say I am an Indian then the Government divides saying 'no, no, no..... You are a Brahmin, you are Christian, you are a Muslim. It is the Government that divides." Then she puts a question to herself: "What is the meaning of "Be an Indian?" She explains that it must be without caste, creed and communal considerations, from Kashmir to Kanyakumari, the country must be one. She then blames the Government with these words: "The Government in dealing with all has no one face. Take any application form they want to know your caste and religion. When all are Indians where is the necessity for this question. You have divided the people according to caste. Then if you reel off on "National integration" will not the public laugh."

As to the reservation policy to those who are backward she says: "On God's name, I have no objection in providing all concessions to those who are backward. The list of those belonging to forward sections and backward sections could be prepared on the basis of economic considerations. And those below a specified limit of income be included in the backward list."

How did the High Court look at it? On the remark of heroine as to the situations that existed during British administration, the High Court observed thus:

“It is preposterous and offensive to claim that education was independent when India was under British rule and that, after independence it is not there.”

The High Court also said:

“That any denigration of Rule of law would never bring orderly society. To preach that it is only law that prompted them to utter falsehood and in its absence they would not have done it is a wrong way presenting a view point.” As to the allegations that ‘Bharat Matha’ is now in the hands of politicians, who are instigating the masses on the basis of caste and language, etc., the High Court remarked: “If this sort of decrying India for being an independent nation is to be projected in films repeatedly, then in course of time, citizens will loose faith in the integrity and sovereignty of India. With this sort of glorification made, how could it be claimed that the film stands for national integration. That was why one Member rightly said that it is a hollow-claim. Hence Guideline 2(vi) and (vii) are contravened.”

On the total impact of the film, the High Court observed:

“That certain peculiar factors will have to be taken into account because of guidelines 3(i) and 3(ii). This film is in Tamil. It deals with reservations now extended to large sections of people on a particular basis, and who have suffered for Centuries, and at a time when they have not attained equality and when their valuable rights which are secured under the Constitution is attempted to be taken away, they get agitated. This film taken in Tamil for Tamil population on being screened in Tamil Nadu, will certainly be viewed in the background of what had happened in Tamil Nadu during the preceding four decades, and the reactions are bound to be volatile.”

We find it difficult to appreciate the observations of the High Court. We fail to understand how the expression in the film with criticism of reservation policy or praising the colonial rule will affect the security of the State of sovereignty and integrity of India. There is no utterance in the film threatening to overthrow the Government by unlawful or unconstitutional means. There is no talk for secession either. Nor there is any suggestion for impairing the integration of the country. All that the film seems to suggest is that the existing method of reservation on the basis of caste is bad and reservation on the basis of economic backwardness is better. The film also deprecates exploitation of people on caste considerations. This is the range and rigor of the film.

The High Court, however, was of opinion that public reaction to the film, which seeks to change the system of reservation is bound to be volatile. The High Court has also stated that people of Tamil Nadu who have suffered for centuries will not allow themselves to be deprived of the benefits extended to them on a particular basis. It seems to us that the reasoning of the High Court runs a foul of the democratic principles to which we have pledged ourselves in the Constitution. In democracy it is not necessary that every one should sing the same song. Freedom of expression is the rule and it is generally taken for granted. Every one has a fundamental right to form his own opinion on any issue of general concern. He can form and inform by any legitimate means.

The democracy is a Government by the people via open discussion. The democratic form of government itself demands its citizens an active and intelligent participation in the affairs of the community. The public discussion with people participation is a basic feature and a rational process of democracy which distinguishes it from all other forms of government. The democracy can neither work nor prosper unless people go out to share their views. The truth is that public discussion on issues relating to administration has positive value. What Falter Lippmann said in another context is relevant here:

“When men act on the principle of intelligence, they go out to find the facts When they ignore it, they go inside themselves and find out what is there. They elaborate their prejudice instead of increasing their knowledge. In *Maneka Gandhi v. Union of India*, (1978) 2 SCR 621 Bhagwati J., observed at 696:

“Democracy is based essentially on free debate and open discussion, for that is the only corrective of Government action in a democratic set up. If democracy means government of the people by the people. it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential.”

The learned judge in *Naraindas v. State of Madhya Pradesh*, (1974) 3 SCR 624 while dealing with the power of the State to select text books for obligatory use by students said at 650:

“It is our firm belief, nay, a conviction which constitutes one of the basic values of a free society to which we are wedded under our Constitution, that there must be freedom not only for the thought that we cherish, but also for the thought that we hate. As pointed out by Mr. Justice Holmes in *Abramson v. United States*, 250 U.S. 616: “The ultimate good desired is better reached by free trade in ideas--the best test of truth is the power of the thought to get itself accepted in the competition of the market.”

There must be freedom of thought and the mind must be ready to receive new ideas, to critically analyze and examine them and to accept those which are found to stand the test of scrutiny and to reject the rest.”

In *Sakal v. Union of India*, (1962) 3 SCR 842 at 866, Mudholkar, J. said:

“This Court must be ever vigilant in guarding perhaps the most precious of all the freedoms guaranteed by our Constitution. The reason for this is obvious. The freedom of speech and expression of opinion is of paramount importance under a democratic Constitution which envisages changes in the composition of legislatures and governments and must be preserved.”

Movie is the legitimate and the most important medium in which issues of general concern can be treated. The producer may project his own messages which the others may not approve of. But he has a right to “think out” and put the counter appeals to reason. It is a part of a democratic give-and-take to which no one could complain. The State cannot prevent open discussion and open expression, however, hateful to its policies. As Professor Fraund puts it: “The State may not punish open talk, however, hateful, not for hypocritical reason that Hyde Parks are a safety-valve, but

because a bit of sense may be salvaged from the odious by minds striving to be rational, and this precious bit will enter into the amalgam which we forge.” (Paul A. Freund-On Understanding the Supreme Court 26 (1950).

“When men differ in opinion, both sides ought equally to have the advantage of being heard by the public.” (Benjamin Franklin). If one is allowed to say that policy of the government is good, another is with equal freedom entitled to say that it is bad. If one is allowed to support the governmental scheme, the other could as well say, that he will not support it. The different views are allowed to be expressed by proponents and opponents not because they are correct, or valid but because there is freedom in this country for expressing even differing views on any issue. Alexander Meiklejohn perhaps the foremost American philosopher of freedom of expression, in his wise little study neatly explains:

“When men govern themselves, it is they--and no one else--who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, an American as well..... American..... If then, on any occasion in the United States it is allowable, in that situation, to say that the Constitution is a good document it is equally allowable, in that situation, to say that the Constitution is a bad document. If a public building may be used in which to say, in time of war, that the war is justified, then the same building may be used in which to say that it is not justified. If it be publicly argued that conscription for armed service is moral and necessary, it may likewise be publicly argued that it is immoral and unnecessary. If it may be said that American political institutions are superior to those of England or Russia or German, it may with equal freedom, be said that those of England or Russia or Germany are superiors to ours. These conflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant..... To be afraid of ideas, any idea, is to be unfit for self government.” (Political Freedom (1960) at 27). He argued, if we may say so correctly, that the guarantees of freedom of speech and of the press are measures adopted by the people as the ultimate rulers in order to retain control over the Government, the people’s legislative and executive agents.

Brandies, J., in *Whitney v. California*, 274 US 357,375-8 (1927) propounded probably the most attractive free speech theory:

“.....that the greatest menace to freedom is an inert people; that public discussion is a political duty; It is hazardous to discourage thought, hope and imagination; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.”

What Archibald Cox said in his article though on “First Amendment” is equally relevant here:

“Some propositions seem true or false beyond rational debate. Some false and harmful, political and religious doctrine gain wide public acceptance. Adolf Hitler’s brutal theory of a ‘master race’ is sufficient example. We tolerate such foolish and sometimes dangerous appeals not because they may prove true but because freedom of speech is indivisible. The

liberty cannot be denied to some ideas and saved for others. The reason is plain enough: no man, no committee, and surely no government, has the infinite wisdom and disinterestedness accurately and unselfishly to separate what is true from what is debatable, and both from what is false. To license one to impose his truth upon dissenters is to give the same license to all others who have, but fear to lose, power. The judgment that the risks of suppression are greater than the harm done by bad ideas rests upon faith in the ultimate good sense and decency of free people).

The problem of defining the area of freedom of expression when it appears to conflict with the various social interests enumerated under Article 19(2) may briefly be touched upon here. There does indeed have to be a compromise between the interest of freedom of expression and social interests. But we cannot simply balance the two interests as if they are of equal weight. Our commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a "spark in a powder keg".

Our remarkable faith in the freedom of speech and expression could be seen even from decisions earlier to our Constitution. In *Kamal Krishna v. Emperor*, AIR 1935 Cal 636, the Calcutta High Court considered the effects of a speech advocating a change of Government. There the accused was convicted under sec. 124(A) of Penal Code for making a speech recommending 'Bolshevik' form of Government to replace the then existing form of Government in Calcutta. While setting aside the conviction and acquitting the accused, Lord Williams, J., who delivered the judgment observed (at 637):

"All that the speakers did was to encourage the young men, whom he was addressing, to join the Bengal Youth League and to carry on a propaganda for the purpose of inducing as large a number of people in India as possible to become supporters of the idea of communism as represented by the present Bolshevik system in Russia. It is really absurd to say that speeches of this kind amount to sedition. If such were the case, then every argument against the present form of Government and in favour of some other form of Government might be allowed to lead to hatred of the Government, and it might be suggested that such ideas brought the Government into contempt. To suggest some other form of Government is not necessarily to bring the present Government into hatred or contempt."

To the same effect is the observation by the Bombay High Court in *Manohar v. Government of Bombay*, AIR 1950 BOM 210. There the writer of an article in a newspaper was convicted for an offence under the Press (Emergency Powers) Act, 1931, for incitement to violence. The writer had suggested the people to follow the example of China by rising against Anglo-American Imperialism and their agents. He had also suggested his readers to pursue the path of violence, as the Chinese people did, in order that Anglo-American Imperialism should be driven out of this country. Chagla C.J., while quashing the conviction said (at 213): "It is true that the article does

state that the working class and the coiling masses can get hold of power through the path of revolution alone. But the expression 'revolution' is used here, as is clear from the context, in contradistinction to reformism or gradual evolution. The revolution preached is not necessarily a violent revolution.

As the writer has not stated in this article that the toiling masses should take up arms and fight for their rights and thus achieve a revolution we refuse to read this expression as inciting the masses to violent methods." In *Niharendu Dutt Majumdar v. Emperor*, AIR 1942 FC 23, the Federal Court examined the effects of a vulgar and abusive outburst against the Government made by the accused for which he was convicted under Rule 34 of the Defence of India Rules. Gwyer, C.J., while acquitting the person commented more boldly (at 27):

"There is an English saying that hard words break no bones; and the wisdom of the common law has long refused to regard an actionable any words which, though strictly and liberally defamatory, would be regarded by all reasonable men as no more than mere vulgar abuse.

The speech now before us is full of them. But we cannot regard the speech, taken as a whole as inciting those who heard it, even though they cried "shame shame" at intervals, to attempt by violence or by public disorder to subvert the Government for the time being established by law in Bengal or elsewhere in India. That the appellant expressed his opinion about that system of Government is true, but he was entitled to do so, and his reference to it were, we might almost say, both common place and in common form, and unlikely to cause any Government in India a moments uneasiness. His more violent outburst were directed against the then Ministry in Bengal and against the Governor in Bengal in his political capacity but we do not feel able to say that his speech whatever may be thought of the form in which it was expressed, exceeded the legal limits of comment or criticism." Even the European Court's approach in protecting the freedom of expression is not different although they have the extensive list of circumstances for limiting the freedom. Article 10 of the European Convention of Human Rights and Fundamental Freedom provides:

"(1) Every one has the right to freedom of expression.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

It appears that the second paragraph of Article 10 virtually removes the right purportedly guaranteed by the first paragraph. However, the European Court in *Handyside v. United Kingdom*, [1976] EHRR/737 observed at 754; "The court's supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society'. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10(2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but

also to those that offend shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued."

This takes us to the validity of the plea put forward by the Tamil Nadu Government. In the affidavit filed on behalf of the State Government, it is alleged that some organisations like the Tamil Nadu Scheduled Castes/ Scheduled Tribes People's Protection Committee, Dr. Ambedkar People's Movement, the Republican Party of India have been agitating that the film should be banned as it hurt the sentiments of people belonging to Scheduled Caste/Scheduled Tribes. It is stated that the General Secretary of the Republican Party of India has warned that his party would not hesitate to damage the cinema theatres which screen the film. Some demonstration made by people in front of "The Hindu" office on March 16, 1988 and their arrest and release on bail are also referred to. It is further alleged that there were some group meetings by Republican Party members and Dr. Ambedkar People's Movement with their demand for banning the film. With these averments it was contended for the State that the exhibition of the film will create very serious law and order problem in the State.

We are amused yet troubled by the stand taken by the State Government with regard to the film which has received the National Award. We want to put the anguished question, what good is the protection of freedom of expression if the State does not take care to protect it? If the film is unobjectionable and cannot constitutionally be restricted under Article 19(2), freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence. That would tantamount to negation of the rule of law and a surrender to black mail and intimidation. It is the duty of the State to protect the freedom of expression since it is a liberty guaranteed against the State. The State cannot plead its inability to handle the hostile audience problem. It is its obligatory duty to prevent it and protect the freedom of expression. In this case, two Revising Committees have approved the film. The members thereof come from different walks of life with variegated experiences. They represent the cross section of the community. They have judged the film in the light of the objectives of the Act and the guidelines provided for the purpose. We do not think that there is anything wrong or contrary to the Constitution in approving the film for public exhibition. The producer or as a matter of fact any other person has a right to draw attention of the Government and people that the existing method of reservation in education institutions overlooks merits. He has a right to state that reservation could be made on the basis of economic backwardness to the benefit of all sections of community. Whether this view is right or wrong is another matter altogether and at any rate we are not concerned with its correctness or usefulness to the people. We are only concerned whether such a view could be advocated in a film. To say that one should not be permitted to advocate that view goes against the first principle of our democracy. We end here as we began on this topic. Freedom of expression which is legitimate and constitutionally protected, cannot be held to ransom, by an intolerant group of people. The fundamental freedom under Article 19(1)(a) can be reasonably restricted only for the purposes mentioned in Articles 19(2) and the restriction must be justified on the anvil of necessity and not

the quirks and of convenience or expediency. Open criticism of Government policies and operations is not a ground for restricting expression. We must practice tolerance to the views of others. Intolerance is as much dangerous to democracy as to the person himself.

In the result, we allow these appeals, reverse the judgment of the High Court and dismiss the writ petitions of the respondents. In the circumstances of the case, however, we make no order as to costs.

Bobby Art International v. Om Pal Singh Hoon & Ors.

(1996) 4 SCC 1

S.P. Bharucha, CJI (for himself and B.N. Kirpal, J.): These appeals impugn the judgment and order of a Division Bench of the High Court of Delhi in Letters Patent appeals. The Letters Patent appeals challenged the judgment and order of a learned single judge allowing a writ petition. The Letters Patent appeals were dismissed, subject to a direction to the Union of India (the second respondent). The writ petition was filed by the first respondent to quash the certificate of exhibition awarded to the film “Bandit Queen” and to restrain its exhibition in India.

The film deals with the life of Phoolan Devi. It is based upon a true story. Still a child, Phoolan Devi was married off to a man old enough to be her father. She was beaten and raped by him. She was tormented by the boys of the village; and beaten by them when she foiled the advances of one of them. A village panchayat called after the incident blamed Phoolan Devi for attempting to entice the boy, who belonged to a higher caste. Consequent upon the decision of the village Panchayat, Phoolan Devi had to leave the village. She was then arrested by the Police and subjected to indignity and humiliation in the Police station. Upon the intervention of some persons she was released on bail; their intervention was not due to compassion but to satisfy their carnal appetite. Phoolan Devi was thereafter kidnapped by dacoits and sexually brutalized by their leader, a man named Babu Gujjar. Another member of the gang, Vikram Mallah, shot Babu Gujjar dead in a fit of rag while he was assaulting Phoolan Devi. Phoolan Devi was attracted by Vikram Mallah and threw her not in with him. Along with Vikram Mallah she accosted her husband, tied him to a tree and took her revenge by brutally beating him. One Sri Ram, the leader of a gang of Thakurs, who had been released from jail, made advances to Phoolan Devi and was spurned. He killed Vikram Mallah. Having lost Vikram Mallah’s protection, Phoolan Devi was gang-raped by Sri Ram, Lalaram and others. She was stripped naked, paraded and made to fetch water from the village well under the gaze of the villagers, but no one came to her rescue. To avenge herself upon her persecutors, she joined a dacoits gang headed by Baba Mustkin. In avenging herself upon Sri Ram, she humiliated and killed twenty Thakurs of the village of Behmai. Ultimately, she surrendered and was in jail for a number of years.

On 17th August, 1994, the film was presented for certification to the Censor Board under the Cinematograph Act, 1952. The Examining Committee of the Censor Board referred it to the Revising Committee under Rule 24(1) of the Cinematographic (Certification) Rules, 1983. On 19th July, 1995, the Revising Committee recommended that the film be granted an 'A' certificate, subject to certain excisions and modifications. (An 'A' certificate implies that the film may be viewed only by adults).

Aggrieved by the decision of the Revising Committee, an appeal was filed under Section 5C of the Cinematographic Act before the Appellate Tribunal. It is constituted by virtue of the provisions of Section 5C of the Cinematograph Act and consists of the Chairman and members who “are qualified to judge the effect of films on the public”. In the present case the tribunal was chaired by

Lentin. J., a retired Judge of the Bombay High Court, and three ladies, Smt. Sara Mohammad, Dr. Sarayu V. Doshi, & Smt. Reena Kumari, were its members.

The Tribunal's order states that the film portrays the trials and tribulations and the various humiliations (mental and physical) heaped on her (Phoolan Devi) from childhood onwards, which, out of desperation and misery, drove her to dacoity and the revenge which she takes on her tormentors and those who had humiliated and tortured and had physically abused her.

“3.1 The tone and tenor of the dialogues in this film reflect the nuances locally and habitually used and spoken in the villages and in the ravines of the Chambal, not bereft of expletives used for force and effect by way of normal and common parlance in those parts; these expletives are not intended to be taken literally. There is nothing sensual or sexual about these expletives used as they are in ordinary and habitual course as the language in those parts and express as they do emotions such as anger, rage, frustration and the like, and represent as they do the color of the various locales in this film.”

.....

“To delete or even to reduce these climactic visuals”, the Tribunal said, “would be a sacrilege”.

[...] The Tribunal permitted certain words of abuse in the vernacular to be retained because of the context in which they were spoken and the persons by whom they were spoken: “spoken as they are as colloquially and as part of their daily life, it would be unfair on our part to castigate the use of these words which we would otherwise have done”.

Upon the basis of this unanimous order of the Tribunal, the film was granted an 'A' certificate.

On 31st August, 1995, the film was screened, with English sub-titles, at the Siri Fort Film Festival of India with the permission of the Ministry of Information and Broadcasting. From 25th January, 1996, onwards, the censored film was open to public viewing at various cinema theatres in the country.

On 27th January, 1996, the first respondent filed the writ petition before the Delhi High Court seeking to quash the certificate granted to the film and to restrain its exhibition in India. The first respondent stated in the writ petition that he was a Hindu and Gujjar by caste. He was the president of the Gujjar Gaurav Sansthan and involved in the welfare of the Gujjar community. He had seen the film when it was exhibited at the International Film Festival; he had felt aggrieved and his fundamental rights had been violated. Though audiences were led to believe that the film depicted the character of “a former queen of ravines” also known as Phoolan Devi, the depiction was “abhorrent and unconscionable and a slur on the womanhood of India”. The petitioner and his community had been depicted in a most depraved way specially in the scene of rape by Babu Gujjar, which scene was “suggestive of the moral depravity of the Gujjar community as rapists and the use of the name Babu Gujjar for the principal villain lowered the reputation of the Gujjar community and the petitioner”. It lowered the respect of the petitioner in the eyes of society and his friends. The scene of rape was obscene and horrendous and cast a slur on the face of the Gujjar community.

The film went beyond the limits of decency and lowered the prestige and position of the woman in general and the community of Mahallas in particular. The first respondent had been discriminated against and Articles 14, 19 and 21 of the Constitution had been violated.

The learned Single Judge allowed the writ petition and quashed the certificate granted to the film. He directed the Censor Board to consider the grant of an 'A' certificate to it after excisions and modifications in accordance with his order had been made. Till a fresh certificate was granted the screening of the film was injunctioned.

The Division Bench, in the judgment under appeal, upheld the view taken by the learned single Judge. Overall, the Division Bench was of the view that the Tribunal's order was vitiated by the use of the wrong tests.

Section 5-B of the Cinematograph Act, which echoes Article 19(2), states that a film shall not be certified for public exhibition if, in the opinion of the authority competent to grant the certificate, the film or any part of it is against the interests of, inter alia, decency. Under the provisions of sub-section (2) of Section 5-B the Central Government is empowered to issue directions section out the principles which shall guide the authority competent to grant certificates in sanctioning films for public exhibition.

The guidelines earlier issued were revised in 1991. Clause (1) thereof reads thus:

“1. The objectives of film certification will be to ensure that -

- (a) the medium of film remains responsible and sensitive to the values and standards of society;
- (b) artistic expression and creative freedom are not unduly curbed;
- (c) certification is responsive to social change;
- (d) the medium of film provides clean and healthy entertainments; and
- (e) as far as possible, the film is or aesthetic value and cinematically of a good standard.”

Clause (2) states that the Board of Film Censors shall ensure that-

“(vii) human sensibilities are not offended by vulgarity, obscenity or depravity;

xxx

xxx

xxx

(ix) scenes degrading or denigrating women in any manner are not presented:

(ix) scenes involving sexual violence against women like attempt to rape, rape or any form of molestation or scenes of a similar nature are avoided, and if any such incident is germane to the theme, they shall be reduced to the minimum and no details are shown;

xxx

xxx

xxx

Clause (3) reads thus:

“The Board of Film Certification shall also ensure that the film-

- (1) is judged in its entirety from the point of view of the overall impact; and
- (ii) is examined in the light of the period depicted in the film and the contemporary standards of the country and the people to which the film relates, provided that the film does not deprave the morality of the audience.”

Learned counsel for the appellants submitted that the film had been scrutinized by the Tribunal, which was an expert body constituted for that purpose, and it had passed the test of such scrutiny. It was emphasized that three members of the four-member Tribunal were ladies and they had not found anything offensive in the film as certified for adult viewing. The guidelines, it was submitted, required the film did not offend either Section 5-B(1) or the guidelines. The submission of learned counsel for the appellants was supported by the learned Additional Solicitor General, appearing for the Union of India.

Dr. Koul, learned counsel for the first respondent, submitted that the machinery under cinematograph act was only for those who had some concern with the making of the film and that citizens who were offended by it were free to approach the High Court under Article 226. There were compelling reasons for the High Court to pass the order that it did not for the film was abhorrent. What had also to be considered were the individual episodes, and the episodes depicting full frontal nudity, rape and the use of swear words offended the requirements of sub-clauses (vii), (ix) and (x) of the guidelines. The film violated the freedom of speech and expression of the first respondent.

The decision of the court most relevant to the appeals before us was delivered by constitution Bench in *K.A. Abbas v. Union of India & Anr.*, (1970) 2 S.C.C. 780. It related to a documentary film entitled “A Tale of Four Cities”. The appellant contended in a petition under Article 32 that he was entitled to a certificate for unrestricted public exhibition thereof. What Hidayatullah, C.J. speaking for the Court, said needs to be reproduced:

“49. [...] *The task* of the censor is extremely delicate and his duties cannot be subject of an exhaustive set of commands established by prior ratiocination. But direction is necessary to him so that he does not sweep within the terms of the directions vast areas of thought, speech and expression of artistic quality and social purpose and interest. Our standards must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read. The standards that we set for our censors must make a substantial allowance in favour of freedom thus leaving a vast area for creative art to interpret life and society with some with some of its foibles along with what is good. The requirements of art and literature include social life and not only in its ideal form, and the line is to be drawn where the average moral man begins to feel embarrassed or disgusted at a naked portrayal of life without the redeeming touch of art or genius or social value. In our scheme of things ideas having redeeming social or artistic value must also have importance and protection for their growth. Sex and obscenity are not always synonymous and it is wrong to classify sex as

essentially obscene or even indecent or immoral. It should be our concern, however, to prevent the use of sex designed to play a commercial role by making its own appeal. This draws in the censor's scissors.

.....

50. [...] it is not the elements of rape, leprosy, sexual immorality which should attract the censor's scissors but how the theme is handled by the producer. It must, however, be remembered that the cinematograph is a powerful medium and its appeal is different. The horrors of war as depicted in the famous etching of Goya do not horrify one so much as the same scenes rendered in colour and with sound and movement would do. We may view a documentary on the erotic tableaux from our ancient temples with equanimity or read the *Kamasutra* but documentary from them as a practical sexual guide would be abhorrent.

.....

In *Raj Kapoor & Ors. v. State & Ors.*, 1980 (1) S.C.C. 43, this Court was dealing with *pro bono publico* prosecution against the producer, actors and others connected with a film called "Satyem, Sivam, Sundaram" on the ground of prurience, moral depravity and shocking erosion of public decency. A petition to quash the proceedings was moved and procedural complications brought the matter to this Court. One of the questions considered was: when can a film to be publicly exhibited be castigated as prurient and obscene and violative of norms against venereal depravity. Krishna Iyer, J., speaking for the Court said, "Art, morals and law's manacles on aesthetics are sensitive subject where jurisprudence meets other social sciences and never goes alone to bark and bite because State-made strait-jacket is an inhibitive prescription for a free country unless enlightened society actively participates in the administration of justice to esthetics."

"9. The world's greatest paintings, sculptures, songs and dances, India's lustrous heritage, the Konaraks and Khajurahos, lofty epics, luscious in patches, may be asphyxiated by law, if prudes and prigs and State moralists prescribe paradigms and prescribe heterodoxies...

14. I am satisfied that the Film Censor Board, acting under Section 5-A, is specially entrusted to screen off the silver screen pictures with offensively invade or deprave public morals through over-sex.... the magistrate shall not brush aside what another tribunal has, for similar purpose, found. May be, even a rebuttable presumption arises in favour of the statutory certificate but could be negated by positive evidence. An act of recognition of moral worthiness by a statutory agency is not opinion evidence but an instance or transaction where the fact in issue has been asserted, recognized or affirmed.

15. I am not persuaded that once a certificate under the Cinematograph Act is issued the Penal Code, *pro tanto*, will hang limp. The court will examine the film and judge whether its public display, in the given time and clime, so breaches public morals or depraves basic decency as to offend the penal provisions.

.....

In *Samaresh Bose and anr. v. Amal Mitra and anr.*, 1985 (4) S.C.C. 289, this Court was concerned with a novel entitled “Prajapati”; it was published in *Sarodiya Desh*, which was read by Bengalis of both sexes and almost of all goes all over India. A complaint was lodged that the novel was obscene and had the tendency to corrupt the morals of its readers. This Court said:

“A vulgar writing is not necessarily obscene. Vulgarity arouses a feeling of disgust and revulsion and also boredom but does not have the effect of depraving, debasing and corrupting the morals of any reader of the novel, whereas obscenity has the tendency to deprave and corrupt those whose minds are open to such immoral influences. We may observe that characters like Sukhen, Shikha, the father and the brothers of Sukhen, the business executives and others portrayed in the book are not just figments of the author’s imagination, Such characters are often to be seen in real life in the society. The author who is a powerful writer has used his skill in focussing the attention of the readers on such characters in society and to describe the situation more eloquently has had used unconventional and slang words so that in the light of the author’s understanding, the appropriate emphasis is there on the problems. If we place ourselves in the position of the author and judge the novel from his point of view, we find that the author intends to expose various evils and ills pervading the society and to pose with particular emphasis the problems which ail and afflict the society in various spheres. He has used his own technique, skill and choice of words which may in his opinion, serve properly the purpose of the novel. If we place ourselves in the position of readers, who are likely to read this book, and we must not forget that in this class of readers there will probably be readers of both sexes and of all ages between teenagers and the aged, we feel that the readers as a class will read the book with a sense of shock, and disgust and we do not think that any reader on reading this book would become depraved, debased and encouraged to lasciviousness. It is quite possible that they come across such characters and such situations in life and have faced them or may have to face them in life..... we do not think that it can be said with any assurance that the novel is obscene merely because slang and unconventional words have been used in the book in which there have been emphasis on sex and description of female bodies and there are the narrations of feelings, thoughts and actions in vulgar language.... We have to bear in mind that the author has written this novel which came to be published in the ‘Srodiya Desh’ for all classes of readers and if cannot be right to insist that the standard should always be for the writer to see that the adolescent may not be brought into contract with sex.....”

In *The State of Bihar v. Shailabala Devi*, 1952 S.C.R., Mukherjee, J., concurring with Mahajan, J., observed that the writing had to be looked at as a whole without laying stress on isolated passages or particular expressions used here and there and that the Court had to take unto consideration what effect the writing was likely to produce on the minds of the readers for whom the publication was intended. Account had also to be taken of the place, circumstances and occasion of the publication, as a clear appreciation of the background in which the words were used was of very great assistance in enabling the court to view them in their proper perspective.

In *Sakal Papers (P) Ltd. and Ors. v. The Union of India*, 1962 (3) S.C.R. 842, a Constitution Bench held that the only restrictions which can be imposed on the rights of an individual under Article

19(1)(a) were those which clause (2) of Article 19 permitted and no other. This was reiterated in *Life Insurance Corporation of India v. Prof. Manubhai D. Shah*, 1992 (3) S.C.C. 637.

The guidelines are broad standards. They cannot be read as one would read a statue. Within the breath of their parameters the certification authorities have discretion. The specific sub-clauses of clause 2 of the guidelines cannot outweigh the sweep of clauses 1 and 3 and, indeed, of sub-clause (ix) of clause (2). Where the theme is of social relevance, it must be allowed to prevail. Such a theme does not offend human sensibilities nor extol the degradation or denigration of women. It is to this end that sub-clause (ix) of clause 2 permits scenes of sexual violence against women, reduced to a minimum and without details, if relevant to the theme. What minimum and lack of details should be is left to the good sense of the certification authorities, to be determined in the light of the relevance of the social theme of the film.

'Bandit Queen' is the story of a village child exposed from an early age to the brutality and lust of man. Married to a man old enough to be her father she is beaten and raped. The village boys make advances which she repulses; But the village panchayat finds her guilty of the enticement of a village boy because he is of high caste and she has to leave the village. She is arrested, and in the police station filthily abused. Those who stand bail for her do so to satisfy their lust. She is kidnapped and raped. During an act of brutality the rapist is shot dead and she finds ally in her rescuer. With his assistance she beats up her husband, violently, her rescuer is shot dead by one whose advances she has spurned. She is gang-raped by the rescuer's assailant and his accomplices and they humiliate her in the light of the village: a hundred men stand in a circle around the village well and was the humiliation, her being stripped naked and walked around the circle and then made to draw water. And not one of the villagers helps her. She burns with anger, shame and the urge for vengeance. She gets it, and kills many Thakurs too.

It is not a pretty story. There are no syrupy songs or pirouetting round trees. It is the serious and sad story of a worm turning: a village born female, becoming a dreaded dacoit. An innocent who turns into a vicious criminal because lust and brutality have affected her psyche so. The film levels an accusing finger at members of society who had tormented Phoolan Devi and driven her to become a dreaded dacoit filled with the desire to revenge.

It is in this light that the individual scenes have to be viewed.

First, the scene where she is humiliated, stripped naked, paraded, made to draw water from the well, within the circle of a hundred men is intended by those who strip her to demean her. The effect of so doing upon her could hardly have been better conveyed than by explicitly showing the scene. The object of doing so was not to titillate the cinema-goer's lust but to arouse in him sympathy for the victim and disgust for the perpetrators. The revulsion that the Tribunal referred to was not at Phoolan Devi's nudity but at the sadism and heartlessness of those who had stripped her naked to rob her of every shred of dignity, Nakedness does not always arouse the baser incident. The reference by the Tribunal to the film 'Schindler's List' was apt, shown frontally, being led into the gas chambers of a Nazi concentration camp. Not only are they about to, but they have

been, stripped in their last moments of the basic dignity of human beings. Tears are a likely reaction; pity, horror and a fellow feeling of shame are certain, except in the pervert or to assuage the susceptibilities of the over-sensitive. 'Bandit Queen' tells a powerful human story and to that story the scene of Phoolan Devi's enforced naked parade is central. It helps to explain why Phoolan Devi became what she did: her rage and vendetta against the society that had heaped indignities upon her.

The rape scene also helps to explain why Phoolan Devi became what she did. Rape is crude and its crudity is what the rapist's bouncing bare posterior is meant to illustrate. Rape and sex are not being glorified in the film. Quite the contrary. It shows what a terrible, and terrifying, effect rape and lust can have upon the victim. It focuses on the trauma and emotional turmoil of the victim to evoke sympathy for her and disgust for the rapist.

Too much need not, we think, be made of a few swear words the like of which can be heard every day in every city, town and village street. No adult would be tempted to use them because they are used in this film.

In sum, we should recognize the message of a serious film and apply this test to the individual scenes thereof: do they advance the message? If they do they should be left alone, with only the caution of an 'A' certificate. Adult Indian citizens as a whole may be relied upon to comprehend intelligently the message and react to it, not to the possible titillation of some particular scene.

A film that illustrates the consequences of a social evil necessarily must show that social evil. The guidelines must be interpreted in that light. No film that extols the social evil or encourages it is permissible, but a film that carries the message that the social evil is evil cannot be made impermissible on the ground that it depicts the social evil. At the same time, the depiction must be just sufficient for the purpose of the film. The drawing of the line is best left to the sensibilities of the expert Tribunal. The Tribunal is multi-member body. It is comprised of persons who gauge public reactions to film and, except in case of stark breach of guidelines, should be permitted to go about its task.

In the present case, apart from the Chairman, three members of the Tribunal were woman. It is hardly to be supposed that three women would permit a film be screened which denigrates women, insults India womanhood or is obscene or pornographic. It would appear from its order that the Tribunal took the view that it would do women some good to see the film.

We are of the opinion that the Tribunal had viewed the film in true perspective and had, in compliance with the requirements of the guidelines, granted to the film an 'A' certificate subject to the conditions it stated. We think that the High Court ought not to have entertained the 1st respondent's writ petition impugning the grant of the certificate based as it was principally upon the slurs allegedly cast by the film on the Gujjar community. We find that the judgment under appeal does not take due note of the theme of the film and the fact that it condemns rape and the degradation of and violence upon women by showing their effect upon a village child, transforming her to a cruel dacoit obsessed with wreaking vengeance upon a society that has caused her so much

psychological and physical hurt, and that the scenes of nudity and rape and the use of expletives, so far as the Tribunal had permitted them, were in aid of the theme and intended not to arouse prurient or lascivious thoughts but revulsion against the perpetrators and pity for the victim.

The appeals are allowed. The judgment and order appeal is set aside. The 1st respondent's writ petition is dismissed. The 'A' certificate issued to the film "Bandit Queen" upon the conditions imposed by the Appellate Tribunal is restored.

The 1st respondent shall pay to each appellant the costs of his appeal.\

Union of India v. Motion Picture Association

AIR 1999 SC 2334

Sujata V. Manohar (for herself and K. Venkataswami and R.C. Lahoti, JJ.): This group of appeals is filed by the Union of India, the State of West Bengal and the State of Uttar Pradesh against a judgment and order dated 31.8.1995 of the Delhi High Court in C.W.P. No. 4408 and 4703 of 1993; while the writ petition is filed by the Eastern India Motion Picture Association against the Union of India and others. This group of appeals and the writ petition raise a common question of law as to the validity of certain provisions of (1) the West Bengal Cinemas (Regulation) Act, 1954 and a notification No. 7277-F dated 20.9.1957 issued thereunder, (2) the Cinematograph Act, 1952, (3) the U:P. Cinemas (Regulation) Act, 1955 and (4) the Delhi Cinematograph Rules, 1981.

The respondents in the appeals are Associations of organizations engaged in the business of distribution and exhibition of motion pictures in the area of Delhi and U. P. commonly known as the Delhi-Uttar Pradesh Circuit and in West Bengal.

In part III of the Cinematograph Act, 1952 which applies only to the Union Territories including Delhi, Section 12 imposes certain restrictions on the powers of the licensing authority to grant a license for the exhibition of cinematograph films. Section 12 Sub-section (4) provides as follows:

The Cinematograph Act:

“12(4): The Central Government may, from time to time, issue directions to licenses generally and to any licensee in particular for the purpose of regulating the exhibition of any film or class of films, so that Scientific films, films intended for educational purposes, films dealing With news and current events, documentary films or indigenous films secure an adequate opportunity of being exhibited, and where any such directions have been issued those directions shall be deemed to be additional conditions and restrictions subject to which the license had been granted.”

Under Section 16, which also forms a part of Part III of the Cinematograph Act, 1952, the Central Government is empowered by notification in the official gazette, to make rules, inter alia,

“(a) prescribing the terms, conditions and restrictions, if any, subject to which license may be granted under this Part.”

Pursuant to the rule-making power so granted, rules have been framed by the Central Government known as the Delhi Cinematograph Rules of 1981. Under these rules various conditions for the grant of a license to exhibit a cinematograph film are stipulated. Conditions 15 and 22 are as follows:

“Condition No. 15: The licensee shall, when and so often as the Administrator may require, exhibit free of charge or on such terms as regards remuneration as the Administrator may determine, films and lantern slides provided by the Administrator;

Provided that the licensee shall not be required to exhibit at one entertainment films or lantern slides the exhibition of which will take more than fifteen minutes in all or to exhibit films or slides

unless they are delivered to him at least twenty four hours before the entertainment at which they are to be shown is due to begin.

Condition No. 22: The licensee shall cause to be exhibited at each performance given at the licensed place one or more approved films, the total length of which may not be exceeding 600 m. (2000 feet) of approved films of 35 m.m. size or the corresponding footage of approved films of 16 m.m. size, and shall comply with any direction which the Administrator or the licensing authority may give by general or special order as to the manner in which the approved films shall be exhibited in the course of any performance.

Explanation I: "Approved film" means cinematograph film approved by the Central Government.

Explanation 2: For the purpose of computing the corresponding footage of films of 16m.m. size, in relation to films of 35m.m. size, 120 m. (400 feet) of films of 16 m.m. size shall be deemed to be equivalent to 300 m. (1000 feet) of films of 35m.m. size."

Under Notification No. XXXM(16)/81 dated 11th January, 1982 issued under Section 5(4) of the Uttar Pradesh Cinemas (Regulation) Act. 1955, directions have been issued to the licensees which are as follows:

Directions

"1. The licensees shall so arrange the exhibition of cinematograph films that approved films are exhibited at every performance open to the public. The ratio of approved films to be exhibited at such performances shall in relation to other films be one to five or the nearest approximation thereto.

Definition-

For the purposes of these directions, an "approved" film means (i) a film produced in India and approved by the Central Government after considering the recommendations of the Film Advisory Board, Bombay, to be scientific films, films intended for educational purposes, films dealing with news and current events or documentary films, (ii) Indian News Reviews produced in India and approved by the Central Government after considering the recommendations of the Chief Producer, Films Division, Bombay, to be films dealing with news and current events.

2. Nothing contained in these directions shall be construed as requiring licensee-

- (a) to exhibit at any performance more than (2000 feet) approximately 610 metres of approved films of 35m.m. size or the corresponding length of approved films of 16 m.m. size; or
- (b) to exhibit any approved film for more than two weeks continuously; or
- (c) to re-exhibit any approved film which has been shown for two continuous weeks; or
- (d) to exhibit approved films to the full extent indicated hereinbefore in the event of sufficient number or length of approved films not being available for the time being,

3. For the purpose of computing the corresponding length of films of 16m.m. size in relation to films of 35 m.m. size, approximately 122 metres (400 feet) of 16 m.m. film shall be deemed to be equivalent to approximately 305 metres (1000 feet) of 35 m.m. films."

Under Section 5(3) of the West Bengal Cinemas (Regulation) Act, 1954, it is provided as follows:

“5(3); The State Government may from time to time, issue directions to licensees generally or in the opinion of the State Government circumstances so justify, to any licensee in particular, for the purpose of regulating, the exhibition of any film or class of films and in particular the exhibition of scientific films, films intended for educational purposes, films, dealing with news and current events, documentary films or films produced in India, and where any such directions have been issued, those directions shall be deemed to be additional conditions and restrictions subject to which the license has been granted.”

By a Notification No. 7277-F dated 20.9.1957 issued by the West Bengal Government under Section 5(3) of the above Act. The State Government has given certain directions for the issue of licenses for the exhibition of films. These are as follows:

“Directions: A licensee shall so regulate the public exhibition of films by means of a cinematograph that, at every such exhibition, there shall be exhibited notified films of such length as bears to the length of other films exhibited approximately the ratio of one to five

- (a) to exhibit at any such public exhibition more than 2,000 ft. of notified films of 35 m.m. size or 800 ft. of notified films of 16 m.m. size; or
- (b) to exhibit any notified films for more than two weeks continuously; or (c) to re-exhibit any notified film which has been shown for two continuous weeks; or
- (d) to exhibit notified films beyond the limit upto which notified films are available for exhibition for the time being, or to exhibit any notified films when such films are not available for the time being.

Provided further that of the total time taken in the exhibition of notified films at every such exhibition not less than half shall be allotted to the exhibition of films approved by the Central Government after considering the recommendations of the Films Advisory Board, Bombay, if films of the latter description are available.

Explanation: In these directions “notified film” means a film which is produced in India in which is-

- (i) a scientific films, or
- (ii) a film intended for educational purpose, or
- (iii) a film dealing with news and current events, or
- (iv) a documentary film, certified or exempted from certification, as the case may be, under Part II of the Cinematograph Act, 1952 (XXXVII of 1952), which is notified by the State government in the “Calcutta Gazette” for exhibition for the purpose of Sub-section (3) of Section 5 of the West Bengal Cinemas (Regulation) Act, 1954 (West Bengal Act XXXIX of 1954);

Provided that any of the films as referred to above, which is approved by the Central Government after considering the recommendations of the Film Advisory Board, Bombay, shall be deemed to be a notified film for the purpose of this notification.”

All these provisions are similar in nature, and have been in force for some decades. They are hereinafter referred to as the “impugned provisions”. Thus, under Section 12(4) of the Cinematograph Act, 1952 the Central Government may issue directions to the licensees that scientific films, films intended for educational purposes... films dealing with news and current

events, documentary films or indigenous films have to be exhibited by the licensee along with the other films which the licensee is exhibiting. The length and the duration of such films is regulated by conditions 15 and 22 of the license which require only a film of a short length being thus shown along with the other films. Similarly, under the West Bengal Cinemas (Regulation) Act, 1954 also Section 5(3) requires an identical class of films which are required to be shown along with the other films' which the respondents exhibit in their cinema theatres. The notification of 20th of September, 1957 specifies the duration of such films and its length, making it clear that the length of such films which are required to be exhibited will not exceed the ratio of 1:5. The length of these films is also specified. The license conditions refer to "approved films" or "notified films" which are defined. As a result, in each cinema theatre the exhibitor of films is required to show a film which may be educational or scientific; a documentary film, or a film carrying news or current event, along with the other films. The duration of such film is strictly limited and only a small proportion of the total viewing time is devoted to the showing of such films. Since short films in these categories are normally produce by the films division of the government of India; each exhibitor is required to enter into an agreement with the films division for the supply of such films for exhibition. Under the terms and condition of the agreement between the exhibitor and the film division; the exhibitor is required to pay to the films division a rental amounting to 1% of his net weekly collection for the supply of the films. This rental has remained the same for the past several decades and is a rental which is fixed as a result of negotiations with the Films Federation of India.

These impugned provisions have been in force or several decades. The respondents however; in 1993 challenged these provisions as violative of their rights under Articles 19(1)(a) and 19 (1) (g) of the constitution. The Delhi High Court, by the impugned judgment has held that the condition in the agreement between Films Division and the exhibitor, for charging a rental for the supply of the said films is unconstitutional. The Delhi High Court has also held that the provision by which the exhibitor is required to collect a film from the Film Division is also onerous and, therefore, invalid. It has also struck down Condition 15 of the license issued under the Cinematograph Act; 1952 as redundant. Therefore, while upholding the statutory provisions, the court has directed that such films should be supplied by the Films Division to each exhibitor at his place of exhibition and that no charges should be levied for the supply of these films, Aggrieved by these finding, the present appeals have been filed. The writ petition which is filed by the Eastern India Motion pictures Association, has challenged the validity of the same provision under Article 19(1) (a) of the constitution, since the Delhi High Court declined to consider the validity of these provisions under Article 19 (1) (a), without any averments to that effect.

The exhibitors contend that the above provisions which compel them to show a scientific, educational or documentary film or a news film, even for a short duration of fifteen to twenty minutes per show violate their fundamental rights to free speech and expression under Article 19(1)(a) of the Constitution, They also contend that Article 19(2) which permits a reasonable restraint on this freedom on the grounds of sovereignty and integrity of India, security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence, does not cover this kind of compulsion to show

educational, scientific and documentary films or other kinds of films specified in the above provisions.

Undoubtedly, free speech is the foundation of a democratic society. A free exchange of ideas, dissemination of information without restraints, dissemination of knowledge, airing of differing viewpoints, debating and forming one shown views and expressing them, are the basic indicia of a free society. This freedom alone makes it possible for people to formulate their own views and opinions on a proper basis and to exercise their social, economic and political rights in a free society in an informed manner. Restraints on this right, therefore, have been jealously watched by the courts. Article 19(2) spells out the various grounds on which this right to free speech and expression can be restrained. Thus in *Express Newspapers Pvt. Ltd. and Ors. v. Union of India & Ors.*, [1986] I SCC 133 (at page 195), this Court stressed that, "Freedom of thought and expression, and the freedom of the press are not only valuable freedoms in themselves but are basic to a democratic form of Government which proceeds on the theory that the problems of the Government can be solved by the free exchange of thought and by public discussion of the various issues facing the nation... This right is one of the pillars of individual liberty freedom of speech, which our constitution has always unfailingly guarded..... however precious and cherished the freedom of speech is under Article 19(1)(a), this freedom is not absolute and unlimited at all times and all circumstances but is subject to the restrictions contained in Article 19(2). In *S. Rangarajan v. P. Jagjivan Ram and Ors.*, (1989) 2 SCC 5 74 (at page 592), this Court again observed: "The democracy is a government by the people via open discussion. The democratic form of government itself demands of its citizens an active and intelligent participation in the affairs of the community

The democracy can neither work nor prosper unless people go out to he press has been repeatedly stressed by this Court in a number of decisions (See in this connection (*Indian Express Newspapers (Bombay) Private Ltd. and Ors. v. Union of India and Ors.*, [1985] I SCC 641, *KA. Abbas v. The Union of India and Anr.*, [1970] 2 SCC 780, *Life Insurance Corporation of India v. Prof. Manubhai D. Shah*, [1992] 3 SCC 63 7.

In *Secretary, Ministry of Information & Broadcasting, Govt. of India and Ors., v. Cricket Association of Bengal and Anr.*, [1995] 2 SCC 161, this Court, after citing Article 10 of the European Convention on Human Rights, went on to state (at page 213), "The freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self-expression which is an important means of free conscience and self-fulfillment. It enables people to contribute to debates on social and moral issues. It is the best way to find a truest model of anything, since it is only through it that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy, Equally important is the role it plays in facilitating artistic and scholarly endeavours of all sorts. The right to communicate, therefore, includes right to communicate through any media that is available whether print or electronic or audio- visual such as advertisement, movie, article, speech etc."

It is contended that just as a restraint on free speech is a violation of Article 19(1) [except as permitted under article 19(2)] compelled speech, often known as a "must carry" provision in a

statute, rule or regulation, is equally an infringement of the right to free speech, except to the extent permitted under Article 19(2). However, whether compelled speech will or will not amount to a violation of the freedom of speech and expression, will depend on the nature of a “must carry” provision. If a “must carry” provision furthers informed decision-making which is the essence of the fight to free speech and expression, it will not amount to any violation of the fundamental freedom of speech and expression. If, however, such a provision compels a person to carry out propaganda or project a partisan or distorted point of view, contrary to his wish, it may amount to a restraint on his freedom of speech and expression. To give an example, at times a statute imposes an obligation to print certain information in public interest. Any food product must carry on its package the list of ingredients used in its preparation, or must print its weight. These are beneficial “must carry” provisions meant to inform the public about the correct quantity and contents of the product it buys. It enables the public to decide on a correct basis whether a particular product should or should not be used. Cigarettes cartons are required to carry a statutory warning that cigarette smoking is harmful to health. This is undoubtedly a “must carry” provision or compelled speech. Nevertheless, it is meant to further the basic purpose of imparting relevant information which will enable a user to make a correct decision as to whether he should smoke a cigarette or not. Such mandatory provisions although they compel speech cannot be viewed as a restraint on the freedom of speech and expression.

In *Neal R Wooley, etc. v. George Maynard*, [1977] 430 US 70S, the United States Supreme Court considered a New Hampshire state law which compelled the state motto “Live Free or Die” to be embossed on car license plates. A follower of Jehovah's Witnesses objected to carrying the motto on his car license plate, the Court held that the state's requirement that non-commercial vehicles license plates be embossed with the state motto invaded First Amendment rights and could not be justified as facilitating the identification of passenger vehicles or as promoting an appreciation of history, individualism, and state pride. In the more recent case of *Turner Broadcasting System, Inc. v. Federal Communications Commission*, [1997] 512 US 622, the US Supreme Court examined Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 which required cable operators to carry the signals of specified numbers based on cable system size of local commercial television stations and local non-commercial educational television stations. On the basis of the material brought on record after remand, the majority came to the conclusion that the “must carry” provisions were consistent with the First Amendment, because the purpose of the “must carry” provision was to preserve the benefits: of free over-the-air local broadcast television, promoting wide-spread dissemination of information from a multiplicity of sources and promoting fair competition in the television programme market. Breyer J. in his partly concurring judgment balanced the restraints which such a compulsory carriage clause would impose because it would interfere with the protected interests of the cable operators to choose their own programming, against an important First Amendment interest in favour of the provision *viz.* promoting the widest possible dissemination of information from diverse and antagonistic sources to facilitate public discussion and informed deliberation. The latter being basic democratic government purposes

which the First Amendment seeks to achieve, they outweighed objections relating to interference with the cable operators' right to choose their own programme.

Although the First Amendment right under the U.S. Constitution is not subject to reasonable restraint as in Article 19(2), the *raison de'tre* of a constitutional guarantee of free speech is the same. We have to examine whether the purpose of compulsory speech in the impugned provisions is to promote the fundamental freedom of speech and expression and dissemination of ideas, or whether it is to restrain this freedom, the social context of any such legislation cannot be ignored. When a substantially significant population body is illiterate or does not have easy access to ideas or information, it is important that all available means of communication, particularly audiovisual communication, are utilized not just for entertainment but also for education, information, propagation of scientific ideas and the like. The best way by which ideas can reach this large body of uneducated people is through the entertainment channel which is watched by all-literate and illiterate alike; To earmark a small portion of time of this entertainment medium for the purpose of showing scientific, educational or documentary films, or for showing news films has to be looked at in this context of promoting dissemination of ideas, information and knowledge to the masses so that there may be an informed debate and decision making on public issues. Clearly, the impugned provisions are designed to further free speech and expression and not to curtail it. None of these statutory provisions require the exhibitor to show a propaganda film or a film conveying views which he objects to. In fact, the exhibitors have not raised any objection to the contents of the films which they are required to show. They, however, contend that one of the important requirements for upholding such compulsory speech in the United States is that such speech should be content-neutral.

While in the present case, the contents of the compulsory films are specified in the legislation concerned. In the context of Article 19(1) what we have to examine is whether the categories of films so required to be carried promote dissemination of information and education or whether they are meant to be propaganda or false or biased information. The statute quite clearly specifies the kinds of films which promote dissemination of knowledge and information. Undoubtedly, the exhibitors, in order to fulfill the conditions of the license, are required to enter into an agreement with the Films Division, Government of India. This is not because of any statutory compulsion but because of the fact that the Films Division is the only organization which produces such short films on sufficient quantities for regular distribution to the cinema exhibitors. The requirement of approval of such films is to ensure that the films, in fact, comply with the requirements specified in the statute. None of the provisions referred to make it mandatory for the exhibitors to procure such films only from the Films Division. The reason why they do so is because of a lack of adequate alternative sources.

The exhibitors contend that before their license is renewed, it is necessary for them to obtain a "no objection" certificate from the Films Division. The purpose of this is to ensure that the statutory requirements have been complied with by the licensee in the previous year. If, however, any licensee is in a position to procure such approved films from any other source, there is nothing in the statutes which prohibits him from doing so. These provisions, therefore, do not violate Article

19(1) (a) of the Constitution: they are not in restraint of free Speech and expression. Therefore, Article 19(2) is not attracted.

The High Court has struck down Condition 15 of the license issued under the Delhi Cinematograph Rules as being too wide, and unnecessary in view of Condition 22. of the license. Under Condition 15, the licensee is required to exhibit films or lantern slides, the exhibition of which will take not more than 15 minutes in all, as required by the administrator. Such exhibition may be free of charge or on such terms as regards remuneration as the administrator may determine. The High Court has held that the kind of films and lantern slides required to be exhibited under Condition 15 are not specified and hence this condition is too wide and not related to the object of placing such a restriction. Condition 15, however, has to be read along with Section 12(4) of the Cinematograph Act, 1952, since Delhi Cinematograph Rules, 1981 are issued under the Cinematograph Act, 1952; and any conditions imposed on the license cannot go beyond the purposes specified in Section 12(4) Condition 15, therefore, has to be read in conjunction with Section 12(4) of the Cinematograph Act under which only scientific films, films intended for educational purposes, films dealing with news and current events, documentary films or indigenous films can be so required to be exhibited. The films referred to in Section 15 must also be of this kind. Lantern slides also take colour from the same provision and lantern slides compulsorily required to be shown must also fall in the categories mentioned in Section 12(4). When it is so read Condition 15 will have a direct nexus with the object sought to be achieved, and it can be upheld as a reasonable restriction. We accordingly so hold. Condition No. 22 refers to exhibition of approved films the total length of which may not exceed 600m of 35mm of a corresponding size of approved films of 60mm. These are somewhat longer films as compared to lantern slides and films referred to in Condition 15. Therefore, Conditions 15 and 22 do not overlap, but refer to different sizes and types of short films, shorter films or lantern slides. The High Court was, therefore, not right in holding that Condition No 15 is redundant since it is covered by Condition No. 22. Both conditions, however, must be read in the light of Section 12(4) of the Cinematograph Act, 1952 and only films and lantern slides which fall within the description of such films under Section 12(4) can be so required to be shown. In the premises, the appeals are allowed and the impugned judgment of the High Court in so far as it strikes down the rental and directs the Films Division to deliver the films to the exhibitors is set aside. The writ petition is dismissed. There will, however, be no order as to costs.

Reliance Petrochemicals Ltd v. Proprietors of Indian Express

1988 SCR Supl. (3) 212

Sabyasachi Mukharji, J. (for himself and S. Rangnathan, J.): At this stage, we are concerned with the question whether there is need for the continuance of the Order of injunction passed by this Court on 25th August, 1988. In order to appreciate the question it is necessary to state a few facts. A petition was moved before this Court on 19th August, 1988 under the Contempt of Courts Act, 1971 for initiation of contempt proceedings against the proprietors of Indian Express Newspapers Bombay Pvt. Ltd., Shri Arun Shourie, Indian Express Newspapers Bombay Pvt. Ltd., Shri Hari Jaisingh, Resident Editor, Indian Express Newspapers Bombay Pvt. Ltd., Shri A.C. Saxena, News Editor, Indian Express Newspaper Pvt. Ltd., Delhi, Shri H.K. Dua, Chief, New Delhi Bureau, Indian Express Newspaper Pvt. Ltd., New Delhi, and Shri V. Ranganathan, Indian Express Bombay Pvt. Ltd. The petition was moved on behalf of Reliance Petrochemicals Ltd. (hereinafter called "Reliance Petrochemicals"). It was stated therein that this Court should take cognizance of the contempt alleged to have been committed by the respondents and it was further prayed that pending the consideration of the question of criminal contempt, this Court should pass an order restraining the Express Group of Newspapers and their related publications from publishing any materials or articles in relation to the subject matter of the proceedings in the Transfer Petitions Nos. 192 and 193 of 1988 which was sub-judice issue in Writ Petition No. 1276 of 1988 in Karnataka High Court,

Writ Petition No. 1791 of 1988 in Delhi High Court, Writ Petition No. of 1988 *Radhey Shyam Goel* v.

Union of India, Suit No. 1172 of 1988 *K.S. Brahmabhatt v. Reliance Petrochemicals Ltd and MRTP* proceedings instituted in *J.P. Sharma v. Reliance Petrochemicals Ltd.* as the same was alleged to be calculated to affect the Reliance debenture issue which was to open on 22nd August, 1988 till the decision of the transfer petitions pending herein.

The subject-matter of dispute related to the Public Issue by the petitioner company of 12.5% Secured Convertible Debentures of Rs.200 each for cash at par aggregating to Rs.593.40 crores (inclusive of retention of 15% excess subscription of Rs.77.40 crores). It was stated that Reliance Petrochemicals

was to set up what was claimed to be the largest petrochemical complex in the private sector for the manufacture of critically scarce raw-material known as Mono Ethylene Glycole (MEG) and plastic raw-materials like High Density Polyethylene (HDPE) and Poly Vinyl Chloride (PVC) which are used for making various articles from films to pipes, auto parts to cable coating, containers to furnishings. It was asserted that the issue was of global and national importance. It was claimed that Reliance's public issue was the largest public issue in India till date and the second largest issue in the world. The public issue was due to open on Monday, the 22nd August, 1988 and was scheduled to be closed on 31st August, 1988. It was the claim of the petitioner that the debentures were being issued after obtaining the consent of the Controller of Capital Issues and on the basis of

schedule indicated therein, and after complying with all the requirements of the Companies Act and otherwise. Certain writ petitions and a suit had been filed in some High Courts, namely, Karnataka, Bombay, Rajasthan, Delhi and later on in Allahabad challenging the grant of consent or sanction for the issue of debentures. Such applications in the different High Courts and the Courts were filed at the last moment when enormous amount of money had already been spent, it was claimed. It was stated that enormous monies on publicity had been spent. In some of these proceedings orders of injunction had been obtained. It was contended that issue was prima facie legal and valid and the consent and permission of the necessary authorities specially the Controller of Capital Issues had been obtained properly. In such circumstances an application for transfer of these proceedings under Article 139A of the Constitution of India read with Part IV-A of the Supreme Court Rules 1966 was moved by Reliance Petrochemicals Ltd. against the Union of India, Controller of Capital Issues and the petitioner in the suit in Bangalore and writ petition in Delhi. It was stated that the Certificate of Incorporation was granted to the petitioner on or about 11th January, 1988 and the Certificate of Commencement of Business was granted on 21st January, 1988. On 4th May, 1988 an application was made to the Controller of Capital Issues for raising Equity Share Capital/Cumulative Convertible Preference Shares/Convertible Debentures for financing the proposed projects for manufacture of PVC HDPE and MEG. On 4th July, 1988, as mentioned before, the consent of the Controller of Capital Issues was granted to the petitioner for capital issue of 5,75,00,000 Equity Shares of Rs. 10 cash inclusive of retainable excess subscription of Rs.7.5 crores and for 2,96,70,000 12.5 per Secured Fully Convertible Debentures of Rs.200 each for cash at par to public. It is not necessary for the present purpose to set out the details of the same. It is stated that the consent of the Controller of Capital Issues was given on 4th July, 1988 on certain terms which are again the relevant to be set out for the present purpose. The consent order of the Controller was modified and further condition of obtaining the Reserve Bank of India's permission for allotment of debentures of Non- Residents as required under FERA 1973 and for allotment of debentures to employees on certain terms was imposed on 19th July, 1988. On 27th July, 1988 a prospectus was filed with the Registrar of Companies, Gujarat, Ahmedabad, for the public issue of 12.5% Secured Fully Convertible Debentures of Rs.200 each for cash at par, as indicated before. A petition was filed in the Karnataka High Court on 17th August, 1988 by one Shri Balkrishna Pillai. In the Delhi High Court another writ petition was filed on 18th August, 1988. On 18th August, 1988 a transfer petition was filed in this Court. It was claimed that any injunction order after the satisfaction of the Central Government, through the Controller of Capital Issues would make the public issue stillborn and sums in excess of Rs.4.5 crores had already been incurred for the public issue as pre-Issue expenses and a sum of Rs.20 crores was allocated as Issue Expenses for what was popularly known as 'Mega Issue' as mentioned hereinbefore. It was claimed that grave prejudice would be caused to the petitioner company as well as the public at large who were investing in the issue. if the issue is not allowed to go through. It was claimed that there was no ground for the High Court to grant injunction or stay order in the facts and circumstances of this Issue and this Court should vacate those orders and transfer the applications pending in different Courts to this Court. On that application being moved on 19th August, 1988, this Court issued

notices to all concerned making the same returnable on 9th September, 1988 in terms of prayer (a) and paragraphs 2 and 4 of the affidavit of Mr. Balkrishna Bhandari affirmed on 18th/19th August, 1988. This Court further directed as follows:

“The issue of 2,96,70,000, 12.5 per cent secured convertible debentures of Rs. 200 each by the petitioner company under the prospectus dated July 27, 1988 filed with the Registrar of Companies Gujarat and with the stock exchanges at Ahmedabad and Bombay to be proceeded with, without let or hindrance, notwithstanding any proceedings instituted or that may be instituted in or before any Court or tribunal or other authority. Any order direction or injunction of any Court, tribunal or authority in any proceeding already passed or which may be passed will by operation of this order be and remain suspended till further orders of this Court. In substance the order was that the issue be proceeded with “without let or hindrance”, notwithstanding any proceedings instituted or that may be instituted in or before any Court or tribunal or other authority.

This Court vacated all orders of injunction in respect of the said issue. It was asserted on behalf of the petitioner that this Court must have been prima facie satisfied that there was no legal infirmity which should stand in the way of the public issue of the said debentures going through and further, in any event, must have been satisfied that there should not be any let or hindrance to the said public issue. The petitioner had drawn our attention to an article published on 25th August, 1988, under the heading “Infractions of Law has Unique Features RPL Debentures”. It is not necessary for the present purpose to set out the said article. It was claimed in the said article that the Controller of Capital Issues had not acted properly and legally in granting the sanction to the issue for various reasons stated therein. It was further stated that the issue was not a prudent or a reliable venture. It was contended that by this article the respondents have commented on a matter which is sub-judice and was intended to undermine the effect of the interim order passed by this Court and the ultimate decision of the Court and they threatened to publish such articles unless restrained by this Court. It was contended that trial by newspapers on issues which are sub-judice is one of the grossest modes of interference with the due administration of justice and any threat of that interference should be prevented by both punitive action of contempt and preventive order of injunction of wrong anticipated to be committed by the delinquent. The publication threatened or expected to be published would cause very grave interference with the due administration of justice, and should, therefore, be prohibited. On that application being moved on 25th August, 1988, this Court directed that cognizance of contempt would only be considered after the necessary sanction from the Attorney General is obtained. This Court on the facts of the alleged contempt declined to take cognizance on that application without the views of the Attorney General. This Court, however, issued an order of injunction restraining all the six respondents mentioned therein from publishing any article, comment, report or editorial in any of the issues of the Indian Express or their related publications questioning the legality or validity of any of the consents, approvals or permissions to which the petitioners in the Transfer Petitions Nos. 192-193 of 1988 have made reference in the Prospectus dated 27th July, 1988 for the issue of 12.5% Secured Full Convertible Debentures. Notice of that application was made returnable on 9th September, 1988 and the same was to come up with other related matters. The respondents were further given liberty to move this Court for

variation or vacation of the order upon notice to the petitioner. Upon that the six respondents had filed an affidavit in opposition on 26th August, 1988 the very next day asking for variation or vacation of the interim order passed by this Court on 25th August, 1988. Attention of the Court was drawn to an article proposed to be published in the Indian Express which was Annexure 'B' to the said affidavit. Submissions were made on the validity or the propriety of the interim order. Upon hearing learned counsel for both the parties, this Court observed that it was sufficient to say that the article proposed to be published and forming part of Annexure 'B' did not violate the order of injunction passed by this Court on 25th August, 1988. In other words, this Court was of the view that the article in question which was intended to be published and shown to this Court on 26th August, 1988 did not question the legality or the validity of the order which was in issue in the proceedings in this Court. In those circumstances no question of variation or vacation of the said interim order arose. The said article proposed at that time has since been published before 31st August, 1988. It was stated in the affidavit as well as in the submissions made from the Bar that the shares have been over-subscribed but the day of allotment, of course, has not yet expired and before the allotment the subscribers, it was submitted, could withdraw their subscriptions. In those circumstances, this Court was invited to consider the question whether there was any necessity for the continuance of the order of injunction granted by this Court on 25th August, 1988. On behalf of the petitioner it was submitted that the danger still persists and the injunction should continue. On the other hand on behalf of the respondents it was submitted that the injunction should be vacated. Elaborate arguments were advanced by counsel for both sides. It was contended that there was no contempt of Courts involved herein and furthermore, it was contended that pre-stoppage of newspaper article or publication on matters of public importance was uncalled for and contrary to freedom of Press enshrined in our Constitution and in our laws. The publication was on a public matter so public debate cannot and should not be stopped. On the other hand, it was submitted that due administration of justice must be unimpaired. We have to balance in the words of Lord Scarman in the House of Lords in *Attorney-General v. British Broadcasting Corporation*, [1981] A.C. 303 at page 354 between the two interests of great public importance, freedom of speech and administration of justice. A balance, in our opinion, has to be struck between the requirements of free Press and fair trial in the words of the Justice Black in *Harry Bridges v. State of California*, 86 L. Ed. 252 at page 260. Therefore, in considering the question posed before us whether there should be continuance of the order of injunction we have to bear in mind and apply the basic principles of law to the facts and circumstances of this case. The point at issue has been canvassed very ably and vehemently on behalf of the petitioner by Sh. M.H. Baig, assisted as he was by Sh. S.S. Shroff and Smt. P.S. Shroff. They submit that the danger still persists and the publication of any article which would jeopardise the allotment of those debentures, should be prevented. On the other hand, Sh. Ram Jethmalani and Sh. Anil B. Diwan, senior counsel assisted as they were by Sh. R.F. Nariman and Sh. C.R. Karanjawalla, urged before us that the injunction should no longer continue. In view of the delicacy of the problem in the question posed before us, it is well to remember the legal background. We may refer to our constitutional provisions in Article 19(1) & (2) which provides as follows:

19. Protection of certain rights regarding freedom of speech, etc.--(1) All citizens shall have the right

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form association or unions:

[d] to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India;

(f) [Omitted by *ibid.* Sub-cl. [f] read to acquire, hold and dispose of property; and

[g] to practice any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of (the sovereignty and integrity of India,) the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.”

The effect of Article 19 on the freedom of Press, was analysed in the decision of this Court in *Express Newspapers (Pvt) Ltd. & Anr. v. The Union of India & Ors.*, [1959] SCR 12, where at page 120 onwards of the report Bhagwati J. referring to the decision of this Court in *Ramesh Thapar v. The State of Madras*, [1950] SCR 594 at 597, referred to the observations of Justice Patanjali Sastri, and further referred to the decision of this Court in *Brij Bhushan & Anr. v. The State of Delhi*, [1950] SCR 605. Referring to these two decisions, Bhagwati J. expressed his view that these were the only two decisions which evolved the interpretation of Article 19(1)(a) of the Constitution and they only laid down that the freedom of speech and expression included freedom of propagation of ideas which freedom was ensured by the freedom of circulation and that the liberty of the press consisted in allowing no previous restraint upon publication. Referring to the fact that there is a considerable body of authority to be found in the decisions of the Supreme Court of America bearing on this concept of the freedom of speech and expression, Justice Bhagwati observed that it was trite knowledge that the fundamental right to the freedom of speech and expression enshrined in our Constitution was based on the provisions in the First Amendment to the Constitution of the U.S.A. and, hence, it would be legitimate and proper to refer to those decisions of the Supreme Court of the U.S.A., in order to appreciate the true nature, scope and extent of this right in spite of the warning administered by this Court against the use of American and other cases, in *State of Travancore- Cochin and Ors. v. Bombay Co. Ltd.*, [1952] SCR 1112 and *State of Bombay v. R. M. D. Chamarbaugwala*, [1957] SCR 874 at 918.

Our Constitution is not absolute with respect to freedom of speech and expression and enshrined by the first Amendment to the American Constitution. Our attention was drawn to the decision of this Court in *Re: P.C. Sen* [1969] 2 SCR 649, where this Court upheld the order of conviction against the Chief Minister of West Bengal for broadcasting a speech justifying an order, the validity of which was challenged in proceedings pending before the Court. The West Bengal Govt. had

issued an order under Rule 125 of the Defence of India Rules, placing certain restrictions upon the right of persons carrying on business in milk products. The validity of this order was challenged by a writ petition. After the Rule nisi had been issued on the petition and served on the State Govt. the State Chief Minister broadcast a speech seeking to justify the propriety of the order. The High Court a Rule requiring the Chief Minister to show cause why he should may be committed for contempt of Court. The High Court found him guilty of contempt and fined him. The matter came up before this Court and the conviction was upheld. It was held that the speech was ex facie calculated to interfere with the administration of justice. This Court reiterated that in all cases of comment on pending proceedings, the question is not whether the publication did interfere, but whether it tended to interfere, with the due course of justice. The question is not so much of the intention of the contemnor as whether it is calculated to interfere with the administration of justice. But for the instant case this decision cannot be of much assistance. Firstly, the contents of the speech of the Chief Minister were entirely different. The Chief Minister in his speech had characterised the preparation of any food with milk product as amounting to a crime. There was a tendency in the speech of the Chief Minister of intimidating the litigants or the potential litigants in respect of the issue pending in the Court. In the instant case we are, however, not concerned directly with the question of whether the respondents have in fact committed contempt of Court by interfering with the due administration of justice. The question whether comments on an issue, directly or indirectly, in Court amount to pre- judging of an issue and transferring a trial by the Court to the trial by the newspapers, is another matter which will be decided when the contempt application will be taken up. At the moment, we are concerned with the short but difficult question i.e. whether there is need for preventing publication of an article on a matter of public interest but on an issue which is sub judice. In this case, as at this stage we are not dealing with the question of punitive action of committal for contempt of Court for publication pending trial of an issue in Court, the decision of this Court in *P.C. Sen's case* (supra) in view of the facts involved, is not of much aid to us. The case of gross contempt was discussed by this Court in *C.K. Daphtary & Ors. v. O.P. Gupta & Ors.*, [1971] Suppl SCR 76. However, in view of the facts involved therein, that decision cannot give us much guidance at present. The law on this aspect has been adverted to in the decision of this Court in *Indian Express Newspapers (Bombay) Pvt. Ltd. & Ors. v. Union of India & Ors.*, [1985] 1 SCC 641, where at page 659 of the report, Justice Venkataramiah referred to the importance of freedom of Press in a democratic society and the role of Courts. Though the Indian Constitution does not use the expression 'freedom of press' in Article 19 but it is included as one of the guarantees in Article 19 [1] [a]. The freedom of Press, as noted by Venkataramiah J., is one of the around which the greatest and the bitterest of constitutional struggles have been waged in all countries where liberal constitutions prevail. Article 19 of the Universal Declaration of Human Rights, 1948 declares the freedom of Press and so does Article 19 of the International Covenant on Civil and Political Rights, 1966. Article 10 of the European Convention on Human Rights, provides as follows:

“Article 10-(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public

authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprise.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

The First Amendment to the Constitution of the U.S.A provided as follows:

“Amendment--1 Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.”

Keeping the constitutional requirements of the Indian law in the background, it would be appropriate to refer to certain American decisions to which our attention was drawn. We have mentioned the observations of Justice Black in the case of *Harry Bridges v. State of California* (supra). There, Justice Black observed that free speech and fair trial are the two most cherished values of our civilization and it would be a trying task, and if we may say so, a difficult one to choose between them. But in case of need a choice has to be made. He that a public utterance or publication is not to be denied the constitutional protection of freedom of speech and Press merely because it concerns a judicial proceeding still pending in the Courts, upon the theory that in such a case it must necessarily tend to obstruct the orderly and fair administration of justice. In America, in view of the absolute terms of the First Amendment, unlike the conditional right of freedom of speech under Article 19(1)(a) of our Constitution, it would be worthwhile to bear in mind the “present and imminent danger” theory. Justice Black quoted from the observations of Justice Holmes in *Abrams v. United States*, [1963] L. Ed. 1173 at 1180, where the latter had observed that to justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. Justice Black concluded that there must be clear and present danger and that would provide a workable principle in preventing publication consistent with the First Amendment. But in our case Mr. Baig submitted that our article 19(1)(a) as it is termed anything that interferes with the due administration of justice, should be prevented if it is a threat to the due administration of justice. His submission was that the Article published or proposed to be published herein, undermines the effect or pre-empts the effect of the order of injunction which was to help or boost up the chances of the debentures being subscribed. Mr. Baig drew our attention to page 282 of the said report where Justice Frankfurter had observed that free speech was not so absolute or irrational a conception as to imply paralysis of the means for effective protection of all the freedoms secured by the Bill of Rights. The administration of justice by an impartial judiciary has been basic to the conception of freedom ever since Magna Carta. Justice Frankfurter further reiterated that the dependence of society upon an unswerving judiciary is such a common place in the

history of freedom that the means by which it is maintained are too frequently taken for granted without heed to the conditions which alone make it possible. (Emphasis supplied). The role of Courts of justice in our society has been the theme of statesmen and historians and constitution makers, and best illustrated in the Massachusetts Declaration of Rights as the right of every citizen to be tried by Judge as free, impartial and independent as the lot of humanity will admit.

Justice Frankfurter dissenting in his Judgment with whom Justice Stone, Justice Roberts and Justice Byrnes agreed, reiterated at page 284 of the report that the Constitution is an instrument of Government and is not conceived as a doctrinaire document, nor was the Bill of Rights intended as a collection of popular slogans. It is well to remember that Justice Frankfurter recognised that we cannot read into the 14th Amendment the freedom of speech and of the Press protected by the 1st Amendment and at the same time leave out the age old means employed by States for securing the calm course of justice. He emphasized that the 14th Amendment does not forbid a State to continue the historic process of prohibiting expressions calculated to subvert a specific exercise of judicial power. So to assure the impartial accomplishment of justice is not an abridgement of freedom of speech or Press, as these phases of liberty have heretofore been conceived even by the stoutest libertarians. Actually, these liberties themselves depend "upon an untrammelled judiciary whose passions are not even unconsciously aroused and whose minds are not distorted by extrajudicial considerations."

The test of imminent and present danger as the basis of Justice Holme's ideas has been referred to by this Court in *P.N. Duda v. P. Shiv Shanker & Ors.*, AIR 1988 SC 1208. This question again cropped up in *John D Pennekamp v. Slate of Florida*, [1945] 90 L.Ed. 331 and Justice Frankfurter reiterated that the 'clear and present danger' conception was never used by Mr. Justice Holmes to express a technical legal doctrine or to convey a formula for adjudicating cases. It was a literary phrase not to be distorted by being taken from its context. He reiterated that the judiciary could not function properly if what the Press does is reasonably calculated to disturb the judicial judgment in its duty and capacity to act solely on the basis of what is before the Court. A judiciary is not independent unless courts of justice are enabled to administer law by absence of pressure from without, whether exerted through the blandishments of reward or the menace of disfavour. A free Press is vital to a democratic society for its freedom gives it power.

In 1976, in *Nebraska Press Association v. Hugh Stuart*, 49 L.Edn. 683, where the facts of the case were entirely different to the present ones, Chief Justice Burger delivered the opinion of the Court saying that to the extent that the order prohibited the reporting of evidence adduced at the open preliminary hearing in a murder trial was bad. Chief Justice Burger reiterated that a responsible Press has always as the handmaiden of effective judicial administration, the criminal field. The observations of Learned Hand referred to at page 683 indicate "the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger", as the test. Hence, we must examine the gravity of the evil. In other words, a balance of convenience in the conventional phrase of Anglo-Saxon Common Law Jurisprudence would, perhaps be the proper test to follow. In this background it would be appropriate to refer to some of the English

decisions to which our attention was drawn. Mr. Jethmalani relied on the observations of Lord Denning in the Court of Appeal in *Attorney General v. British Broadcasting Corpn.*, [1979] 3 AER 45, where the Master of Rolls Lord Denning characterized some of these similar type of injunctions as “gagging injunctions”. Mr. Baig, however, protested that in view of the terms in which the injunction was issued in the instant case, the order did not “gag” anything that was legitimate. The House of Lords, however, did not approve the observations of Lord Denning. We may refer to the observations of the House of Lords in *Attorney General v. B.B.C.*, [1981] AC 303, wherein the Attorney General brought proceedings for an injunction to restrain the defendants from broadcasting a programme dealing with matters which related to an appeal pending before a local valuation court on the ground that the broadcast would be a contempt of court. The Divisional Court of the Queen's Bench Division, on the single issue before it, held that a local valuation court was a court for the purposes of the powers of the High Court relating to contempt. On appeal, the Court of Appeal, by a majority, affirmed that decision. The House of Lords, however, allowed the appeal and held that the jurisdiction of the Divisional Court in relation to contempt did not extend to a local valuation court because it was a court which discharged administrative functions and was not a court of law and the Divisional Court's jurisdiction only extended to courts of law and when it referred to 'Inferior courts' must be taken as inferior courts of law and though the local valuation court has some of the attributes of the long-established 'Inferior Courts' public policy required in the interests of freedom of speech and freedom of the press that the principles relating to contempt of court should not apply to it or to the host of other modern tribunals which might be regarded as 'inferior courts'. There, however, Lord Scarman emphasized that the due administration of justice should not, at all, be hampered. Lord in the Court of Appeal referred to *Borrie & Lowe, The Law of Contempt* (1973) and mentioned that professionally trained Judges are not easily influenced by publications. This is a point which was emphasized before us also. Lord Denning referred to the question whether there was contempt of court by the B.B.C. He emphasized whether there was no accused. The House of Lords, however, in appeal held that valuation court is not a court where the concept of contempt of court would apply. But it did make observations that such broadcasting or publication might affect a Judge. Viscount Dilhorne at page 335 of the report observed as follows: “It is sometimes asserted that no judge will be influenced in his judgment by anything said by the media and consequently that the need to prevent the publication of matter prejudicial to the hearing of a case only exists where the decision rests with laymen. This claim to judicial superiority over human frailty is one that I find some difficulty in accepting. Every holder of a judicial office does his utmost not to let his mind be affected by what he has seen or heard or read outside the court and he will not knowingly let himself be influenced in any way by the media, nor in my view will any layman experienced in the discharge of judicial duties. Nevertheless it should, I think, be recognized that a man may not be able to put that which he has seen, heard or read entirely out of his mind and that he may be subconsciously affected by it. As Lord Denning M.R. said the stream of justice must be kept clean and pure. It is the law, and it remains the law until it is changed by Parliament that the publication of matter likely to prejudice the hearing of a case before a court of law will constitute a contempt of court punishable by fine or imprisonment or both.

In this appeal we do not have to pronounce on whether the proposed broadcast would have prejudicially affected the hearing before the local valuation court. Although it clearly was likely to have aroused hostility to the Exclusive Brethern, it by no means follows that it would have prejudiced their claim to relief from rates. The mere assertion in the course of the broadcast that they were not entitled to that relief was in my view unlikely to have affected in any way a decision on whether their meeting room was a place of Public religious worship coming within section 39.” Lord Edmund-Davies at page 354 of the report emphasized that only a very short question arose, namely, whether the local valuation court comes within the jurisdiction of the High Court or not. Before that Lord Scarman had occasion to refer to the observations of the European Court of Human Rights which criticized the judgment of the House of Lords in *Attorney General v. Times Newspapers Ltd.*, 1 1971 AC 273 and emphasized that neither the Convention nor the European Court's decision, as part of the English law, which related to Article B 10(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms. In *Attorney General v. Times Newspapers Ltd.*, (*supra*), between 1959-61 a company made and marketed under licence a drug containing thalidomide about 450 children were born with gross deformities to mothers who had taken that drug during pregnancy. In 1968, 62 actions against the company begun within 3 years of the births of the children were compromised by lump sum payments conditional on the allegations of negligence against the company being withdrawn. Thereafter leave to issue writs out of time was granted *ex parte* in 261 cases, but apart from a statement of claim in one case and a defence delivered in 1969 no further steps had been taken in those actions. A further 123 claims had been notified in correspondence. In 1971 negotiations began on the company's proposal to set up a 3 1/4 million charitable trust fund for those children outside the 1968 settlement conditional on all the parents accepting the proposal. Five parents refused. An application to replace those parents by the Official Solicitor as next friend was refused by the Court of Appeal in April 1972. Negotiations for the proposed settlement were resumed. On September 24, 1972, a national Sunday newspaper published the first of a series of articles to draw attention to the plight of the thalidomide children. The company complained to the Attorney General that the article was a contempt of court because litigation against them by the parents of some of the children was still pending. The editor of the newspaper justified the article and at the same time sent to the Attorney General and to the company for comment an article in draft, for which he claimed complete factual accuracy, on the testing, manufacture and marketing of the drug. On the Attorney-General's motion, the Divisional Court of the Queen's Bench Division granted an injunction restraining publication on the ground that it would be a contempt of court. After the grant of the injunction on November 17, 1972, and while the newspaper's appeal was pending, the thalidomide tragedy was on November 29 debated in Parliament and speeches were made and reported which expressed opinions and stated facts similar to those in the banned article. Thereafter, there was a national campaign in the press and among the general public directed to bringing pressure on the company to make a better offer for the children and their parents; and the company in fact made a substantially increased offer. The Court of Appeal having discharged the injunction. The Attorney-General appealed to the House of Lords. It was held that the contempt of court to publish material which prejudged the issue of pending litigation

or was likely to cause public pre-judgment of that issue, and accordingly the publication of this article, which in effect charged the company with negligence, would constitute a contempt, since negligence was one of the issues in the litigation. The House of Lords granted injunction prohibiting the Times Newspaper from publishing the proposed publication. Reference was made to Oswald's Contempt of Court, 3rd Edn. (1910), where it was emphasized that the contempt of court involves 3 objects, namely, (i) to enable the parties to come to the courts without interference; (ii) to enable the courts to try cases without interference; and (iii) to ensure that the authority and administration of the law is maintained. There was no room for the balancing suggested by the respondents between the public interest in free discussion of matters of public concern and the public interest that judicial proceedings should not be interfered with . (Emphasised by Mr. Baig).

Lord Reid referred to the observations of the Chief Justice Jordan in *Ex Parte Bread Manufacturers Ltd.*, [1937] 37 SR (NSW) 242 to the following effect:

“It is of extreme public interest that no conduct should be permitted which is likely to prevent a litigant in a court of justice from having his case tried free from all matter of prejudice. But the administration of justice, important though it undoubtedly is, is not the only matter in which the public is vitally interested; and if in the course of the ventilation of a question of public concern matter is published which may prejudice a party in the conduct of a law suit, it does not follow that a contempt has been committed. The case may be one in which as between competing matters of public interest the possibility of prejudice to a litigant may be required to yield to other and superior considerations. The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion or the denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant. It is well settled that a person cannot be prevented by process of contempt from continuing to discuss publicly a matter which may fairly be regarded as one of public interest, by reason merely of the fact that the matter in question has become the subject of litigation, or that a person whose conduct is being publicly criticized has become a party to litigation either as plaintiff or as defendant, and whether in relation to the matter which is under discussion or with respect to some other matter.”

Lord Reid made certain observation upon which Mr. Baig relied, i.e. at page 300 which is as follows:

“I think that anything in the nature of prejudgment of particular case or of specific issues in it is objectionable, not only because of its side effects on that particular case but also because of its side effects which may be far reaching. Responsible "mass media" will do their best to be fair, but there will also be ill-informed, slapdash or prejudiced attempts to influence the public. If people are led to think that it is easy to find the truth, disrespect for the processes of the law could follow, and, if mass media are allowed to judge, unpopular people and unpopular causes will fare very badly. Most cases of prejudging of issues fall within the existing authorities on contempt. I do not think that the freedom of the press would suffer; and I think that the law would be clearer and easier to apply in

practice if it is made a general rule that it is not permissible to prejudge issues in pending cases.” (Emphasis supplied)

Lord Diplock stated at page 309 of the report that the due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly that, once the dispute has been submitted to a court of, law, they should be able to rely upon their being no usurpation by any other person of the function of that court to decide it according to law.

Lord Simon of Glaisdale at page 315 emphasized as follows:

“The first public interest involved is that of freedom of discussion in democratic society. People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions. Much of such fact- finding and argumentation necessarily has to be conducted vicariously, the public press being a principal instrument. This is the justification for investigative and campaign journalism. Of course it can be abused--but so may anything of value. The law provides some safeguards against abuse; though important ones (such as professional propriety and responsibility) lie outside the law.” (Emphasis supplied)

Lord Cross of Chelsea at page 322 of the report observed as follows:

“Contempt of Court” means an interference with the administration of justice and it is unfortunate that the offence should continue to be known by a name which suggests to the modern mind that its essence is a supposed affront to the dignity of the court. Nowadays when sympathy is readily accorded to anyone who defies constituted authority the very name of the offence predisposes many people in favour of the alleged offender. Yet the due administration of justice is something which all citizens, whether on the left or the right or in the center, should be anxious to safeguard. When the alleged contempt consists in giving utterance either publicly or privately to opinions with regard to or connected with legal proceedings, whether civil or criminal, the law of contempt constitutes an interference with freedom of speech, and I agree with my noble and learned friend that we should maintain the rule that any “prejudging” of issues, whether of fact or of law, in pending proceedings--whether civil or criminal--is in principle an interference with the administration of justice although in any particular case the offence may be so trifling that to bring it to the notice of the court would be unjustifiable.” Mr. Baig emphasized that there is an inherent jurisdiction to restrain by injunction any publication that interferes with a fair trial or a pending case or with the administration of justice in general. He further urged that trial of newspaper in sub judice matter is wrong. Publication is permissible provided it does not amount to prejudgment or prejudice of a matter in Court. Liberty or freedom of Press must subserve the due administration of justice. He submitted that there is need

to continue the injunction because contribution to the debentures could be withdrawn as the final allotment has not yet been made.

On the other hand, Mr. Diwan submitted that there is no jury trial involved here and no likelihood of the trial being prejudiced because trial is by professionally trained Judges. Public have a right to know about this issue of debentures which is a matter of public concern. It affects the public interest, so public have a right to know and the newspapers have an obligation to inform. We must see whether there is a present and imminent danger for the continuance of the injunction. It is difficult to lay down a fixed standard to judge as to how clear, remote or imminent the danger is. The order passed on 19th August, 1988 as reiterated on 25th August, 1988 stated that there must be no legal impediment in the issue of the debentures or in the progress of the debentures, taking into account the overall balance and convenience and having due regard to the sums Of money involved and the progress already made. It is necessary to reiterate that the continuance of this injunction would amount to interference with the freedom of Press in the form of preventive injunction and it must, therefore, be based on reasonable grounds for the sole purpose of keeping the administration of justice unimpaired. In the words of Mr. Justice Brandeis of the American Supreme Court concurring in *Charlotte Anita Whitney v. People of the State of California*, 71 L. Edn. 109S at 1106, there must be reasonable round to believe that the danger apprehended is real and imminent. This test we accept on the basis of balance of convenience. This Court has not yet found or laid down any formula or test to determine how the balance of convenience in a situation of this type, or how the real and imminent danger should be judged in case of prevention by injunction of Publication of an article in a pending matter. In the context of the facts of this case we must judge whether there is such an imminent danger which calls for continuance of the injunction. Incidentally, it may be mentioned that the so-called informed Press may misrepresent the Court proceedings. We must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to Know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our Constitution. That right has reached new dimensions and urgency. That right puts greater responsibility upon those who take upon the responsibility to inform.

The question of contempt must be judged in a particular situation. The process of due course of administration of justice must remain unimpaired. Public interest demands that there should be no interference with judicial process and the effect of the judicial decision should not be pre-empted or circumvented by public agitation or publications. It has to be remembered that even at turbulent times through which the developing countries are passing, contempt of court means interference with the due administration of justice. In the peculiar facts of this case now that the subscription to debentures has closed and, indeed, the debentures have been over-subscribed, we are inclined to think that there is no such imminent v followed and that the views expressed by Lord Denning, M.R. in *Attorney General v. BBC*, [1979 3 AER 45-- though reversed by the House of Lords in 1981 A.C. 303--and by the American Courts in *Bridges v. State of California*, 86 L. Ed. 252 and in *John D. Pennekamp v. State of Florida*, 90 L. Ed. 1295 should be preferred as more appropriate to present day conditions, particularly in the context of the freedom of press guaranteed under Act

19(1)(a) of the Constitution of India, and also incorporated in Article 19 of the Universal Declaration of Human Rights, 1948, Art. 10 of the European Convention of Human Rights and Art. 19 of the International Convention on Civil and Political Rights, 1966. I do not think we are called upon to decide this wider question at this stage. As already pointed out, the contempt petition filed by the petitioners in respect of the article published by the respondents on 25.8.88 has not been taken cognizance of by us in the absence of the consent of the Learned Attorney General. At the moment we have to assess whether any article that may be published by the respondents, even assuming that it touches on the issues of validity or legality of the approvals, consents and permissions referred to in our order of 19.8.88, will so clearly and obviously prejudice or tend to prejudice the course of the proceedings, now pending in this Court, that such publication should be enjoined by, what the respondents describe as, a “gagging order”. I agree with my learned brother that there is no such imminent danger or apprehension in the circumstances present here, as calls for such an extreme step curtailing the freedom of a newspaper. It is sufficient, I think, to clarify, if at all any such clarification were needed, that should any newspaper publish any such matter, it will be doing so at its own risk and subject to its liability for being proceeded against by the petitioner or others for defamation, contempt of court or otherwise. A somewhat narrower ground, as I understand it, put forward for the petitioner was that the grant of ex parte injunction by us on 19.8.88 and 25.8.88 was the result of our prima facie conclusion that consents, approvals or permissions from the concerned authorities for the debenture issue had been duly and validly obtained by the petitioner and that any article, liberty for the publication of which is sought for by the vacation of the interim order, would contain views contrary to or inconsistent with the prima facie view of this Court. Persons reading the newspaper might be taken in by and believe in the statements made by the respondents in such articles and, if they start acting upon such beliefs, then the effect of the order of this Court, upholding, prima facie, the validity of the debenture issue on the above aspects would stand undermined. In my view this contention is untenable. I do not think that the contention proceeds on a correct analysis of the ratio of our order dated 25.8.88 or the earlier order dated 19.8.88. It should be remembered that the proceedings, which gave rise to the transfer applications, were writ petitions and a suit filed in various courts challenging inter alia, the validity or regularity of the debenture issue of the petitioner company. If these matters had been heard by the various High Courts or other subordinate courts, there was a possibility that one or more of the courts, satisfied with the prima facie tenability of the contentions of the petitioners therein might issue an order staying the debenture issue pending disposal of the suit or writ petition. In fact, also, it seems that interim orders of this nature had been obtained. The petitioner was apprehensive that, if any such interim order was passed, all the time, labour and money expended in floating the debenture issue might be nullified at the last moment. The petitioner, therefore, moved for the transfer of all the various proceedings to this Court and for an interim order permitting it to issue the debentures as planned without let or hindrance and without being hampered by any interim stay order from any court. I do not think it would be correct to say that, when we passed the order dated 19.8.1988, we formed any prima facie opinion on the question whether the debenture issue had been validly approved or consented to by the various authorities.

Though it is true that there were averments in the transfer petitions stating that all the legal formalities had been properly complied with, what predominantly influenced us to pass the order dated 19.8.88 was that, even assuming, prima facie, as contended in the various writ petitions and suits, that there could be some doubt regarding the validity or otherwise of the consent orders etc., the restraint by any court or tribunal on the issue of debentures at a late stage might prove catastrophic, and cause irreparable loss or damage, to the petitioner. We were also of the opinion that, pending adjudication on the issue of validity raised in the various suits, the balance of convenience required that there should be no order of any court or tribunal staying the debenture issue.

Now, I shall turn to the circumstances in which the order dated 25.8.88 were passed. Subscriptions to the debenture issue were open between 22nd August, 88 and 31st August, 88. It was during this interim period that the first article was published by the respondent newspaper attacking the validity of the consent granted by the Controller of Capital Issues to the issue of the debentures. I do not go into the merits of the article. But, when it was pointed out to us that this article had been published at a very crucial time when the subscription to the issue had started flowing in, we saw that it would have the indirect effect of achieving exactly what this Court wanted to prevent by its order dated 19.8.88. Though this Court, in view of the allegations raised in the transfer petitions, referred in its order only to stay orders from courts restraining the progress of the debenture issue, it was the intention of this Court that the debenture issue should go ahead without any obstacles placed in the way of the collection of subscriptions therefore on the grounds on which stay orders had been sought to be obtained from courts. The article published by the respondents, though not violative of the terms of the injunction granted by this Court, could have the effect of circumventing the order of this Court and rendering it ineffective. It had, prima facie, a tendency to affect the efficacy of, and defeat the object with which this Court had passed the interim order dated 19.8.88. This is the reason why we passed the second order dated 25.8.88 and also declined to modify or vary it at the request of the counsel for the newspapers on the next day. I am of opinion that the said order was rightly passed and that the contention of learned counsel for the respondent that no such injunction ought to have been granted at all is not acceptable.

The position today, however, has radically changed. We are told that the issue has been over-subscribed. In my opinion, this stage having been completed, there is no necessity to continue the interim order passed by us on the 25th of August, 1988.

Counsel for the petitioner, however, vehemently contended that there has been no material change in the situation. He submitted that many lakhs of people have subscribed to the debentures and, within a strict time schedule laid down by the statute, the petitioner is bound to scrutinize all the applications, decide on the issue of allotment and send out allotment letters or refund the application moneys received. It is submitted that even at this stage there is a potential danger that continued publication of articles by the respondents attacking the validity of the debenture issue will have the effect of causing a large number of applicants for the debentures to panic and to seek refund of the application moneys already paid by them. In fact, it is said, a writ petition of that nature has already

been filed in the Allahabad High Court. Counsel submitted that, in a sensitive matter like issue of debentures, even the request for return of money by any one person could trigger off several applications of the same type and that the danger, that the petitioner company might be asked to refund moneys sent in respect of subscriptions already made on the basis of the allegations in such articles as the one already published, is real and imminent. He submitted that it is therefore as much necessary today to continue the injunction as it was when it was granted on the 25th of August, 1988.

I have given careful thought to this contention urged on behalf of the petitioner company. It is of course difficult in the absence of any reliable data for any person to come to a conclusion as to how exactly the publication of articles of the type published by the respondents would cause prejudice in the manner contended for by the petitioner. It seems to me, however, that the danger apprehended by the petitioner company is not so real or substantial as to warrant the continuance of the injunction order passed by us on the 25th of August, 88. Even if, for the purpose of argument, one were to assume that such claims for refund will be made, they cannot straightaway harm the interests of the petitioner company. There is no possibility that, pending determination of the issues raised, any court will order interim relief to such applicants by way of grant of such refunds. The petitioner will be liable to make any such refund only if it is ultimately decided by this court or any other court that the issue of debentures is invalid and that the application moneys have to be refunded. That of course the company will have to do in any event. There is, however, no immediate cause for apprehension on the part of the petitioner that the publication of any such article could abort the debenture issue in the manner it could have done before 31.8.88. I, therefore, agree that there is no justification for the continuance of the interim order dated 25.8.88 any longer.

Sahara India Real Estate. v. Securities & Exch.Board of India

(2012) 10 SCC 603

S. H. KAPADIA, CJI (for himself and D.K. Jain, S.S. Nijjar, Ranjana P. Desai, J.S. Khehar, JJ.):

1. Finding an acceptable constitutional balance between free press and administration of justice is a difficult task in every legal system.
2. Civil Appeal Nos. 9813 and 9833 of 2011 were filed challenging the order dated 18.10.2011 of the Securities Appellate Tribunal whereby the appellants (hereinafter for short Sahara) were directed to refund amounts invested with the appellants in certain Optionally Fully Convertible Bonds (OFCD) with interest by a stated date.
3. By order dated 28.11.2011, this Court issued show cause notice to the Securities and Exchange Board of India (SEBI), respondent No. 1 herein, directing Sahara to put on affidavit as to how they intend to secure the liabilities incurred by them to the OFCD holders during the pendency of the Civil Appeals.
4. Pursuant to the aforesaid order dated 28.11.2011, on 4.01.2012, an affidavit was filed by Sahara explaining the manner in which it proposed to secure its liability to OFCD holders during the pendency of the Civil Appeals.
5. On 9.01.2012, both the appeals were admitted for hearing. However, IA No. 3 for interim relief filed by Sahara was kept for hearing on 20.01.2012.
6. On 20.01.2012, it was submitted by the learned counsel for SEBI that what was stated in the affidavit of 4.01.2012 filed by Sahara inter alia setting out as to how the liabilities of Sahara India Real Estate Corporation Ltd. (SIRECL) and Sahara Housing and Investment Corporation (SHICL) were to be secured was insufficient to protect the OFCD holders.
7. This Court then indicated to the learned counsel for Sahara and SEBI that they should attempt, if possible, to reach a consensus with respect to an acceptable security in the form of an unencumbered asset. Accordingly, IA No. 3 got stood over for three weeks for that purpose.
8. On 7.02.2012, the learned counsel for Sahara addressed a personal letter to the learned counsel for SEBI at Chennai enclosing the proposal with details of security to secure repayment of OFCD to investors as pre- condition for stay of the impugned orders dated 23.06.2011 and 18.10.2011 pending hearing of the Civil Appeals together with the Valuation Certificate indicating fair market value of the assets proposed to be offered as security. This was communicated by e-mail from Delhi to Chennai. Later, on the same day, there was also an official communication enclosing the said proposal by the Advocate-on-Record for Sahara to the Advocate-on- Record for SEBI.
9. A day prior to the hearing of IA No. 3 on 10.02.2012, one of the news channels flashed on TV the details of the said proposal which had been communicated only inter parties and which was obviously not meant for public circulation. The concerned television channel also named the valuer who had done the valuation of the assets proposed to be offered as security.

10. On 10.02.2012, there was no information forthcoming from SEBI of either acceptance or rejection of the proposal.

11. The above facts were inter alia brought to the notice of this Court at the hearing of IA No. 3 on 10.02.2012 when Shri F.S. Nariman, learned senior counsel for Sahara orally submitted that disclosure to the Media was by SEBI in breach of confidentiality which was denied by the learned counsel for SEBI. After hearing the learned counsel for the parties, this Court passed the following order:

We are distressed to note that even without prejudice proposals sent by learned counsel for the appellants to the learned counsel for SEBI has come on one of the TV channels. Such incidents are increasing by the day. Such reporting not only affects the business sentiments but also interferes in the administration of justice. In the above circumstances, we have requested learned counsel on both sides to make written application to this Court in the form of an I.A. so that appropriate orders could be passed by this Court with regard to reporting of matters, which are sub-judice.

12. Pursuant to the aforesaid order, IA Nos. 4 and 5 came to be filed by Sahara. According to Sahara, IA Nos. 4 and 5 raise a question of general public importance. In the said IA Nos. 4 and 5, Sahara stated that the time has come that this Court should give appropriate directions with regard to reporting of matters (in electronic and print media) which are sub-judice. In this connection, it has been further stated: it is well settled that it is inappropriate for comments to be made publicly (in the Media or otherwise) on cases (civil and criminal) which are sub-judice; this principle has been stated in Section 3 of the Contempt of Courts Act, which defines criminal contempt of court as the doing of an act whatsoever which prejudices or interferes or tends to interfere with the due course of any judicial proceeding or tends to interfere or interfere with or obstruct or tends to interfere or obstruct the administration of justice. In the IAs, it has been further stated that whilst there is no fetter on the fair reporting of any matter in court, matters relating to proposal made inter-parties are privileged from public disclosure. That, disclosure and publication of pleadings and other documents on the record of the case by third parties (who are not parties to the proceedings in this court) can (under the rules of this Court) only take place on an application to the court and pursuant to the directions given by the court (see Order XII, Rules 1, 2 and 3 of Supreme Court Rules, 1966). It was further stated that in cases like the present one a thin line has to be drawn between two types of matters; firstly, matters between company, on the one hand, and an authority, on the other hand, and, secondly, matters of public importance and concern. According to Sahara, in the present case, no question of public concern was involved in the telecast of news regarding the proposal made by Sahara on 7.02.2012 by one side to the other in the matter of providing security in an ongoing matter. In the IAs, it has been further stated that this Court has observed in the case of *State of Maharashtra v. Rajendra J. Gandhi* [(1997) 8 SCC 386] that: A trial by press, electronic media or public agitation is the very antithesis of rule of law. Consequently, it has been stated in the IAs by Sahara that this Court should consider giving guidelines as to the manner and extent of publicity which can be given to pleadings/ documents filed in court by one or the other party in a pending proceedings which have not yet been adjudicated upon.

13. Accordingly, vide IA Nos. 4 and 5, Sahara made the following prayers:

(b) appropriate guidelines be framed with regard to reporting (in the electronic and print media) of matters which are sub- judice in a court including public disclosure of documents forming part of court proceedings.

(c) appropriate directions be issued as to the manner and extent of publicity to be given by the print/ electronic media of pleadings/ documents filed in a proceeding in court which is pending and not yet adjudicated upon;

14. Vide IA No. 10, SEBI, at the very outset, denied that the alleged disclosure was at its instance or at the instance of its counsel. It further denied that papers furnished by Sahara were passed on by SEBI to the TV Channel. In its IA, SEBI stated that it is a statutory regulatory body and that as a matter of policy SEBI never gives its comments to the media on matters which are under investigation or sub judice. Further, SEBI had no business stakes involved to make such disclosures to the media. However, even according to SEBI, in view of the incident having happened in court, this Court should give appropriate directions or frame such guidelines as may be deemed appropriate.

15. At the very outset, we need to state that since an important question of public importance arose for decision under the above circumstances dealing with the rights of the citizens and the media, we gave notice and hearing to those who had filed the IAs; the question of law being that every citizen has a right to negotiate in confidence inasmuch as he/ she has a right to defend himself or herself. The source of these two rights comes from the common law. They are based on presumptions of confidentiality and innocence. Both, the said presumptions are of equal importance. At one stage, it was submitted before us that this Court has been acting *suo motu*. We made it clear that Sahara was at liberty to withdraw the IAs at which stage Shri Sidharth Luthra, learned senior counsel stated that Sahara would not like to withdraw its IAs. Even SEBI stated that if Sahara withdraws its IAs, SEBI would insist on its IA being decided. In short, both Sahara and SEBI sought adjudication. Further, on 28.03.2012, learned counsel for Sahara filed a note in the Court citing instances (mostly criminal cases) in which according to him certain aberration qua presumption of innocence has taken place. This Court made it clear that this Court is concerned with the question as to whether guidelines for the media be laid down? If so, whether they should be self- regulatory? Or whether this Court should restate the law or declare the law under Article 141 on balancing of Article 19(1)(a) rights vis-à-vis Article 21, the scope of Article 19(2) in the context of the law regulating contempt of court and the scope of Article 129/ Article 215.

16. Thus, our decision herein is confined to IA Nos. 4, 5 and 10. This clarification is important for the reason that some accused have filed IAs in which they have sought relief on the ground that their trial has been prejudiced on account of excessive media publicity. We express no opinion on the merits of those IAs.

Constitutionalization of free speech Comparative law: differences between the US and other common-law experiences

17. Protecting speech is the US approach. The First Amendment does not tolerate any form of restraint. In US, unlike India and Canada which also have written Constitutions, freedom of the press is expressly protected as an absolute right. The US Constitution does not have provisions similar to Section 1 of the Charter Rights under the Canadian Constitution nor is such freedom subject to reasonable restrictions as we have under Article 19(2) of the Indian Constitution. Therefore, in US, any interference with the media freedom to access, report and comment upon ongoing trials is prima facie unlawful. Prior restraints are completely banned. If an irresponsible piece of journalism results in prejudice to the proceedings, the legal system does not provide for sanctions against the parties responsible for the wrongdoings. Thus, restrictive contempt of court laws are generally considered incompatible with the constitutional guarantee of free speech. However, in view of cases, like O.J. Simpson, Courts have evolved procedural devices aimed at neutralizing the effect of prejudicial publicity like change of venue, ordering re-trial, reversal of conviction on appeal (which, for the sake of brevity, is hereinafter referred to as neutralizing devices). It may be stated that even in US as of date, there is no absolute rule against prior restraint and its necessity has been recognized, albeit in exceptional cases [see *Near v. Minnesota*, 283 US 697] by the courts evolving neutralizing techniques.

18. In 1993, Chief Justice William Rehnquist observed: constitutional law is now so firmly grounded in so many countries, it is time that the US Courts begin looking at decisions of other constitutional courts to aid in their own deliberative process.

19. Protecting Justice is the English approach. Fair trials and public confidence in the courts as the proper forum for settlement of disputes as part of the administration of justice, under the common law, were given greater weight than the goals served by unrestrained freedom of the press. As a consequence, the exercise of free speech respecting ongoing court proceedings stood limited. England does not have a written constitution. Freedoms in English law have been largely determined by Parliament and Courts. However, after the judgment of ECHR in the case of *Sunday Times v. United Kingdom* [(1979) 2 EHRR 245], in the light of which the English Contempt of Courts Act, 1981 (for short the 1981 Act) stood enacted, a balance is sought to be achieved between fair trial rights and free media rights vide Section 4(2). Freedom of speech (including free press) in US is not restricted as under Article 19(2) of our Constitution or under Section 1 of the Canadian Charter. In England, Parliament is supreme. Absent written constitution, Parliament can by law limit the freedom of speech. The view in England, on interpretation, has been and is even today, even after the Human Rights Act, 1998 that the right of free speech or right to access the courts for the determination of legal rights cannot be excluded, except by clear words of the statute. An important aspect needs to be highlighted. Under Section 4(2) of the 1981 Act, courts are expressly empowered to postpone publication of any report of the proceedings or any part of the proceedings for such period as the court thinks fit for avoiding a substantial risk of prejudice to the

administration of justice in those proceedings. Why is such a provision made in the Act of 1981? One of the reasons is that in Section 2 of the 1981 Act, strict liability has been incorporated (except in Section 6 whose scope has led to conflicting decisions on the question of intention). The basis of the strict liability contempt under the 1981 Act is the publication of prejudicial material. The definition of publication is also very wide. It is true that the 1981 Act has restricted the strict liability contempt to a fewer circumstances as compared to cases falling under common law. However, contempt is an offence sui generis. At this stage, it is important to note that the strict liability rule is the rule of law whereby a conduct or an act may be treated as contempt of court if it tends to interfere with the course of justice in particular legal proceedings, regardless of intent to do so. Sometimes, fair and accurate reporting of the trial (say a murder trial) would nonetheless give rise to substantial risk of prejudice not in the pending trial but in the later or connected trials. In such cases, there is no other practical means short of postponement orders that is capable of avoiding such risk of prejudice to the later or connected trials. Thus, postponement order not only safeguards fairness of the later or connected trials, it prevents possible contempt. That seems to be the underlying reason behind enactment of Section 4(2) of the 1981 Act. According to Borrie & Lowe on the Law of Contempt, the extent to which prejudgment by publication of the outcome of a proceedings (referred to by the House of Lords in *Sunday Times case*) may still apply in certain cases. In the circumstances to balance the two rights of equal importance, viz., right to freedom of expression and right to a fair trial, that Section 4(2) is put in the 1981 Act. Apart from balancing it makes the media know where they stand in the matters of reporting of court cases. To this extent, the discretion of courts under common law contempt has been reduced to protect the media from getting punished for contempt under strict liability contempt. Of course, if the courts order is violated, contempt action would follow.

20. In the case of *Home Office v. Harman* [(1983) 1 A.C. 280] the House of Lords found that the counsel for a party was furnished documents by the opposition party during inspection on the specific undertaking that the contents will not be disclosed to the public. However, in violation of the said undertaking, the counsel gave the papers to a third party, who published them. The counsel was held to be in contempt on the principle of equalization of the right of the accused to defend himself/herself in a criminal trial with right to negotiate settlement in confidence. [See also *Globe and Mail v. Canada (Procureur général)*, 2008 QCCA 2516]

21. The Continental Approach seeks to protect personality. This model is less concerned with the issue of fair trial than with the need for safeguarding privacy, personal dignity and presumption of innocence of trial participants. The underlying assumption of this model is that the media coverage of pending trials might be at odds not only with fairness and impartiality of the proceedings but

also with other individual and societal interests. Thus, narrowly focussed prior restraints are provided for, on either a statutory or judicial basis. It is important to note that in the common-law approach the protection of sanctity of legal proceedings as a part of administration of justice is guaranteed by institution of contempt proceedings. According to Article 6(2) of the European Convention of Human Rights, presumption of innocence needs to be protected. The European Courts of Human Rights has ruled on several occasions that the presumption of innocence should be employed as a normative parameter in the matter of balancing the right to a fair trial as against freedom of speech. The German Courts have accordingly underlined the need to balance the presumption of innocence with freedom of expression based on employment of the above normative parameter of presumption of innocence. France and Australia have taken a similar stance. Article 6(2) of the European Convention of Human Rights imposes a positive obligation on the State to take action to protect the presumption of innocence from interference by non-State actors. However, in a catena of decisions, the ECHR has applied the principle of proportionality to prevent imposition of overreaching restrictions on the media. At this stage, we may state, that the said principle of proportionality has been enunciated by this Court in *Chintaman Rao v. The State of Madhya Pradesh* [(1950) SCR 759].

22. The Canadian Approach: Before Section 1 of Canadian Charter of Rights, the balance between fair trial and administration of justice concerns, on the one hand, and freedom of press, on the other hand, showed a clear preference accorded to the former. Since the Charter introduced an express guarantee of freedom of the press and other media of communication, the Canadian Courts reformulated the traditional sub judice rule, showing a more tolerant attitude towards trial-related reporting [see judgment of the Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835 which held that a publication ban should be ordered when such an order is necessary to prevent a serious risk to the proper administration of justice when reasonably alternative measures like postponement of trial or change of venue will not prevent the risk (necessity test); and that salutary effects of the publication bans outweigh the deleterious effects on the rights and interests of the parties and the public, including the effect on the right to free expression and the right of the accused to open trial (i.e. proportionality test)]. The traditional common law rule governing publication bans that there be real and substantial risk of interference with the right to a fair trial emphasized the right to a fair trial over the free expressions interests of those affected by the ban. However, in the context of post-Charter situation, the Canadian Supreme Court has held that when two protected rights come in conflict, Charter principles require a balance to be achieved that fully respects both the rights. The Canadian Courts have, thus, shortened the distance between the US legal experience and the common-law experiences in other countries. It is important to highlight that in *Dagenais*, the publication ban was sought under common law jurisdiction of the Superior Court and the matter was decided under the common law rule that the Courts of Record have inherent power to defer the publication. In *R. v. Mentuck* [2001] 3 SCR 442

that Dagenais principle was extended to the presumption of openness and to duty of court to balance the two rights. In both the above cases, Section 2(b) of the Charter which deals with freedom of the press was balanced with Section 1 of the Charter. Under the Canadian Constitution, the Courts of Record (superior courts) have retained the common law discretion to impose such bans provided that the discretion is exercised in accordance with the Charter demands in each individual case.

23. The Australian Approach: The Australian Courts impose publication bans through the exercise of their inherent jurisdiction to regulate their own proceedings. In Australia, contempt laws deal with reporting of court proceedings which interfere with due administration of justice. Contempt laws in Australia embody the concept of sub judice contempt which relates to the publication of the material that has a tendency to interfere with the pending proceedings.

24. The New Zealand Approach: It recognizes the Open Justice principle. However, the courts have taken the view that the said principle is not absolute. It must be balanced against the object of doing justice. That, the right to freedom of expression must be balanced against other rights including the fundamental public interest in preserving the integrity of justice and the administration of justice.

Indian Approach to prior restraint

(i) Judicial decisions

25. At the outset, it may be stated that the Supreme Court is not only the sentinel of the fundamental rights but also a balancing wheel between the rights, subject to social control. Freedom of expression is one of the most cherished values of a free democratic society. It is indispensable to the operation of a democratic society whose basic postulate is that the government shall be based on the consent of the governed. But, such a consent implies not only that the consent shall be free but also that it shall be grounded on adequate information, discussion and aided by the widest possible dissemination of information and opinions from diverse and antagonistic sources. Freedom of expression which includes freedom of the press has a capacious content and is not restricted to expression of thoughts and ideas which are accepted and acceptable but also to those which offend or shock any section of the population. It also includes the right to receive information and ideas of all kinds from different sources. In essence, the freedom of expression embodies the right to know. However, under our Constitution no right in Part III is absolute. Freedom of expression is not an absolute value under our Constitution. It must not be forgotten that no single value, no matter exalted, can bear the full burden of upholding a democratic system of government. Underlying our Constitutional system are a number of important values, all of which help to guarantee our liberties, but in ways which sometimes conflict. Under our Constitution, probably, no values are absolute. All important values, therefore, must be qualified and balanced against, other important, and often competing, values. This process of definition, qualification and balancing is as much required with respect to the value of freedom of expression as it is for other values. Consequently, free speech, in appropriate cases, has got to correlate with fair trial. It also follows that in appropriate case one right [say freedom of expression] may have to yield to the other right like right to a fair trial. Further, even Articles 14 and 21 are subject to the test of reasonableness after the judgment of this Court in the case of *Maneka Gandhi v. Union of India* [(1978) 1 SCC 248].

Decisions of the Supreme Court on prior restraint

26. In *Brij Bhushan v. State of Delhi* [AIR 1950 SC 129], this Court was called upon to balance exercise of freedom of expression and pre-censorship. This Court declared the statutory provision as unconstitutional inasmuch as the restrictions imposed by it were outside Article 19(2), as it then stood. However, this Court did not say that pre-censorship per se is unconstitutional.

27. In *Virendra v. State of Punjab* [AIR 1957 SC 896], this Court upheld pre-censorship imposed for a limited period and right of representation to the government against such restraint under Punjab Special Powers (Press) Act, 1956. However, in the same judgment, another provision imposing pre-censorship but without providing for any time limit or right to represent against pre-censorship was struck down as unconstitutional.

28. In the case of *K.A. Abbas v. Union of India* [AIR 1971 SC 481], this Court upheld prior restraint on exhibition of motion pictures subject to Government setting up a corrective machinery and an independent Tribunal and reasonable time limit within which the decision had to be taken by the censoring authorities.

29. At this stage, we wish to clarify that the reliance on the above judgments is only to show that prior restraint per se has not been rejected as constitutionally impermissible. At this stage, we may point out that in the present IAs we are dealing with the concept of prior restraint per se and not with cases of misuse of powers of pre-censorship which were corrected by the Courts [see *Binod Rao v. Minocher Rustom Masani* reported in 78 Bom LR 125 and *C. Vaidya v. D'Penha* decided by Gujarat High Court in Sp. CA 141 of 1976 on 22.03.1976 (unreported)]

30. The question of prior restraint arose before this Court in 1988, in the case of *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay (P) Ltd.* [AIR 1989 SC 190] in the context of publication in one of the national dailies of certain articles which contained adverse comments on the proposed issue of debentures by a public limited company. The validity of the debenture was sub judice in this Court. Initially, the court granted injunction against the press restraining publication of articles on the legality of the debenture issue. The test formulated was that any preventive injunction against the press must be based on reasonable grounds for keeping the administration of justice unimpaired and that, there must be reasonable ground to believe that the danger apprehended is real and imminent. The Court went by the doctrine propounded by Holmes J., of clear and present danger. This Court treated the said doctrine as the basis of balance of convenience test. Later on, the injunction was lifted after subscription to debentures had closed.

31. In the case of *Naresh Shridhar Mirajkar v. State of Maharashtra* [AIR 1967 SC 1], this Court dealt with the power of a court to conduct court proceedings in camera under its inherent powers and also to incidentally prohibit publication of the court proceedings or evidence of the cases outside the court by the media. It may be stated that open Justice is the cornerstone of our judicial system. It instills faith in the judicial and legal system. However, the right to open justice is not absolute. It can

be restricted by the court in its inherent jurisdiction as done in *Mirajkar's* case if the necessities of administration of justice so demand [see *Kehar Singh v. State (Delhi Administration)*, AIR 1988 SC

1883]. Even in US, the said principle of open justice yields to the said necessities of administration of justice [see: *Globe Newspaper Co. v. Superior Court*, 457 US 596]. The entire law has been reiterated once again in the judgment of this Court in *Mohd. Shahabuddin v. State of Bihar* [(2010) 4 SCC 653], affirming judgment of this Court in *Mirajkar's* case.

32. Thus, the principle of open justice is not absolute. There can be exceptions in the interest of administration of justice. In *Mirajkar*, the High Court ordered that the deposition of the defence witness should not be reported in the newspapers. This order of the High Court was challenged in this Court under Article 32. This Court held that apart from Section 151 of the Code of Civil Procedure, the High Court had the inherent power to restrain the press from reporting where administration of justice so demanded. This Court held vide para 30 that evidence of the witness need not receive excessive publicity as fear of such publicity may prevent the witness from speaking the truth. That, such orders prohibiting publication for a temporary period during the course of trial are permissible under the inherent powers of the court whenever the court is satisfied that interest of justice so requires. As to whether such a temporary prohibition of publication of court proceedings in the media under the inherent powers of the court can be said to offend Article 19(1)(a) rights [which includes freedom of the press to make such publication], this Court held that an order of a court passed to protect the interest of justice and the administration of justice could not be treated as violative of Article 19(1)(a) [see para 12]. The judgment of this Court in *Mirajkar* is delivered by a Bench of 9-Judges and is binding on this Court.

33. At this stage, it may be noted that the judgment of the Privy Council in the case of *Independent Publishing Co. Ltd. v. AG of Trinidad and Tobago* [2005 (1) AC 190] has been doubted by the Court of Appeal in New Zealand in the case of *Vincent v. Solicitor General* [(2012) NZCA 188 dated 11.5.2012]. In any event, on the inherent powers of the Courts of Record we are bound by the judgment of this Court in *Mirajkar*. Thus, Courts of Record under Article 129/Article 215 have inherent powers to prohibit publication of court proceedings or the evidence of the witness. The judgments in *Reliance Petrochemicals Ltd.* and *Mirajkar* were delivered in civil cases. However, in *Mirajkar*, this Court held that all Courts which have inherent powers, i.e., the Supreme Court, the High Courts and Civil Courts can issue prior restraint orders or proceedings, prohibitory orders in exceptional circumstances temporarily prohibiting publications of Court proceedings to be made in the media and that such powers do not violate Article 19(1)(a). Further, it is important to note, that, one of the Heads on which Article 19(1)(a) rights can be restricted is in relation to contempt of court under Article 19(2). Article 19(2) preserves common law of contempt as an existing law. In fact, the Contempt of Courts Act, 1971 embodies the common law of contempt. At this stage, it is suffice to state that the Constitution framers were fully aware of the Institution of Contempt under the common law which they have preserved as existing law under Article 19(2) read with Article 129 and Article 215 of Constitution. The reason being that contempt is an offence sui

generis. The Constitution framers were aware that the law of contempt is only one of the ways in which administration of justice is protected, preserved and furthered. That, it is an important adjunct to

the criminal process and provides a sanction. Other civil courts have the power under Section 151 of Code of Civil Procedure to pass orders prohibiting publication of court proceedings. In *Mirajkar*, this Court referred to the principles governing Courts of Record under Article 215 [see para 60]. It was held that the High Court is a Superior Court of Record and that under Article 215 it has all the powers of such a court including the power to punish contempt of itself. At this stage, the word including in Article 129/Article 215 is to be noted. It may be noted that each of the Articles is in two parts. The first part declares that the Supreme Court or the High Court shall be a Court of Record and shall have all the powers of such a court. The second part says includes the powers to punish for contempt. These Articles save the pre-existing powers of the Courts as courts of record and that the power includes the power to punish for contempt [see *Delhi Judicial Service Association v. State of Gujarat* [(1991) 4 SCC 406] and *Supreme Court Bar Association v. Union of India* [(1998) 4 SCC 409]. As such a declaration has been made in the Constitution that the said powers cannot be taken away by any law made by the Parliament except to the limited extent mentioned in Article 142(2) in the matter of investigation or punishment of any contempt of itself. If one reads Article 19(2) which refers to law in relation to Contempt of Court with the first part of Article 129 and Article 215, it becomes clear that the power is conferred on the High Court and the Supreme Court to see that the administration of justice is not perverted, prejudiced, obstructed or interfered with. To see that the administration of justice is not prejudiced or perverted clearly includes power of the Supreme Court/High Court to prohibit temporarily, statements being made in the media which would prejudice or obstruct or interfere with the administration of justice in a given case pending in the Supreme Court or the High Court or even in the subordinate courts. In view of the judgment of this Court in *A.K. Gopalan v. Noordeen* [(1969) 2 SCC 734], such statements which could be prohibited temporarily would include statements in the media which would prejudice the right to a fair trial of a suspect or accused under Article 21 from the time when the criminal proceedings in a subordinate court are imminent or where suspect is arrested. This Court has held in *Ram Autar Shukla v. Arvind Shukla* [1995 Supp (2) SCC 130] that the law of contempt is a way to prevent the due process of law from getting perverted. That, the words due course of justice in Section 2 (c) or Section 13 of the

1971 Act are wide enough and are not limited to a particular judicial proceedings. That, the meaning of the words contempt of court in Article 129 and Article 215 is wider than the definition of criminal contempt in Section 2 (c) of the 1971 Act. Here, we would like to add a caveat. The contempt of court is a special jurisdiction to be exercised sparingly and with caution whenever an act adversely affects the administration of justice [see Nigel Lowe and Brenda Sufrin, *Law of Contempt* (Third Edition)].

Trial by newspaper comes in the category of acts which interferes with the course of justice or due administration of justice [see Nigel Lowe and Brenda Sufrin, page 5 of Fourth Edition]. According

to Nigel Lowe and Brenda Sufrin [page 275] and also in the context of second part of Article 129 and Article 215 of the Constitution the object of the contempt law is not only to punish, it includes the power of the Courts to prevent such acts which interfere, impede or pervert administration of justice. Presumption of innocence is held to be a human right. [See: *Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra* (2005) 5 SCC 294]. If in a given case the appropriate Court finds infringement of such presumption by excessive prejudicial publicity by the newspapers (in general), then under inherent powers, the Courts of Record suo motu or on being approached or on report being filed before it by subordinate court can under its inherent powers under Article 129 or Article 215 pass orders of postponement of publication for a limited period if the applicant is able to demonstrate substantial risk of prejudice to the pending trial and provided he is able to displace the presumption of open Justice and to that extent the burden will be on the applicant who seeks such postponement of offending publication.

34. The above discussion shows that in most jurisdictions there is power in the courts to postpone reporting of judicial proceedings in the interest of administration of justice. Under Article 19(2) of the Constitution, law in relation to contempt of court, is a reasonable restriction. It also satisfies the test laid down in the judgment of this Court in *R. Rajagopal v. State of T.N.* [(1994) 6 SCC 632]. As stated, in most common law jurisdictions, discretion is given to the courts to evolve neutralizing devices under contempt jurisdiction such as postponement of the trial, re-trials, change of venue and in appropriate cases even to grant acquittals in cases of excessive media prejudicial publicity. The very object behind empowering the courts to devise such methods is to see that the administration of justice is not perverted, prejudiced, obstructed or interfered with. At the same time, there is a presumption of Open Justice under the common law. Therefore, courts have evolved mechanisms such as postponement of publicity to balance presumption of innocence, which is now recognized as a human right in *Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra* (supra) *vis-à-vis* presumption of Open Justice. Such an order of postponement has to be passed only when other alternative measures such as change of venue or postponement of trial are not available. In passing such orders of postponement, courts have to keep in mind the principle of proportionality and the test of necessity. The applicant who seeks order of postponement of publicity must displace the presumption of Open Justice and only in such cases the higher courts shall pass the orders of postponement under Article 129/Article 215 of the Constitution. Such orders of postponement of publicity shall be passed for a limited period and subject to the courts evaluating in each case the necessity to pass such orders not only in the context of administration of justice but also in the context of the rights of the individuals to be protected from prejudicial publicity or mis-information, in other words, where the court is satisfied that Article 21 rights of a person are offended. There is no general law for courts to postpone publicity, either prior to adjudication or during adjudication as it would depend on facts of each case. The necessity for any such order would depend on extent of prejudice, the effect on individuals involved in the case, the over-riding necessity to curb the right to report judicial proceedings conferred on the media under Article 19(1)(a) and the right of the media to challenge the order of postponement.

(ii) Contempt of Courts Act, 1971

35. Section 2 defines contempt, civil contempt and criminal contempt. In the context of contempt on account of publications which are not fair and accurate publication of court proceedings, the relevant provisions are contained in Sections 4 and 7 whereas Section 13 is a general provision which deals with defences. It will be noticed that Section 4 deals with report of a judicial proceeding. A person is not to be treated as guilty of contempt if he has published such a report which is fair and accurate. Section 4 is subject to the provisions of Section 7 which, however, deals with publication of information relating to proceedings in chambers. Here the emphasis is on information whereas in Section 4, emphasis is on report of a judicial proceeding. This distinction between a report of proceedings and information is necessary because Section 7 deals with proceedings in camera where there is no access to the media. In this connection, the provisions of Section 13 have to be borne in mind. The inaccuracy of reporting of court proceedings will be contempt only if it can be said on the facts of a particular case, to amount to substantial interference with the administration of justice. The reason behind Section 4 is to grant a privilege in favour of the person who makes the publication provided it is fair and accurate. This is based on the presumption of open justice in courts. Open justice permits fair and accurate reports of court proceedings to be published. The media has a right to know what is happening in courts and to disseminate the information to the public which enhances the public confidence in the transparency of court proceedings. As stated above, sometimes, fair and accurate reporting of the trial (say a murder trial) would nonetheless give rise to substantial risk of prejudice not in the pending trial but in the later or connected trials. In such cases, there is no other practical means short of postponement orders that is capable of avoiding such risk of prejudice to the later or connected trials. Thus, postponement order not only safeguards fairness of the later or connected trials, it prevents possible contempt by the Media.

(iii) Order of Postponement of publication- its nature and Object

36. As stated, in US such orders of postponement are treated as restraints which offend the First Amendment and as stated courts have evolved neutralizing techniques to balance free speech and fair trial whereas in Canada they are justified on the touchstone of Section 1 of the Charter of Rights.

What is the position of such Orders under Article 19(1)(a) and under Article 21?

37. Before examining the provisions of Article 19(1)(a) and Article 21, it may be reiterated, that, the right to freedom of speech and expression, is absolute under the First Amendment in the US Constitution unlike Canada and India where we have the test of justification in the societal interest which saves the law despite infringement of the rights under Article 19(1)(a). In India, we have the test of reasonable restriction in Article 19(2). In the case of Secretary, Ministry of Information & Broadcasting, *Govt. of India v. Cricket Association of Bengal* [(1995) 2 SCC 161] it has been held that it is true that Article 19(2) does not use the words national interest, interest of society or public interest but the several grounds mentioned in Article 19(2) for imposition of restrictions such as

security of the State, public order, law in relation to contempt of court, defamation etc. are ultimately referable to societal interest which is another name for public interest [para 189]. It has been further held that, the said grounds in Article 19(2) are conceived in the interest of ensuring and maintaining conditions in which the said right can meaningfully be exercised by the citizens of this country [para 151].

38. In the case of *E.M.S. Namboodripad v. T. Narayanan Nambiar* [AIR 1970 SC 2015] it has been held that the existence of law containing its own guiding principles, reduces the discretion of the Courts to the minimum. But where the law [i.e. 1971 Act] is silent the Courts have discretion [para 30]. This is more so when the said enactment is required to be interpreted in the light of Article 21. We would like to quote herein below para 6 of the above judgment which reads as under :

The law of contempt stems from the right of the courts to punish by imprisonment or fines persons guilty of words or acts which either obstruct or tend to obstruct the administration of justice. This right is exercised in India by all courts when contempt is committed in *facie curiae* and by the superior courts on their own behalf or on behalf of courts subordinate to them even if committed outside the courts. Formerly, it was regarded as inherent in the powers of a court of record and now by the Constitution of India, it is a part of the powers of the Supreme Court and the High Courts.

39. The question before us is whether such postponement orders constitute restrictions under Article 19(2) as read broadly by this Court in the case of *Cricket Association of Bengal* (supra)?

40. As stated, right to freedom of expression under the First Amendment in US is absolute which is not so under Indian Constitution in view of such right getting restricted by the test of reasonableness and in view of the Heads of Restrictions under Article 19(2). Thus, the clash model is more suitable to American Constitution rather than Indian or Canadian jurisprudence, since First Amendment has no equivalent of Article 19(2) or Section 1 of the Canadian Charter. This has led the American Courts, in certain cases, to evolve techniques or methods to be applied in cases where on account of excessive prejudicial publicity, there is usurpation of courts functions. These are techniques such as retrials being ordered, change of venue, ordering acquittals even at the Appellate stage, etc. In our view, orders of postponement of publications/ publicity in appropriate cases, as indicated above, keeping in mind the timing (the stage at which it should be ordered), its duration and the right of appeal to challenge such orders is just a neutralizing device, when no other alternative such as change of venue or postponement of trial is available, evolved by courts as a preventive measure to protect the press from getting prosecuted for contempt and also to prevent administration of justice from getting perverted or prejudiced.

(iv) Width of the postponement orders

41. The question is - whether such postponement orders constitute restriction under Article 19(1)(a) and whether such restriction is saved under Article 19(2)?

42. At the outset, we must understand the nature of such orders of postponement. Publicity postponement orders should be seen, in the context of Article 19(1)(a) not being an absolute right. The US clash model based on collision between freedom of expression (including free press) and

the right to a fair trial will not apply to Indian Constitution. In certain cases, even accused seeks publicity (not in the pejorative sense) as openness and transparency is the basis of a fair trial in which all the stakeholders who are a party to a litigation including the judges are under scrutiny and at the same time people get to know what is going on inside the court rooms. These aspects come within the scope of Article 19(1) and Article 21. When rights of equal weight clash, Courts have to evolve balancing techniques or measures based on re- calibration under which both the rights are given equal space in the Constitutional Scheme and this is what the postponement order does subject to the parameters, mentioned hereinafter. But, what happens when courts are required to balance important public interests placed side by side. For example, in cases where presumption of open justice has to be balanced with presumption of innocence, which as stated above, is now recognized as a human right. These presumptions existed at the time when the Constitution was framed [existing law under Article 19(2)] and they continue till date not only as part of rule of law under Article 14 but also as an Article 21 right. The constitutional protection in Article 21 which protects the rights of the person for a fair trial is, in law, a valid restriction operating on the right to free speech under Article 19(1)(a), by virtue of force of it being a constitutional provision. Given that the postponement orders curtail the freedom of expression of third parties, such orders have to be passed only in cases in which there is real and substantial risk of prejudice to fairness of the trial or to the proper administration of justice which in the words of Justice Cardozo is the end and purpose of all laws. However, such orders of postponement should be ordered for a limited duration and without disturbing the content of the publication. They should be passed only when necessary to prevent real and substantial risk to the fairness of the trial (court proceedings), if reasonable alternative methods or measures such as change of venue or postponement of trial will not prevent the said risk and when the salutary effects of such orders outweigh the deleterious effects to the free expression of those affected by the prior restraint. The order of postponement will only be appropriate in cases where the balancing test otherwise favours non-publication for a limited period. It is not possible for this Court to enumerate categories of publications amounting to contempt. It would require the courts in each case to see the content and the context of the offending publication. There cannot be any straightjacket formula enumerating such categories. In our view, keeping the above parameters, if the High Court/ Supreme Court (being Courts of Record) pass postponement orders under their inherent jurisdictions, such orders would fall within reasonable restrictions under Article 19(2) and which would be in conformity with societal interests, as held in the case of Cricket Association of Bengal (supra). In this connection, we must also keep in mind the language of Article 19(1) and Article 19(2). Freedom of press has been read into Article 19(1)(a). After the judgment of this Court in *Maneka Gandhi* (supra, p. 248), it is now well-settled that test of reasonableness applies not only to Article 19(1) but also to Article 14 and Article 21. For example, right to access courts under Articles 32, 226 or 136 seeking relief against infringement of say Article 21 rights has not been specifically mentioned in Article 14. Yet, this right has been deduced from the words equality before the law in Article 14. Thus, the test of reasonableness which applies in Article 14 context would equally apply to Article 19(1) rights. Similarly, while judging reasonableness of an enactment even Directive Principles have been taken into

consideration by this Court in several cases [see recent judgment of this Court in *Society for Unaided Private Schools of Rajasthan v. U.O.I.*, 2012 (4) SCALE 272. Similarly, in the case of *Dharam Dutt v. Union of India* reported in (2004) 1 SCC 712, it has been held that rights not included in Article 19(1)(c) expressly, but which are deduced from the express language of the Article are concomitant rights, the restrictions thereof would not merely be those in Article 19(4)]. Thus, balancing of such rights or equal public interest by order of postponement of publication or publicity in cases in which there is real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial and within the above enumerated parameters of necessity and proportionality would satisfy the test of reasonableness in Articles 14 and 19(2). One cannot say that what is reasonable in the context of Article 14 or Article 21 is not reasonable when it comes to Article 19(1)(a). Ultimately, such orders of postponement are only to balance conflicting public interests or rights in Part III of Constitution. They also satisfy the requirements of justification under Article 14 and Article 21. Further, we must also keep in mind the words of Article 19(2) in relation to contempt of court. At the outset, it may be stated that like other freedoms, clause 1(a) of Article 19 refers to the common law right of freedom of expression and does not apply to any right created by the statute (see page 275 of Constitution of India by D.D. Basu, 14th edition).

The above words in relation to in Article 19(2) are words of widest amplitude. When the said words are read in relation to contempt of court, it follows that the law of contempt is treated as reasonable restriction as it seeks to prevent administration of justice from getting perverted or prejudiced or interfered with. Secondly, these words show that the expression contempt of court in Article 19(2) indicates that the object behind putting these words in Article 19(2) is to regulate and control administration of justice. Thirdly, if one reads Article 19(2) with the second part of Article 129 or Article 215, it is clear that the contempt action does not exhaust the powers of the Court of Record. The reason being that contempt is an offence sui generis. Common law defines what is the scope of contempt or limits of contempt. Article 142(2) operates only in a limited field. It permits a law to be made restricted to investigations and punishment and does not touch the inherent powers of the Court of Record. Fourthly, in case of criminal contempt, the offending act must constitute interference with administration of justice. Contempt jurisdiction of courts of record forms part of their inherent jurisdiction under Article 129/ Article 215. Superior Courts of Record have inter alia inherent superintendent jurisdiction to punish contempt committed in connection with proceedings before inferior courts.

The test is that the publication (actual and not planned publication) must create a real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. It is important to bear in mind that sometimes even fair and accurate reporting of the trial (say murder trial) could nonetheless give rise to the real and substantial risk of serious prejudice to the connected trials. In such cases, though rare, there is no other practical means short of postponement orders that is capable of avoiding the real and substantial risk of prejudice to the connected trials. Thus, postponement orders safeguard fairness of the connected trials. The principle underlying postponement orders is that it prevents possible contempt. Of course, before passing postponement orders, Courts should look at the content of the offending publication (as alleged) and its effect.

Such postponement orders operate on actual publication. Such orders direct postponement of the publication for a limited period. Thus, if one reads Article 19(2), Article 129/ Article 215 and Article 142(2), it is clear that Courts of Record have all the powers including power to punish which means that Courts of Record have the power to postpone publicity in appropriate cases as a preventive measure without disturbing its content. Such measures protect the Media from getting prosecuted or punished for committing contempt and at the same time such neutralizing devices or techniques evolved by the Courts effectuate a balance between conflicting public interests.

It is well-settled that precedents of this Court under Article 141 and the Comparative Constitutional law helps courts not only to understand the provisions of the Indian Constitution it also helps the Constitutional Courts to evolve principles which as stated by Ronald Dworkin are propositions describing rights [in terms of its content and contours] (See *Taking Rights Seriously* by Ronald Dworkin, 5th Reprint 2010). The postponement orders is, as stated above, a neutralizing device evolved by the courts to balance interests of equal weightage, viz., freedom of expression vis-à-vis freedom of trial, in the context of the law of contempt. One aspect needs to be highlighted. The shadow of the law of contempt hangs over our jurisprudence. The media, in several cases in India, is the only representative of the public to bring to the notice of the court issues of public importance including governance deficit, corruption, drawbacks in the system. Keeping in mind the important role of the media, Courts have evolved several neutralizing techniques including postponement orders subject to the twin tests of necessity and proportionality to be applied in cases where there is real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. Such orders would also put the Media to notice about possible contempt. However, it would be open to Media to challenge such orders in appropriate proceedings. Contempt is an offence sui generis. Purpose of Contempt Law is not only to punish. Its object is to preserve the sanctity of administration of justice and the integrity of the pending proceeding. Thus, the postponement order is not a punitive measure, but a preventive measure as explained hereinabove. Therefore, in our view, such orders of postponement, in the absence of any other alternative measures such as change of venue or postponement of trial, satisfy the requirement of justification under Article 19(2) and they also help the Courts to balance conflicting societal interests of right to know vis-à-vis another societal interest in fair administration of justice.

One more aspect needs to be mentioned. Excessive prejudicial publicity leading to usurpation of functions of the Court not only interferes with administration of justice which is sought to be protected under Article 19(2), it also prejudices or interferes with a particular legal proceedings. In such case, Courts are duty bound under inherent jurisdiction, subject to above parameters, to protect the presumption of innocence which is now recognised by this Court as a human right under Article 21, subject to the applicant proving displacement of such a presumption in appropriate proceedings. Lastly, postponement orders must be integrally connected to the outcome of the proceedings including guilt or innocence of the accused, which would depend on the facts of each case. For aforesaid reasons, we hold that subject to above parameters, postponement orders fall under Article 19(2) and they satisfy the test of reasonableness.

(v) Right to approach the High Court/ Supreme Court

43. In the light of the law enunciated hereinabove, anyone, be he an accused or an aggrieved person, who genuinely apprehends on the basis of the content of the publication and its effect, an infringement of his/ her rights under Article 21 to a fair trial and all that it comprehends, would be entitled to approach an appropriate writ court and seek an order of postponement of the offending publication/ broadcast or postponement of reporting of certain phases of the trial (including identity of the victim or the witness or the complainant), and that the court may grant such preventive relief, on a balancing of the right to a fair trial and Article 19(1)(a) rights, bearing in mind the abovementioned principles of necessity and proportionality and keeping in mind that such orders of postponement should be for short duration and should be applied only in cases of real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. Such neutralizing device (balancing test) would not be an unreasonable restriction and on the contrary would fall within the proper constitutional framework.

Maintainability

44. As stated above, in the present case, we heard various stake holders as an important question of public importance arose for determination. Broadly, on maintainability the following contentions were raised:

- (i) the proceedings were not maintainable as there is no *lis*;
- (ii) there is a difference between law-making and framing of guidelines. That law can be made only by Parliament. That, guidelines to be framed by the Court, therefore, should be self-regulatory or at the most advisory;
- (iii) under Article 142, this Court cannot invest courts or any other authority with jurisdiction, adjudicatory or otherwise, which they do not possess.

45. Article 141 uses the phrase law declared by the Supreme Court. It means law made while interpreting the statutes or the Constitution. Such judicial law-making is part of the judicial process. Further under Article 141, law-making through interpretation and expansion of the meanings of open-textured expressions such as law in relation to contempt of court in Article 19(2), equal protection of law, freedom of speech and expression and administration of justice is a legitimate judicial function. According to Ronald Dworkin, Arguments of principle are arguments intended to establish an individual right. Principles are propositions that describe rights. [See Taking Rights Seriously by Ronald Dworkin, 5th Reprint 2010, p. 90]. In this case, this Court is only declaring under Article 141, the constitutional limitations on free speech under Article 19(1)(a), in the context of Article 21. The exercise undertaken by this Court is an exercise of exposition of constitutional limitations under Article 141 read with Article 129/Article 215 in the light of the contentions and large number of authorities referred to by the counsel on Article 19(1)(a), Article 19(2), Article 21, Article 129 and Article 215 as also the law of contempt insofar as interference with administration

of justice under the common law as well as under Section 2(c) of 1971 Act is concerned. What constitutes an offending publication would depend on the decision of the court on a case-to-case basis. Hence, guidelines on reporting cannot be framed across the Board. The shadow of law of contempt hangs over our jurisprudence. This Court is duty bound to clear that shadow under Article 141. The phrase in relation to contempt of court under Article 19(2) does not in the least describe the true nature of the offence which consists in interfering with administration of justice; in impending and perverting the course of justice. That is all which is done by this judgment. We have exhaustively referred to the contents of the IAs filed by Sahara and SEBI. As stated above, the right to negotiate and settle in confidence is a right of a citizen and has been equated to a right of the accused to defend himself in a criminal trial. In this case, Sahara has complained to this Court on the basis of breach of confidentiality by the Media. In the circumstances, it cannot be contended that there was no *lis*. Sahara, therefore, contended that this Court should frame guidelines or give directions which are advisory or self-regulatory whereas SEBI contended that the guidelines/directions should be given by this Court which do not have to be coercive. In the circumstances, constitutional adjudication on the above points was required and it cannot be said that there was no *lis* between the parties. We reiterate that the exposition of constitutional limitations has been done under Article 141 read with Article 129/Article 215. When the content of rights is considered by this Court, the Court has also to consider the enforcement of the rights as well as the remedies available for such enforcement. In the circumstances, we have expounded the constitutional limitations on free speech under Article 19(1)(a) in the context of Article 21 and under Article 141 read with Article 129/Article 215 which preserves the inherent jurisdiction of the Courts of Record in relation to contempt law. We do not wish to enumerate categories of publication amounting to contempt as the Court(s) has to examine the content and the context on case-to-case basis.

Paid News

Ashok Shankarrao Chavan v. Madhavrao Kinhalkar

(2014) 7 SCC 99

Fakkir Mohamed Ibrahim Kalifulla, J. (for himself and S.S. Nijjar, JJ.): 2. The simple yet important question of law that have arisen in these appeals before us and which have serious ramifications on the maintenance of sanctity in our democracy is as to whether the Election Commission, under Section 10A of the Representation of the People Act, 1951, can conduct an enquiry to determine the falsity of the return of election expenses by an elected candidate, especially after a decision is rendered by the High Court in the Election Petition preferred by the Respondent No.1. 3. On the aforesaid background, let us briefly examine the facts of this case. The appeal (SLP (C) No.29882 of 2011) has been filed by the candidate who was elected in the Assembly elections in the State of Maharashtra. The results of the election to the Assembly were declared on 22.10.2009. The Respondent No.1 was one of the candidates who contested the said election as against the Appellant. The Appellant was declared elected and the Respondent No.1 was an unsuccessful candidate. As per the provisions of the Representation of the People Act, 1951 and the Conduct of Election Rules, 1961 (hereinafter called “the Act and the Rules”), within one month from the date of publication of the results, a statement of election expenses has to be filed by the candidate with the District Election Officer (hereinafter called “DEO”). The Appellant stated to have filed his statement of election expenses on 17.11.2009, i.e., within one month of the date of election. It is also brought to our notice that on 24.11.2009, the DEO, Nanded forwarded his report to the Election Commission of India and that according to the Appellant, nothing adverse was stated in the said report. However, on 02.12.2009, the Respondent No.1 filed a complaint with the Election Commission alleging violation of the Election Code based on newspaper reports. Besides the above complaint of the Respondent No.1 to the Election Commission, he also filed an Election Petition before the Election Tribunal (High Court) on 04.12.2009. This very allegation which was raised before the Election Commission was stated to have been raised in the Election Petition as well. The Election Petition was dismissed by the Election Tribunal (High Court) on 18.10.2012 on the ground of want of material particulars. The Respondent No.1 thereby preferred a statutory appeal before this Court in Appeal No.9271 of 2012, which was also dismissed by this Court on 21.01.2013.

10. The sum and substance of the submission of Mr. Gopal Subramaniam, learned Senior Counsel (*for the appellant*) is:

(a) By virtue of Article 329 (b) of the Constitution read with Section 80 of the Act, a challenge to the election can only be by way of an election petition, that the election of the Appellant having been challenged unsuccessfully, in an election petition which was also confirmed by this Court in C.A. 9271/2012 by order dater 21.1.2013, there is no power or jurisdiction with the Election Commissioner to enquire into the validity of the said election or for that matter pass an order of disqualification by way of holding an enquiry under Section 10A of the Act.

(b) Even after the amendments to the Act in 1956, as well as in 1966, in the end by which Section 7(c) came to be amended and, thereafter, replaced by Section 10A, whatever ratio laid down by this Court in *Sucheta Kripalani (supra)* continued to hold good and that the judgment in *L.R. Shivaramagowda (supra)* was clearly distinguishable and required reconsideration. The submission is that as per Section 7(c) of the Act, prior to its amendment, what was held by this Court in *Sucheta Kripalani (supra)* was that the submission of return of election expenses is only in form and not in substance and that the said principle continues to apply even in relation to Section 10A of the Act.

(c) The enquiry contemplated by the Election Commission if permitted to be held, would result in conducting a trial which would be ultra vires of Article 329 (b), that there is no statutory rule or procedure for holding such an enquiry, which would otherwise involve the applicability of rules of pleading, powers of the Code of Civil Procedure, 1905 question of limitation, adding of proper parties, applicability of the Evidence Act, 1872 and the like. When such a procedure is not being provided as contemplated in the Act, the attempt of the Election Commission to proceed with the inquiry would result in anomalous consequences, and, therefore, the impugned order of the Election Commission cannot be sustained.

(d) Section 10A disqualification is only a default disqualification and not a stigmatized one and any enquiry under Section 10A can only be based on the DEO's report. Also reasons are to be given only when removal or reduction of disqualification is to be made under Section 11, and, therefore, if the Election Commission were to ultimately set aside an election by exercising its power under Section 10A, the consequences would be very severe.

(e) The Election Commission, who was impleaded as a party in the election petition itself sought for its deletion, that the Complainants Mukhtar Abbas Naqvi or Kirit Somaiya, neither being voters nor candidates who lost in the election, had no locus standi to seek for an enquiry under Section 10A, inasmuch as an election petition can only be as against an elected candidate. Further, the scope of holding any enquiry by the Election Commission can be referable only to Article 191(1)(e) read with Article 192(2) of the Constitution and not otherwise by invoking Section 10A of the said Act.

(f) The scope of invalidating an election is available under Section 100(1)(d)(iv) of the said Act which would cover all illegality.

(g) Law of the election being a special law, its intentment as well as effects will have to be found in the given law and not outside of it. The doctrine of equitable consideration will not apply and where the Constitution leaves any ambiguity, the benefit of the doubt should be given to the subject as against the legislature. (h) The power of Election Commission under Article 324 of the Constitution can be invoked only where it is unoccupied and when there is no vacuum in the Act, the Election Commission cannot enlarge its powers wider than what is available to the Election Tribunal (High Court).

(i) The impugned order of the Election Commission in attempting to enlarge its powers while invoking Section 10A cannot be permitted.

(j) The Election Commission failed to note that the requirement under the Rule is for the election officer, as well as the Election Commission, to only see that the returns were filed in time as prescribed under the Act and if there is no good reason for failure to lodge the accounts within time,

the Election Commission can only examine the reason for passing appropriate orders under Section 11 and not beyond.

13. Mr. Jayant Bhushan, learned Senior Counsel appearing for the Respondent No.1, after narrating the sequence of events from the date the election result was declared, announcing the success of the Appellant on 22.10.2009 and thereafter, the filing of the complaint under Section 10A before the Election Commission on 02.12.2009, referred to the various dates of hearings when the Election Commission heard the parties, including the Appellant and the impugned order dated 02.04.2011 passed by the Election Commission, which was upheld by the Delhi High Court in W.P. No.2511 of 2011 by order dated 30.09.2011. In his submissions, he raised the following contentions:

(a) A reading of Section 10A along with Section 77(1) and (2), 78 as well as Rules 86 to 89 would show that it is only the Election Commission which can, on being satisfied about the failure to lodge a correct account of all election expenditure in the manner required by or under the Act, disqualify a candidate for the period specified in the said provision.

(b) That Section 10A is independent of Article 329(b) of the Constitution and, therefore, there is no scope to hold that the said provision is ultra vires.

(c) By virtue of Rule 89 read along with Section 10A, it cannot be held that only at the instance of DEO the Election Commission can exercise its powers under Section 10A. On the other hand, the satisfaction which could be arrived at by the Election Commission under Section 10A may be based on a report of the DEO or after hearing the parties or upon an enquiry by the Election Commission as per Rule 89, which uses the expression 'as it thinks fit'.

(d) The present allegation against the Appellant is paid news and advertisements, which were not accounted for and which having not been disclosed by the Appellant in the return, have now come to light through the Press Council and other sources. Therefore, it could not have been within the knowledge of the DEO in order to state that it is only at the instance of the DEO that the Election Commission can hold any enquiry under Section 10A of the Act.

(e) The scope of jurisdiction of the Election Tribunal in considering the validity of the Election of a member is different from the power of disqualification that can be passed by the Election Commission under Section 10A and, therefore, the dismissal of the Election Petition for want of particulars cannot be a ground to thwart the exercise of the power and jurisdiction of the Election Commission to pass orders under Section 10A.

(f) The case on hand is covered by the decision of this Court reported in L.R. Shivaramagowda (supra) inasmuch as this Court has already held that the Commission alone has the power to determine whether the election account filed by a returned candidate is true and correct for the purpose of Section 10A of the Act.

(g) The decision in Sucheta Kripalani (supra) is no longer good law inasmuch as the substratum of the said judgment having been erased by the subsequent amendments to the Act once in 1956 and again in 1966 by which the whole scheme of the Act had undergone a drastic change by which the scope of jurisdiction of the Election Tribunal, as well as the power and jurisdiction of the Election Commission has been distinctly spelt out.

19. Mr. Ashok Desai, learned Senior Counsel who appeared for the Election Commission, prefaced his submission by stating that free and fair election is the basic feature of our democracy, which again is the basic structure of the Constitution, that under Article 324 of the Constitution, the Election Commission is not only invested with plenary powers but has got a constitutional obligation to organize a free and fair election and that under Section 10A, the power of the Election Commission is much wider when it comes to the question of disqualification in contrast to an election petition, where the validity of an election can be challenged. [.....]The submission of the learned Senior Counsel can be concretized as under:

(a) The learned Senior Counsel by making a comparative reading of Section 123(6) vis-à-vis Section 10A, submitted that while under Section 123(6), only a candidate who contested the election can file a complaint, under Section 10A any person including an elector can make the complaint.

(b) It was then pointed out that while for preferring a complaint under Section 123(6) a period of limitation of 45 days from the date of the election is prescribed as per Section 81, there is no prescribed time limit for invoking Section 10A and that what is expected is only a complaint to be filed within a reasonable time.

(c) Lastly, under Section 123(6), a party who is concerned with the allegation may be an aggrieved party who can provide the source, while under Section 10A a citizen who is keen on purity of election can prefer a complaint. It was also pointed out that while an election petition would be decided by Election Tribunal (High Court) namely, the High Court, the disqualification under Section 10A can be decided by an Election Commission.

21. Having dealt with the rival contentions of the parties, it would be necessary to find out whether the impugned order of the Election Commission is correct or not. For this, the various provisions of the Constitution as well as the relevant provisions as they originally existed prior to 1956 and 1966, the amendments made to the Act and the provisions which are existing as on date are required to be noted.

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S.7. Disqualifications for membership of Parliament or of a State Legislature.- A person shall be disqualified for being chosen as, and for being, a member of either House, of Parliament or of the Legislative Assembly or Legislative Council of a State-

(a) xxx xxx xxx

(b) xxx xxx xxx

(c) if, having been nominated as a candidate for Parliament or the Legislature of any State or having acted as an election agent of any person so nominated, he has failed to lodge a return of election expenses within the time and in the manner required by or under this Act, unless five years have elapsed from the date by which the return ought to have been lodged or the Election Commission has removed the disqualification;

S.8. Savings

(a) xxx xxx xxx

(b) a disqualification under clause (c) of that section shall not take effect until the expiration of two months from the date by which return of election expenses ought to have been lodged or of such longer period as the Election Commission may in any particular case allow;

S.143. Disqualification arising out of failure to lodge return of election expenses.- If default is made in making the return of the election expenses of any person who has been nominated as a candidate at an election to which the provisions of Chapter VIII of Part V apply, or if such a return is found, either upon the trial of an election petition under Part VI or by any court in a judicial proceeding to be false in any material particular, the candidate and his election agent shall be disqualified for voting at any election for a period of five years from the date by which the return was required to be lodged.

S.144. Removal of disqualifications. – Any disqualification under this Chapter may be removed by the Election Commission for reasons to be recorded by it in writing.

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S.10A. Disqualification for failure to lodge account of election expenses.- If the Election Commission is satisfied that a person- (a) Has failed to lodge an account of election expenses, within the time and in the manner required by or under this Act, and (b) Has no good reason or justification for the failure, The Election Commission shall, by order published in the Official Gazette, declare him to be disqualified and any such person shall be disqualified for a period of three years from the date of the order. S.11. Removal or reduction of period of disqualification.- The Election Commission may, for reasons to be recorded, remove any disqualification under this Chapter (except under section 8A) or reduce the period of any such disqualification.

S.77. Account of election expenses and maximum thereof.- (1) Every candidate at an election shall, either by himself or by his election agent, keep a separate and correct account of all expenditure in connection with the election incurred or authorized by him or by his election agent between the date on which he has been nominated and the date of declaration of the result thereof, both dates inclusive. (2) The account shall contain such particulars, as may be prescribed. (3) The total of the said expenditure shall not exceed such amount as may be prescribed.

S.78. Lodging of account with the district election officer.- (1) Every contesting candidate at an election shall, within thirty days from the date of election of the returned candidate or, if there are more than one returned candidate at the election and the dates of their election are different, the later of those two dates, lodge with the district, election officer an account of his election expenses which shall be a true copy of the account kept by him or by his election agent under section 77.

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51. Before advertng to the submissions of the learned counsel for the respective parties, it will be in order to note the alleged violations committed by the Appellants in the above appeals, which prompted the Election Commission to initiate the present proceedings under Section 10A of the Act. Insofar as the Appellant in the appeal (SLP (C) No.29882 of 2011) is concerned, there were three complaints at the instance of (i) Shri Mukhtar Abbas Naqvi, Member of Parliament, Bhartiya Janata Party and five others, (ii) Dr Madhavrao Kinhalkar, one of the rival contestants at the aforesaid general elections from 85 Bokar Assembly Constituency and (iii) Dr. Kirit Somaiya,

Vice-President, Bhartiya Janata Party, Maharashtra and four others. In their complaints submitted to the Election Commission towards the end of November 2009 and beginning of December 2009, it was alleged that the Appellant Ashok Shankarrao Chavan got several advertisements published in various newspapers, in particular, Lokmat, Pudhari, Maharashtra Times and Deshonnati during the election campaigning period, which appeared in those newspapers in the garb of news eulogizing him and his achievements as Chief Minister of Maharashtra. It was further alleged that the huge expenditure, which they described, was incurred or authorized by the Appellant for getting those advertisements published as news and is now a well-known phenomenon, as 'paid news'. The expenditure incurred or authorized on the publication of those 'paid news' was not included by the Appellant in his account of election expenses as required under Section 77 of the Act and lodged with the DEO, Nanded under Section 78 of the Act. The Complainants alleged that the Respondent showed only an expense of Rs.5379/- as the expenses of newspaper advertisement in his account, whereas the expenditure on the above mentioned 'paid news' ran into several crores and it was suppressed in his return of election expenses. In the complaint dated 30.11.2009 of Shri Mukhtar Abbas Naqvi and others, it was prayed that the account of the election expenses of the Respondent should be enquired into and action should be taken against him under Section 10A of the said Act.

52. Pursuant to the receipt of the above complaints, the Appellant was called upon to submit his comments by the Commission on 16.01.2010. The Appellant submitted his reply on 29.01.2010 refuting all the allegations of the Complainants. The reply was forwarded to the Complainants on 5th and 9th February, 2010 and the Complainants filed their rejoinders in February and March 2010. The Commission decided to hear the parties on 11.06.2010. In the meanwhile, the Commission also obtained the comments of the Chief Electoral Officer Maharashtra about the four newspapers and the allegations of publishing 'paid news' relating to the Appellant. The impugned order of the Election Commission states that all the four newspapers denied the allegation of any payment having been made to them by the Respondent for the publication of the alleged 'paid news'. According to the newspaper establishments, the alleged 'paid news' were in fact news or editorials and supplements published by them gratuitously as they had links with or leanings towards the Congress Party and the Appellant. When the matter was posted for hearing, a preliminary objection was raised questioning the jurisdiction of the Election Commission to hold an elaborate enquiry in exercise of its powers under Section 10A and while dealing with said preliminary issue, the Election Commission relied upon the decision of this Court in L.R. Shivaramagowda (supra) and reached a conclusion that the commission had every jurisdiction under Section 10A to go into the question of alleged incorrectness or falsity of the election expenses maintained by the Appellant under Section 77(1) and (2) and lodged by him under Section 78 of the Act. The Commission, therefore, decided to hear the matter on merits to be held on 29.04.2011 at 4 p.m. in the Commission Secretariat. The said order was the subject matter of challenge. The said order of the Election Commission came to be upheld by the Division Bench of the Delhi High Court in the order impugned dated 30.09.2011 in Writ Petition (C) No.2511 of 2011.

53. Insofar as the Appellant in the appeal (SLP (C) No.14209 of 2012) is concerned, he submitted his accounts of election expenses along with the register and vouchers to the tune of Rs.18,92,353/- as per the requirements of Section 78 of the said act, to the DEO West Singhbhum, Chaibasa, Jharkhand on 01.06.2009, who in turn submitted this report to the Election Commission on 08.10.2010, as per the requirements of Rule 89 of the Rules. It was alleged that the Election Commission after receiving the report failed to act as per the requirements of Rule 89(4), which envisaged the commission to decide the issue as soon as possible after the submission of the report by the DEO. It was further alleged that after about 15 months from the submission of the report by the DEO, the Election Commission on 07.10.2010 issued a show cause notice under Rule 89(5) of the Rules to the Appellant, for the reason being that he failed to lodge his election expenses in the manner required by law and demanded as to why he shouldn't be disqualified under Section 10A of the said act. Pursuant to his notice, the Appellant explained on 24.10.2010 that the vouchers were misplaced in the DEO's office and were again provided to the DEO on 08.10.2010 and therefore, requested the Election Commission to treat the notice dated 07.10.2010 as withdrawn. Subsequent to this reply, it was alleged that the Election Commission, 4 months after the submission of the representation by the Appellant on 22.11.2011, again issued a fresh show cause notice to the him under Rule 89(5) read with Section 10A, stating therein that they were in further receipt of a report from the Income Tax Department, which alleged that prima facie, the account filed by the Appellant was incorrect and as to why he shouldn't be disqualified. The Election Commission along with this notice, sent a copy of the alleged summary of findings by the Income Tax Department, which showed the election expenses incurred to the tune of Rs.9,32,56,259/-. The authorized total expenditure of which account is to be kept and can be incurred in one parliamentary constituency in the state of Jharkhand as per Section 77 read with Rule 90 is Rs. 25,00,000/-. The Appellant replied to this notice by stating that as he was in jail and was having severe health issues, and therefore, requested the Election Commission to grant him more time for inspecting the documents, to which a period of 20 days was granted. The Election Commission subsequently passed an order on 02.02.2011 in the similar and identical case of Ashok Shankarrao Chavan, concluding that the Commission has undoubted jurisdiction under Section 10A to go into the question of the alleged incorrectness or falsity of the return by the candidate under Sections 77(1) and 77(2), lodged under Section 78. Aggrieved by this order, the Appellant herein filed Writ Petition (C) No.4662 of 2011 before the Delhi High Court, which was thereby dismissed by the Court in view of the order already passed by it in Writ Petition (C) No. 2511 of 2011.

54. In so far as the appeal (SLP (C) No.21958 of 2013) is concerned, the Appellant was a candidate from 24 Bisauli Assembly Constituency U.P. in the General Assembly Election of 2007 from a party, namely, Rashtriya Parivartan Dal. Sri Yogendra Kumar, the 2nd Respondent, was also a contesting candidate from the said constituency. The polling in the constituency was scheduled to take place on 18.04.2007. A day before the date of polling, a publication was made in a newspaper 'Amar Ujala' dated 17.04.2007 mentioning that there is a wave in favour of the Appellant in the election and the voters have made up their mind to support the Appellant. A similar publication was also made in the newspaper 'Dainik Jagaran' dated 17.04.2007. The polling took place on

18.04.2007 and the Appellant was declared as an elected member of the U.P. Legislative Assembly. On 27.04.2007 a complaint was submitted by the Respondent No.2 to the Press Council of India that the newspapers Amar Ujala and Dainik Jagaran, were in violation of journalistic conduct and have published one sided news item in the form of advertisement in favour of the Appellant by taking huge sums of money on 17.04.2007, i.e. after the close of the campaigning and the day before the poll. On 12.05.2007 the Appellant submitted the accounts of his election expenses before District Election Officer as required by Section 77 and 78 of the Act. The Press Council of India issued notices to both the newspapers on 09.08.2007, to which both the papers submitted their reply before the Press Council of India that the publication was not a news item but an advertisement. It was stated in the reply that at the bottom, the word 'ADVT' was appended and it was further submitted that the material, which was published was given to the Press on behalf of the Appellant and was not materials collected by the correspondents of the newspaper. The Press Council thereby, decided the complaint vide order dated 31.03.2010, wherein it held that the publication though camouflaged as news items, in reality it was only an advertisement. It further held that the newspapers Amar Ujala and Dainik Jagaran were guilty of ethical violation. Subsequently, after receiving the order dated 31.03.2010 from the Press Council of India vide letter dated 04.05.2010, the Commission called for a report from the Chief Electoral Officer U.P. regarding expenditure on the advertisement dated 17.04.2010 to which the Chief Electoral Officer vide his letter dated 10.05.2010 forwarded the report dated 09.05.2010 of the DEO. The DEO in his report had stated that the expenditure was not clear from the returns submitted by the Appellant. The Election Commission thereby issued a notice dated 22.06.2010 to the Appellant stating that in the account of the election expenses, the expenditure incurred for the two advertisements dated 17.04.2007 were not reflected and thereby, attracted disqualification under Section 10A for a period of three years. The Appellant thereby submitted a reply on 18.07.2010 stating that the publication of the above items in the newspapers were neither ordered by the Appellant nor by her election agent. On 19.08.2010, the Election Commission requested the newspapers to send copies of all the relevant documents pertaining to the publication dated 17.04.2007. On 06.01.2011, the Election Commission again wrote to the Appellant stating that the account of election expenses lodged by her as per Section 78 of the Act had not reflected the proper and correct expenditure and a hearing was thereby fixed on 04.02.2011. In the hearing it was submitted by the Appellant that the advertisement given by her party was only in a small box size 7 x 6 cms. For which an amount of Rs.840 was paid to the Daily Amar Ujala vide bill dated 17.04.2007. The Election Commission after hearing the Appellant and the Respondent No.2, vide its order dated 20.10.2011 held the Appellant to be guilty of breach of the provisions 78 and 10A of the Act accordingly disqualified her for a period of three years. Subsequent to this order, a writ petition was filed by her on 05.11.2011, challenging the order of the Election Commission in Writ Petition No.63965 of 2011 before the Hon'ble High Court of Allahabad, which dismissed the said writ petition vide the judgment and order dated 03.05.2013. 55. In recent times, when elections are being held it is widely reported in the Press and Media that money power plays a very vital role. Going by such reports and if it is true then it is highly unfortunate that many of the voters are prepared to sell their votes

for a few hundred rupees. In fact, taking advantage of the weakness of the voters, exploitation to the maximum level is being carried out by those who aspire to become either Member of Parliament or State Legislature. We are pained to state that the sanctity of the status as a Member of the Legislatures, either Parliament or State Legislature are not being seriously weighed even by those who sponsor their candidature. It is a hard reality that if one is prepared to expend money to unimaginable limits only then can he be preferred to be nominated as a candidate for such membership, as against the credentials of genuine and deserving candidates. If such practices are to be simply ignored and a laudable object with which the Act has been brought into the statute book as early as in the year 1950 and later on by the Act of 1951, wherein by virtue of the Constitutional provision under Article 324 an authority in the status of the Election Commission is created in order to supervise and control the elections, it must be stated that such an authority who is in ultimate control in the matter of holding of the elections should be held to be invested with the widest power of its kind specified in the Act. Therefore, when it comes to the question of interpretation of the extent of such power to be exercised by the said authority, we are convinced that the Court should have a very liberal approach in interpreting the nature of power and jurisdiction vested with the said authority, namely, the Election Commission. This view of ours is more so apt in the present day context, wherein money power virtually controls the whole field of election and that people are taken for a ride by such unscrupulous elements who want to gain the status of a Member of Parliament or the State Legislature by hook or crook.

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111. In our considered view, if the above basics of democracy and purity in elections have to be maintained, it is appropriate to hold that the decision of the Election Commission as upheld by the High Court to the effect that Section 10A clothes the Election Commission with the requisite power and authority to enquire into the allegations relating to failure to submit the accounts of election expenses in the manner prescribed and as required by or under the Act, is perfectly justified and we do not find any scope to interfere with the same. Inasmuch as the period of membership is likely to come to an end, it will be in order for the Election Commission to conclude the proceedings within 45 days and pass appropriate orders in accordance with law. In order to ensure that within the said period the Election Commission is not prevented from passing the orders due to non-cooperation of any of the parties, it will open for the Election Commission to hold the proceedings on a day to day basis and conclude the same within the said period.

112. In so far as the appeal (SLP (C) No.21958 of 2013) is concerned, apart from holding that the Election Commission has got every jurisdiction to hold the enquiry under Section 10A for the purpose of disqualification, since the Election Commission has already passed its orders on merits and disqualified the Appellant for a period of three years, we also examined the reasoning of the Election Tribunal (High Court) for passing the said order, as well as the judgment of the Division Bench. Since, the order of Election Commission has now been confirmed by the Division Bench and since the Division Bench has dealt with the said issue on merits extensively, we wish to refer to the said part of the judgment to find out whether the grievance of the Appellant on merits deserves any consideration. The Division Bench has recorded the plea raised on behalf of the

Appellant by stating that according to the Appellant, the advertisements were published by Rashtriya Parivartan Dal and the payment of publication was borne by the party and, therefore, the question to be considered was as to whether the expenses incurred by the party for publishing the advertisement can be held to be expenses incurred or authorized by the Appellant. The Division Bench also took note of the decision of this Court in *Common Cause (A Registered Society)* (supra), wherein it was held that even if expenses are claimed by the party, the presumption should be that the said expenses shall incurred or authorized by the candidate, which presumption however is rebuttable. The relevant paragraph of the abovementioned decision on this proposition has been extracted in the earlier part of the judgment.

113. After noting the above settled principle, the Division Bench proceeded to find out whether the said expenses claimed to have been incurred by the party can be treated to be expenses incurred or authorized by the Appellant.

114. The Division Bench thereafter reached the following conclusion:

“Section 77 of the Representation of People Act, 1951, as amended by Act No. 46 of 2003, Explanation-I clearly provides that expenditure incurred by the leaders of political party on account of travel by air or by any other means of transport for propagating programme of the political party shall not be deemed to be expenditure in connection with the election incurred or authorized by a candidate of that political party. Thus now expenses of only limited category incurred by political party is not treated as expenses incurred or authorized by the candidate. The present is not a case which can be said to be covered by Explanation 1 (a) of Section 77 of the Representation of People Act, 1951. Thus, the expenses incurred for publishing the advertisement in the newspapers on 17th April, 2007 are expenses which have to be treated to be incurred or authorized by the candidate by virtue of Section 77 of the Representation of People Act, 1951 and the expenses are not covered by exception as engrafted in Explanation- I. The Election Commission of India, after considering all materials on the record, has recorded a finding that the expenses were required to be shown in the account of expenditure of the candidate. The petitioner has filed the account of expenditure as Annexure-5 to the writ petition. In the account of expenditure submitted by the petitioner neither it is claimed that amount incurred in the above advertisement was shown by the petitioner in her account of expenditure not it is even claim that expenditure was incurred by the petitioner. The petitioner’s clear case is that the aforesaid expenditure was incurred by the political party of which petitioner was a candidate. As per the law laid down by the Apex Court in the abovenoted cases and the pleadings on the record, it is clear that the aforesaid cannot be treated to be expenses which were not required to be shown in the account of expenditure of the petitioner. The petitioner, thus, has to be held to have incurred/authorize the expenses for publication of the aforesaid advertisement which having not been shown in her account, the account of expenditure submitted by the petitioner is clearly untrue and breach was committed by the petitioner of Section 77 of the Representation of People Act, 1951.”

115. Before reaching the above conclusion, the Division Bench has also taken note of the various factual details observed by the Election Commission in its order, as to the nature of expenses and the stand of the Appellant as under:

“As noted above, the main issue before the Election Commission of India was as to whether the expenditure expenses incurred for publishing two advertisements on 17th April, 2007 in the newspapers ‘Amar Ujala’ and Dainik Jagaran’ were shown in the account of expenses submitted by the petitioner under Section 78 of the Representation of People Act, 1951.

There is no dispute between the parties that advertisement was published on 17th April, 2007 in the aforesaid two newspapers. Copy of the advertisements have been filed as Annexure- 1 and 2 to the writ petition. The election Commission of India has specifically considered the advertisement published in the newspaper ‘Dainik Jagran’ on 17th April, 2010. The advertisement in the newspaper is in a block and in the bottom of the block the word ‘Advt’ has been mentioned. However, the advertisement has been disguised as a news item and the newspaper publication mentions that leaning of voters of Bisauli constituency is in favour of Smt. Umlesh Yadav, the petitioner. In the advertisement name of petitioner has been mentioned in several places and also the names of large number of persons have been mentioned quoting their view that they are in favour of the petitioner. The said publication mentions that voters have now decided to elect Smt. Umlesh Yadav, the petitioner. The details of publishing the said news item in the newspaper ‘Dainik Jagran’ was called by the Election Commission of India. Both before the Press Council of India and the Election Commission of India, the newspaper ‘Dainik Jagran’ stated that aforesaid news publication was an advertisement for which a bill of Rs. 21,250/- in the name of Pramod Mishra was issued and client name was mentioned as D.P. Yadav and the amount was paid in cash. Similar advertisement was published in the newspaper ‘Amar Ujala’ on 17th April, 2007 which advertisement was also in a block. The advertisement although was disguised as a news item but was in a block. In the bottom of the block there was another small block with the heading ‘Appeal’ and in the bottom the word ‘Advt.’ was mentioned. The newspaper was submitted before the Election Commission of India as well as Press Council of India stating that the same was advertisement in the newspaper for which a bill of Rs.8,000/- in the name of D.P. Yadav was issued and paid. Both the newspapers have submitted that materials for publication of advertisement was provided on behalf of the petitioner and the material was not collected by correspondents of the newspapers. The petitioner’s case before the Election Commission of India was that only an appeal was published by the party from which the petitioner was contesting on 17th April, 2007 for which an amount of Rs.840/- was paid and bill was also issued by the newspapers of Rs.840/-. Petitioner’s case is that the said bill was drawn in the name of D.P. Yadav, the husband of the petitioner who was also the president of Rashtriya Parivartan Dal. The petitioner in this writ petition has come with specific plea that aforesaid two news publications were published by the party i.e. the Rashtriya Parivartan Dal and the expenditure of the aforesaid news publication was paid and borne by the party. Paragraph 6 of the writ petition which contains the said pleading is quoted below:-

‘6. That at this juncture, it may be stated here that the aforesaid two news publications were published by the Party, which the petitioner belong to, viz., Rashtriya Parivartan Dal and the expenditure for the aforesaid news publications were paid and borne by the Party. The Photostat copies of the aforesaid two news publications as published in ‘Amar Ujala’ and ‘Dainik Jagaran’

dated 17.04.2007 are being annexed herewith and marked as Annexure-1 and 2, respectively, to this writ petition.’

In the writ petition, the petitioner has now having come with the plea that advertisements were got published by Rashtriya Parivartan Dal and the payment of publication was borne by the party, now the question to be considered is as to whether expenses incurred by the party for publishing the advertisement can be held to be expenses incurred or authorized by the petitioner.”

116. Apart from noting the above factual aspects relating to the expenses claimed to have been incurred by the party, which claim of the Appellant was rejected by the Election Commission and also confirmed by the Division Bench of the High Court, the High Court considered the various decisions relied upon by on behalf of the Appellant and held as under:

“The Election Commission of India considered the entire facts and circumstances of the present case, the reply submitted by the petitioner on 22nd July, 2011 as well as the supplementary reply dated 4th April, 2011 and has rightly exercised its jurisdiction under Section 10A of the Representation of People Act, 1951 C.A.5044 of 2014 declaring the petitioner disqualified for three years. All the conditions for exercise of power under Section 10A of the Representation of People Act, 1951 were fully satisfied and we do not find any infirmity in the order of the Election Commission of India dated 20th October, 2011 which may warrant any interference by this Court in exercise of discretionary jurisdiction.”

117. Having perused the above order of the Division Bench, wherein the details with regard to the various allegations relating to the violation in the lodging of the election expenses, in such details, in the absence of glaring illegality or irregularity pointed out before us, we have no reason to interfere with those finding of facts arrived at by the Election Commission, which was also confirmed by the Division Bench after a thorough examination. Therefore, on merits as well, we do not find any good ground to interfere with the impugned order of the Election Commission disqualifying the Appellant for a period of three years. The appeals, therefore, stand dismissed.

118. The appeals (SLP(C) Nos.29882 of 2011 and 14209 of 2012) are dismissed with the above observations and directions to the Election Commission. The appeal (SLP (C) No.21958 of 2013) stands dismissed. No costs.
