(2012) 10 Supreme Court Cases 603

(BEFORE S.H. KAPADIA, C.J. AND D.K. JAIN, S.S. NIJJAR, RANJANA P. DESAI AND J.S. KHEHAR, JJ.)

SAHARA INDIA REAL ESTATE CORPORATION LIMITED AND OTHERS .. Appellants;

Versus

SECURITIES AND EXCHANGE BOARD OF INDIA AND ANOTHER .. Respondents.

IAs Nos. 4-5, 10-13, 16-27, 30-50, 55-59, 61-62 in CAs Nos. 9813 and 9833 of 2011† with IAs Nos. 14 and 17 in CA No. 733 of 2012, decided on September 11, 2012

A. **Press and Media Laws — Coverage of court proceedings — Matters sub judice — Postponement of reporting of, by judicial order — Safeguarding presumption of innocence**

— *Purpose of postponement*, held, is fair and dispassionate judicial consideration untainted by media hype

— *Parameters for passing postponement order*, held, are (i) real and substantial risk of prejudice to fairness of the trial or to the proper administration of justice, (ii) necessity, and (iii) proportionality — Order of postponement will only be appropriate in cases where the balancing test i.e. public right to know through media balanced with litigating party's right to have cool-minded judicial verdict otherwise favours postponement of publication for a limited period

— *Mechanism of postponement and courts competent to entertain postponement application* — Mechanism of postponement, held, is by invocation of inherent powers of writ courts under Arts. 129 and 215 of Constitution — Other options are change of venue or postponement of trial, and only if these are not adequate measures, subject to the above parameters, Supreme Court or High Courts alone can under their inherent powers under Arts. 129 and 215 of Constitution pass orders of postponement for a limited period suo motu or on being approached or on report being filed before them by a subordinate court

— *Stage at which postponement order may be passed* — Actual and not planned publication must create the real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial — So postponement orders operate on the actual publication — Hence, before passing postponement orders, the superior courts should look at content of offending publication (as alleged) and its effect — Further held, postponement should be ordered without disturbing content of the publication

— *Burden to establish a case for postponement order* — Held, is on party which seeks postponement — Real and substantial risk of prejudice in the case by media publicity has to be proved — Further, party seeking postponement must displace presumption of open justice

† From the Judgment and Order dated 18-10-2011 by the Securities Appellate Tribunal in Appeal No. 131 of 2011

— *Suo motu action* — Where excessive prejudicial publicity by newspapers (in general) impinges upon presumption of innocence of any person then courts of record can pass such postponement order in exercise of their inherent powers a

— *Nature of postponement order* — A preventive measure — Held, postponement order though having its genesis in contempt law, is really not punitive — Its function is to prevent possible contempt

— *Width and extent of postponement order* — Held, order may include direction for non-disclosure of identity of victim, witness or complainant — Publishing of evidence of a witness may also be barred — Public right to know through media is to be balanced with litigating party's right to have cool-minded judicial verdict — However, such orders of postponement should be ordered without disturbing the content of the publication b

— *Period for which postponement order may be issued* — Held, postponement order can only be for a limited period or short period c

— *Postponement order vis-à-vis open justice system* — Held, open justice promotes transparency and public confidence but openness is not an absolute requirement for every case — Exceptions can be created where core function of judicial system, namely, to render unbiased decisions, has to be preserved d

— *Privacy and confidentiality* — Right to negotiate in private — Avoidance of media gaze — Such right can be equated to right of accused in a criminal trial

— *Guidelines* — Guidelines for reporting, held, cannot be framed across the board — What is an offending publication has to be decided on a case-to-case basis — It would require the courts in each case to see content and context of offending publication e

— *Remedy against postponement order* — Held, postponement order is open to challenge in appropriate court

— *Fair and accurate reporting* — Fair reporting privilege is based on presumption of "open justice" in courts — Media by virtue of S. 4 of Contempt of Courts Act, 1971 is entitled to publish a fair and accurate report — 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 f

— *Justifications for and sources of power for passing postponement orders* — Arts. 129 and 215 of Constitution declare Supreme Court and High Courts as courts of record and having constitutional power to punish for their contempt — Constitution also preserves common law powers of superior courts — Art. 19(2) of Constitution permits reasonable restrictions on freedom of expression for avoiding contempt of court — Temporary postponement order, held, is a reasonable restriction — Art. 21 of Constitution conferring right to fair trial — Unwanted media coverage may affect this right — Justification as a test under Arts. 14 and 21 of Constitution — Postponement order, held, satisfies this requirement also g h

— Constitution of India — Arts. 129 & 215 and 19(1)(a) & 19(2) & 21 — Contempt of Courts Act, 1971 — Ss. 2(c), 3, 4 and 5 — Human and Civil Rights — Fair Trial — Facets of — Presumption of innocence until proved guilty — Trial by media — Preventive measures — Criminal Trial — Presumption of innocence

The judgment in the present case was the outcome of unsolicited media publicity given by a TV channel to private communication between the appellant and the respondent while the matter was pending before the Supreme Court. As suggested by the Court, the parties were negotiating on the security in the form of an unencumbered asset, which the appellant should offer to the respondent Securities & Exchange Board of India (SEBI) in order to obtain stay of the two impugned orders passed by SEBI. However, one day before the next date of hearing, a TV channel flashed details of the proposal made by the appellant to SEBI. The TV channel also named the valuer who had valued the assets proposed to be offered as security. The Court took exception to unnecessary media interference and decided to clarify the law relating to media reporting of court proceedings.

In these circumstances, the Supreme Court

Held :

The principle of open justice is not absolute. There can be exceptions in the interest of administration of justice. Courts of record under Article 129/ Article 215 of the Constitution have inherent powers to prohibit publication of court proceedings or the evidence of a witness. The Contempt of Courts Act, 1971 embodies the common law of contempt. 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 the 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. Articles 129 and 215 are in two parts. 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. A declaration has been made in the Constitution that the said powers cannot be taken away by any law made by Parliament except to the limited extent mentioned in Article 142(2). Under Article 19(2) read with the first part of Article 129 and Article 215, 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, which 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. (Paras 32 and 33)

[**Ed.**: It is interesting to consider that the Preamble of the Constitution secures to all citizens "liberty of thought, expression, belief, faith and worship" unfettered by a reasonable restriction clause like Article 19(2).]

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. The contempt of court is a special jurisdiction to be exercised sparingly and with caution whenever an act adversely affects the administration of justice. Trial by newspaper comes in the category of acts which interferes with

the course of justice or due administration of justice. 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. 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 the 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. 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. *The principle underlying postponement orders is that it prevents possible contempt.* (Paras 33 and 34, 43 and 46)

Before passing postponement orders, the 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. (Para 43)

Reliance Petrochemicals Ltd. v. *Indian Express Newspapers Bombay (P) Ltd.*, (1988) 4 SCC 592; *Naresh Shridhar Mirajkar* v. *State of Maharashtra*, AIR 1967 SC 1; *Delhi Judicial Service Assn.* v. *State of Gujarat*, (1991) 4 SCC 406; *Supreme Court Bar Assn.* v. *Union of India*, (1998) 4 SCC 409; *A.K. Gopalan* v. *Noordeen*, (1969) 2 SCC 734; *Ram Autar Shukla* v. *Arvind Shukla*, 1995 Supp (2) SCC 130; *Ranjitsing Brahmajeetsing Sharma* v. *State of Maharashtra*, (2005) 5 SCC 294 : 2005 SCC (Cri) 1057, *relied on*

Independent Publishing Co. Ltd. v. *Attorney General of Trinidad and Tobago*, (2005) 1 AC 190 : (2004) 3 WLR 611 (PC); *Vincent Ross Siemer* v. *Solicitor General*, 2012 NZCA 188, *referred to*

Nigel Lowe and Brenda Sufrin: *Law of Contempt*, 3rd Edn.; Nigel Lowe and Brenda Sufrin: *Law of Contempt*, p. 5 of 4th Edn., *referred to*

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, the courts have to keep in mind the principle of proportionality and the test of necessity. The applicant who seeks an order of postponement of publicity must displace the presumption of open justice and only in such cases shall the higher courts 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 misinformation, 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 the extent of prejudice, the effect on individuals involved in the case, the overriding necessity to curb the right to report judicial proceedings conferred on the media under Article 19(1)(*a*) of the Constitution and the right of the media to challenge the order of postponement. (Para 34)

Ranjitsing Brahmajeetsing Sharma v. *State of Maharashtra*, (2005) 5 SCC 294 : 2005 SCC (Cri) 1057; *R. Rajagopal* v. *State of T.N.*, (1994) 6 SCC 632, *relied on*

Publicity postponement orders should be seen in the context of Article 19(1)(*a*) as 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 the Indian Constitution. In certain cases, even the 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 courtrooms. These aspects come within the scope of Article 19(1) and Article 21 of the Constitution. When rights of equal weight clash, the Courts have to evolve balancing techniques or measures based on recalibration 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 herein. (Paras 42 and 45)

The presumption of open justice has to be balanced with the presumption of innocence which is now recognised 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 is the end and purpose of all laws. (Para 42)

However, such orders of postponement should be ordered only 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 the 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 straitjacket formula enumerating such categories. (Para 42)

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. *Balancing* 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). Such orders of postponement are only to *balance* conflicting public interests or rights in Part III of the Constitution. They also satisfy the requirements of justification under Article 14 and Article 21. (Para 42)

Ministry of Information & Broadcasting v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161; *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248; *Society for Unaided Private*

Schools of Rajasthan v. *Union of India*, (2012) 6 SCC 1; *Dharam Dutt* v. *Union of India*, (2004) 1 SCC 712, *relied on*

The shadow of the law of contempt hangs over Indian 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. Under Section 4 of the Contempt of Courts Act, 1971 a person is not treated as guilty of contempt if the report of the judicial proceedings is fair and accurate. 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 of the Contempt of Courts Act 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. (Paras 46 and 35)

Keeping in mind the important role of the media, courts have evolved several neutralising 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. The postponement order is not a punitive measure, but a preventive measure. 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. (Paras 46, 35 and 49)

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, superior courts are duty-bound under inherent jurisdiction, subject to above parameters, to protect the presumption of innocence which is now recognised by the Court as a human right under Article 21, subject to the applicant proving displacement of such a presumption in appropriate proceedings. 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. (Paras 47 and 48)

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 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 neutralising device (balancing test) would not be an unreasonable restriction and on the contrary would fall within the proper constitutional framework. (Para 50)

What constitutes an offending publication would depend on the decision of the court on case-to-case basis. Guidelines on reporting cannot be framed across the board. (Paras 52 and 53)

B. **Criminal Trial — Fair and Speedy trial — Postponement of media reporting — Fair and accurate reporting of a trial, held, can be temporarily prohibited if there is substantial risk of prejudice in later or connected trials — Contempt of Courts Act, 1971 — Ss. 7, 4 and 13 — Press and Media Laws — Postponement orders**

Held :

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. However, 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, though rare, 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. Postponement order not only safeguards fairness of the later or connected trials, it prevents possible contempt by the media. The postponement order is a neutralising 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. (Paras 35, 43 and 45)

C. **Constitution of India — Pt. III — Constitutional scheme — Composite mechanism to sustain democratic set-up — One right does not override the other — No single right taken individually is absolute — Court's duty to strike a proper balance in a given situation where one right competes with other — Temporary deferment of one right so as to avoid conflict with other — Reasonableness as hallmark of State action — Freedom of expression vis-à-vis right to have a trial uninfluenced by media publicity — Temporary restraint on media coverage of judicial proceedings — Postponement order — Underlying basis — Balancing of two competing rights, namely, public right to know through media under Art. 19(1)(a), against individual right under Art. 21 to protect one's liberty or privacy — Constitution of India — Art. 19(1)(a), Preamble and Arts. 21 and 14 — Press and Media Laws — Postponement orders (Paras 25 and 45)**

D. **Constitution of India — Arts. 19(1)(a) & 19(2) and Preamble — Freedom of expression — Meaning and content — Reasonable restrictions — Right to freedom of expression, a most cherished value forming basis of democratic society — Various facets of said right — Informed citizenry — Availability of different shades of opinion including radical ones — Widest dissemination of information by different sources — Discussion forums enabling exchange of ideas — Media as an instrument of free expression — Right to freedom of expression, however, not absolute and subject to reasonable restrictions under Art. 19(2) so as to ensure orderly conduct of democratic society (Para 25)**

Naresh Shridhar Mirajkar v. *State of Maharashtra*, AIR 1967 SC 1, *followed*

Maneka Gandhi v. *Union of India*, (1978) 1 SCC 248; *Brij Bhushan* v. *State of Delhi*, AIR 1950 SC 129 : (1950) 51 Cri LJ 1525; *Virendra* v. *State of Punjab*, AIR 1957 SC 896; *K.A. Abbas* v. *Union of India*, (1970) 2 SCC 780; *Reliance Petrochemicals Ltd.* v. *Indian Express Newspapers Bombay (P) Ltd.*, (1988) 4 SCC 592; *Schenck* v. *United States*, 63 L Ed 470 : 249 US 47 (1919); *Kehar Singh* v. *State (Delhi Admn.)*, (1988) 3 SCC 609 : 1988 SCC (Cri) 711; *Globe Newspaper Co.* v. *Superior Court*, 73 L Ed 2d 248 : 457 US 596 (1982); *Mohd. Shahabuddin* v. *State of Bihar*, (2010) 4 SCC 653 : (2010) 2 SCC (Cri) 904, *relied on* a

Naresh Shridhar Mirajkar v. *Justice Tarkunde*, (1965) 67 Bom LR 214, *held, affirmed* b

Binod Rao v. *Minocher Rustom Masani*, (1976) 78 Bom LR 125; *C. Vaidya* v. *D'Penha*, Special Civil Application No. 141 of 1976, decided on 22-3-1976 (Guj) (Unreported), *considered*

Sahara India Real Estate Corpn. Ltd. v. *SEBI*, Appeal No. 131 of 2011, order dated 18-10-2011 (SAT); *Sahara India Real Estate Corpn. Ltd.* v. *SEBI*, (2012) 12 SCC 610; *Sahara India Real Estate Corpn. Ltd.* v. *SEBI*, Civil Appeal No. 9813 of 2011, order dated 9-1-2012 (SC); *Sahara India Real Estate Corpn. Ltd.* v. *SEBI*, IA No. 3 in Civil Appeal No. 9813 of 2011, order dated 20-1-2012 (SC); *Sahara India Real Estate Corpn. Ltd.* v. *SEBI*, (2012) 12 SCC 611; *State of Maharashtra* v. *Rajendra Jawanmal Gandhi*, (1997) 8 SCC 386 : 1998 SCC (Cri) 76, *referred to* c

E. **Constitution of India — Arts. 129, 215, 142(2) and 19(2) — Contempt jurisdiction and media freedom — Widest amplitude of expression "in relation to contempt of court" occurring in Art. 19(2) — Inherent power of Supreme Court and High Courts under Arts. 129 and 215 being courts of record — Rationale behind contempt power — Proper administration of justice — Court, held, can regulate its proceedings in interest of justice — Contempt, therefore, a *sui generis* common law offence — Comparative power of contempt under Arts. 129/215 and Art. 142(2) — Held, Art. 142(2) operates in a limited field while powers under Arts. 129 and 215 are wider — Ambit of powers under Arts. 129 and 215 — Superior courts (Supreme Court and High Courts), held, being courts of record, have inherent powers even to punish for contempt of lower courts — Contempt of Courts Act, 1971, Ss. 2(c), 4 and 10 (Para 43)** d e

D.D. Basu: *Constitution of India*, 14th Edn., p. 275, *quoted*

F. **Constitution of India — Arts. 19(1)(a) & (2) and Preamble — Freedom of speech and expression — Comparative position in different jurisdictions — Freedom of expression and postponement of media publicity of court proceedings — Held, in USA, right to freedom of expression is absolute and therefore courts there, in order to prevent media interference, have to devise techniques other than media restrictions — Clash model of USA, further held, is the product of absolute freedom of expression recognised in USA — Position, however, is different in India where reasonable restrictions on media are permitted by Constitution itself — Postponement order can be passed in India to ensure that conducting of fair and dispassionate trial by court is not usurped by media — Law relating to freedom of expression in other jurisdictions, namely, Canada, UK, European continent, Australia and New Zealand also reviewed while determining contours of Indian law — Constitution of USA — First Amendment (Paras 36, 37, 40, 42 and 17 to 24)** f g h

Ministry of Information & Broadcasting v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161; *E.M. Sankaran Namboodripad* v. *T. Narayanan Nambiar*, (1970) 2 SCC 325 : 1970 SCC (Cri) 451, *relied on*

Near v. *Minnesota*, 75 L Ed 1357 : 283 US 697 (1931); *Sunday Times* v. *United Kingdom*, (1979) 2 EHRR 245; *Home Office* v. *Harman*, (1983) 1 AC 280 : (1982) 2 WLR 338 : (1982) 1 All ER 532 (HL); *Globe and Mail* v. *Canada (Procureur general)*, 2008 QCCA 2516 (Can LII); *Chintamanrao* v. *State of M.P.*, AIR 1951 SC 118 : 1950 SCR 759; *Dagenais* v. *Canadian Broadcasting Corpn.*, (1994) 3 SCR 835 (Can SC); *R.* v. *Mentuck*, 2001 SCC 76 : (2001) 3 SCR 442 (Can SC), *considered*

William Rehnquist, "Constitutional Courts—Comparative Remarks" in Paul Kirchhof & Donald P. Kommers (Eds.), *Germany and its Basic Law: Past, Present and Future* (1993) 412, 413; Borrie & Lowe: *Law of Contempt*, *considered*

G. **Contempt of Courts Act, 1971 — Ss. 7, 4 and 13 — Relative scope — Court proceedings in chambers or *in camera* — Divulging of information by media — Contempt under S. 7 — Reason for treating such disclosure differently from fair and accurate reporting under S. 4 — Held, S. 7 refers to leakage of information whereas S. 4 refers to reporting of court proceedings — Leakage defeats very purpose of hearing in chambers or *in camera* — Hence, it is treated as contempt of court — S. 4 on the other hand supports open justice system — Effect of S. 13 — For imposing sentence under S. 13, held, interference with due course of justice is the primary consideration (Para 35)**

H. **Constitution of India — Arts. 141, 32, 136 and 226 — Determination of law through judicial interpretation — Permissibility — Open-textured expressions in Constitution/legislation to which definite meaning ought to be assigned — Such exercise, held, is a legitimate judicial function — Media reporting of court proceedings — Broad contours of law laid down by Court with reference to constitutional and other legal provisions — Held, Court by doing this, has only crystallised law flowing from open-textured expressions like "law in relation to contempt of court", "freedom of speech and expression", "administration of justice", and combined reading of Arts. 19(1)(a), 19(2), 21, 129, 215 and S. 2(c) of Contempt of Courts Act, 1971 — Court by virtue of its function under Art. 141, is entitled to give definite shape to law where so warranted — Words and Phrases — "Law in relation to contempt of court", "equal protection of law", "freedom of speech and expression" and "administration of justice" — Interpretation of — Jurisprudence — Judicial law-making — "Open-texture" of law, as basis for (Para 52)**

Ronald Dworkin: *Taking Rights Seriously*, 5th Reprint, 2010, *quoted*

I. **Constitution of India — Art. 141 — Law declared by Supreme Court — Existence of lis — On facts, held, lis existed — Negotiations for settlement going on between appellant, a private party and respondent, a statutory body (SEBI) — Unsolicited media publicity bringing the matter to public domain and thus invading their privacy — Both parties inviting Court to define law at least for future guidance — Held, there was an issue before Court, requiring declaration of law (Para 53)**

J. **Constitution of India — Arts. 32, 226 and 136 — Practice and Procedure — Collateral issue arising during pendency of main matter before Court — Court, if can resolve such issue (Para 53)**

K. **Constitution of India — Art. 141 — Precedents — Utility — Understanding bases of law — Held, Indian precedents as well as comparative law from foreign jurisdictions, assist in determining contents and contours of rights (Para 44)**

Ronald Dworkin: *Taking Rights Seriously*, 5th Reprint, 2010, *quoted*

K-D-M/50691/CRVL

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31. (1969) 2 SCC 734, *A.K. Gopalan* v. *Noordeen* 721*e*
32. AIR 1967 SC 1, *Naresh Shridhar Mirajkar* v. *State of Maharashtra* 719*c-d*, 719*e*, 719*f*, 719*g*, 720*c*, 720*d*, 720*d-e*, 721*a*
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36. AIR 1950 SC 129 : (1950) 51 Cri LJ 1525, *Brij Bhushan* v. *State of Delhi* 718*d*
37. 75 L Ed 1357 : 283 US 697 (1931), *Near* v. *Minnesota* 714*b-c*
38. 63 L Ed 470 : 249 US 47 (1919), *Schenck* v. *United States* 719*c*

SUMMARY OF ARGUMENTS††

I. Mr F.S. Nariman, Senior Advocate

1. The principal questions that have arisen after a large number of counsel have argued on behalf of their respective clients, are:

1.1. *Are there any legal or constitutional impediments to the Court framing mandatory guidelines for the press/media*?

1.2. *Is it permissible to rely on Article 129 and Article 215 of the Constitution as the source of power and jurisdiction to issue injunction to the press/media to postpone publication for a stated time in the interest of the administration of justice*?

1.3. *Thirdly, assuming there is power and jurisdiction, should the matter as to postponement of publication be left for determination in individual cases as they arise*?

1.4. Fourthly, whether in view of the law and in view of safeguarding the fundamental right to freedom of speech through the press/media, whether guidelines set out by the Court should be in the nature of normative guidelines in order to facilitate the press/media to put its own house in order?

Re: Q.1.1. Are there any legal or constitutional impediments to the Court framing mandatory guidelines for the press/media?

†† The learned Attorney General and Shri Ram Jethmalani only made oral submissions.

Summary of Arguments

I. Mr F.S. Nariman, Senior Advocate *(contd.)*

2. (*a*) It is submitted that the most timely one line comment to this entire proceeding initiated by the IAs of Sahara and of SEBI is the one contained in a very recent majority judgment of the Hon'ble Chief Justice (and Justice Swatanter Kumar) in *Unaided Private Schools case*[1].

In this judgment a line from a famous American case *Dennis* v. *United States*[2] has been quoted[1]:

"viz. to say that a thing is constitutional is not to say that it is desirable":

The quote is relevant in the present context. Because the freedom of expression through the press or the media is guaranteed in Article 19(1)(*a*): but that the width of this freedom may sometimes be hurtful to individuals in certain cases (and hence "undesirable") cannot detract from the constitutional mandate.

(*i*) One view about the constitutional mandate is that in India, unlike the First Amendment to the US Constitution the freedom of expression speech through the press/media (i.e. freedom of the press) is not absolute—but subject to the restrictions set out in Article 19(2)—But that is only one way of putting it.

(*ii*) It can with equal force be said of our Constitution that the constitutional mandate is that, absent existing law or law enacted by Parliament or by State Legislatures imposing reasonable restrictions on the Article 19(1) right (in relation to matters mentioned in Article 19(2)), the freedom of expression through the press/media is otherwise absolute.

(*b*) In this context balancing does not arise: Article 21 and Article 19(1)(*a*) "this is my fundamental submission" said counsel Mr Salve.

Ans. But it is submitted that Article 21 is not strictly relevant in the context of Article 19(1)(*a*)—because Article 21 is not intended to afford protection to the right to life and personal liberty (which has been held to include the right to a fair trial) *against violation by private individuals* the words "except by procedure established by law" plainly excludes such a suggestion. This has been held:

(*a*) held in *Vidya Verma* v. *Shiv Narain Verma*[3], SCR at pp. 985-86 in which a Bench of five Hon'ble Judges of this Hon'ble Court stated: (AIR pp. 109-10, para 7)

"7. ... 'There is no express reference to the State in Article 21. But could it be suggested that on that account that [the]

1 *Society for Unaided Private Schools of Rajasthan* v. *Union of India*, (2012) 6 SCC 1

2 95 L Ed 1137 : 341 US 494 (1951), A case as to whether preaching over throw of government by force and violence is per se say an infraction of the First Amendment, and holding that it was so only if it satisfied the "clear-and-present-danger" test.

3 AIR 1956 SC 108 : (1955) 2 SCR 983

Summary of Arguments

I. Mr F.S. Nariman, Senior Advocate *(contd.)*

article was intended to afford protection to life and personal liberty against violation by private individuals? The words 'except by procedure established by law' plainly exclude such a suggestion.' "

(*b*) This case follows another five-Judge Bench decision in *P.D. Shamdasani* v. *Central Bank of India Ltd.*[4], SCR at p. 394.

3. It was argued by the counsel for Vodafone that in certain circumstances by reason of its reach and prestige the press/electronic media occupies virtually the position of "State". But this is incorrect: in the first place this was a minority view propounded by one Judge (Justice Hidayatullah) in *Mirajkar case*[5] who said that a judgment of the High Court Judge could be struck down if it violated fundamental rights because judiciary would not be excluded from "the State" as defined in Article 12 but this view not accepted by the majority of eight Judges (8:1).

Besides, it does not help the argument along because even if the media be elevated to the position of "State" in the fundamental rights chapter it does not just fit into the language of Article 21 because it would then mean that the right of fair trial part of the right to life and personal liberty could be *legislated* upon by the press/electronic media which has no power to do so obviously.

The judgment in *Mirajkar case*[5] quoted relied on by Mr Divan must be read with some caution. It was based on the *A.K. Gopalan*[6] test (1950) for determining constitutional infringement: this test then held the field. In para 42 in *Mirajkar*[5] it is stated: (AIR p. 12)

"*42*. It is true that the opinion thus expressed by Kania, C.J., in *A.K. Gopalan*[6], had not received the concurrence of the other learned Judges who heard the said case. Subsequently, however, in *Ram Singh* v. *State of Delhi*[7], AIR at p. 272 : SCR at p. 456, the said observations were cited with approval by the Full Court. The same principle has been accepted by this Court in *Express Newspaper (P) Ltd.* v. *Union of India*[8], AIR at p. 618 : SCR at pp. 129-30, and by the majority judgment in *Atiabari Tea Co. Ltd.* v. *State of Assam*[9], AIR at pp. 255-56 : SCR at p. 864."

If the object and intent of the measure had been the test (as *Mirajkar*[5] had stated) then the decision in *Mirajkar*[5] may well have been right: because the intent of the Court in restraining disclosure of the evidence of the witness

4 AIR 1952 SC 59 : 1952 SCR 391
5 *Naresh Shridhar Mirajkar* v. *State of Maharashtra*, AIR 1967 SC 1
6 *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 : 1950 SCR 88
7 AIR 1951 SC 270 : 1951 SCR 451
8 AIR 1958 SC 578 : 1959 SCR 12
9 AIR 1961 SC 232 : (1961) 1 SCR 809

Summary of Arguments

I. Mr F.S. Nariman, Senior Advocate *(contd.)*

Goda was not to affect the freedom of the press under Article 19(1)(*a*) but only to protect the reputation of the witness in the case before it.

But in *R.C. Cooper*[10] SCC at para 43 the test of intendment or object has now been authoritatively abandoned. In *R.C. Cooper*[10] it was held that the validity of State action must only be judged in the light of its direct effect or operation upon the rights of individuals and groups of individuals "in all their dimensions": not on its object or intent. (para 43)

4. As to what is the scope of Article 215 the following submissions are offered:

> In AIR at p. 136 *Parashuram Dataram Shamdasani* v. *King Emperor*[11] the Privy Council said that the summary power of punishing for contempt is a power which a court must *of necessity possess*.
>
> In *Sukhdev Singh Sodhi* v. *Teja Singh*[12] it was held (Bose, J.) that the jurisdiction to punish for contempt is something inherent in every court of record (at SCR p. 457). In Article 215 it has been held that whether it is a fresh conferment of power or it is a continuation of existing power hardly matters because whichever way it is viewed the jurisdiction is a special one (SCR at p. 462 bottom).
>
> But although the High Court as a court of record must of necessity have the power (and so must the Supreme Court) to summarily commit for contempt, did it ever have the power to preventively restrain the press from publishing anything affecting an accused or a witness for a limited period of time?
>
> The answer is given quite categorically *NO* by the Privy Council in the case already cited *Independent Publishing Co. Ltd.* v. *Attorney General of Trinidad and Tobago*[13] (copy annexed) which it is expressly stated that the assumption that because there was a inherent power to commit for contempt therefore there was also an inherent power to restrain the press by injunction from publishing for a limited time was not good law. *R.* v. *Clement*[14]—this case was expressly "overruled" so stated in the Headnote in *Independent Publishing case*[13] (paras 63 to 68).

10 *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248 (10:1)

11 (1945) 58 LW 347 : AIR 1945 PC 134

12 AIR 1954 SC 186 : 1954 SCR 454

13 (2005) 1 AC 190

14 (1821) 4 B & Ald 218 : 106 ER 918: It was authoritatively held in that case overruling *R.* v. *Clement* (1821) that a court had no common law power to make an order postponing the publication of a report of proceedings conducted in open court; that if the court was to have such a power it must be conferred by legislation and in the absence of such a power an order purporting the postpone the fair and accurate reporting of court proceedings infringe the constitutional rights of free speech and the freedom of the press. But regardless of the legality of the orders the publication of a matter likely to prejudice the fair administration of justice particularly where a warning has been given by the Court could give rise to a contempt of Court.

Summary of Arguments

I. Mr F.S. Nariman, Senior Advocate *(contd.)*

5. Therefore it is respectfully submitted that although every High Court and Supreme Court as a court of record would have power which inheres in it to commit for contempt it would not as part of its inherent power include the power to restrain the doing of an act which if done would be punished as contempt. That being the position the invocation of Article 215 or Article 129 would render no assistance to the Court.

6. On the analogy that to say that a thing is constitutional is not to say that it is desirable, it is certainly open to the Court to lay down guidelines not as a mandatory command but as a normative guide particularly because what the Supreme Court says in its pronouncements even by way of recommendations is something of which Parliament almost invariably takes a serious note—far more than the recommendations made in Reports of Law Commission.

7. It was possibly motivated by this consideration that for instance a Bench of two Judges of this Hon'ble Court in *State of Uttaranchal* v. *Balwant Singh Chaufal*[15] Justice Dalveer Bhandari speaking for the Court laid down as a matter of guidance for the High Courts as to what should be the manner in which the PILs should be dealt with and disposed of (in the High Courts).

8. It is particularly relevant in this context to point out that a joint publication viz. "Reporting Restrictions in the criminal courts" (by the JSB—Judicial Studies Board) the Newspaper Society, the Society of Editors and The Times Newspaper—October 2009) whilst mentioning reporting restrictions in the criminal courts contains a foreword by—Lord Chief Justice of England and Wales which lays down what guidelines ought to be:

9. The Lord Chief Justice of England and Wales in his foreword says:

> "In May 2000 an event took place which would have seemed utterly remarkable to older generations of the judiciary and news editors and journalists. Their representatives worked closely together, each fully respecting the independence of the other, to address the misunderstandings and problems to which reporting restrictions both in the Crown Court and the Magistrates' Court can give rise. The results of their efforts were, I believe, immensely valuable both to Judges and Magistrates and to journalists and editors all of whom might be confronted, often unexpectedly, with areas of uncertainty for which no immediate answer could be found in the books likely to be available at court. No one wanted a jurisprudential disquisition and no one wanted delay while lawyers were instructed, nor indeed the consequent expense of doing so. The objective was to produce a practical guide which would provide rapid answers to immediate problems in a form to which both the judiciary and the magistracy and the media could refer with equal

15 (2010) 3 SCC 402

Summary of Arguments

I. Mr F.S. Nariman, Senior Advocate *(contd.)*

confidence for authoritative guidance. That objective was, I believe, to the overall advantage of the administration of justice."

10. It is submitted that the application for framing of guidelines is not to require a "jurisprudential disquisition" in the words of the Lord Chief Justice of England and Wales but "to produce a practical guide which would provide rapid answers to immediate problems in a form to which both the judiciary and the media could refer with equal confidence for authoritative guidance: that objective (as the Lord Chief Justice said) is to the overall advantage of the administration of justice.

11. Far from the rule of law being endangered by the present position as observed by the Lord Chief Justice:

> "In any society which embraces the rule of law which is an essential requisite of the criminal justice system that it should be administered in public and subject to public scrutiny. For this purpose the representatives of the media reflect the public interest. However, as is well known there are a number of statutory exceptions to these principles: hence the occasions of difficulty and uncertainty which can sometimes arise."

Outline of Oral Submission of Mr Nariman on 27-3-2012 and 28-3-2012

12. In the present case, while the matter was sub judice and under active consideration of this Hon'ble Court, "without prejudice" communications exchanged between the advocates for the parties regarding a proposal for securities offered were splashed in the media on the eve of the hearing of the matter, which was brought to the notice of this Hon'ble Court. (See *Background Note — Annexure I.*

13. In this background the following question which arise for consideration is:

> (*a*) Whether disclosure of communing between the parties in print/ electronic media during the active hearing of the main proceedings is permissible either as a matter of law or propriety?

14. It was contended that the right to freedom and speech of expression was a preferred freedom and ought not to be curtailed.

15. The boundary between law and guidelines needs to be addressed specially in the context of freedom of speech of expression. An example of Guidelines is the Restatement of Indian Law. In this context, "Law" needs to be that which is enacted by Parliament. Reference was made to the judgment of *Delhi Judicial Service Assn.*[16]

16. *C.Q. "If guidelines were to be framed, can we not enforce them specially in the (CJ) context of criminal trial?"*

17. *Ans.* If guidelines were laid down then the difficulty is the consequent infringement would mean instituting proceedings which are punitive in nature and need to be decided as an Article 145(3) case.

16 *Delhi Judicial Service Assn.* v. *State of Gujarat*, (1991) 4 SCC 406

Summary of Arguments

I. Mr F.S. Nariman, Senior Advocate *(contd.)*

18. Relying upon *Romesh Thappar*[17] SCR at pp. 601-02, it was contended that unless law restricting freedom of speech and expression is directed solely against undermining the security of the State or overthrow of it, such law cannot fall within the reservation under Clause (2) of Article 19 although restrictions which it can seek to impose may have been conceived generally in the interest of public order. In other words, Clause (2) of Article 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to the State is involved, an enactment, which is capable of being applied to cases where no such danger could arise, cannot be held to be constitutional and valid to any extent.

19. Assuming the power with the Supreme Court and High Courts as Courts of record under the Constitution is unlimited and not restricted by the Contempt Courts Act even then such a "law" must be passed by Parliament for imposition of reasonable restriction in relation to contempt of court.

20. Referring to *Supreme Court Bar Assn.* v. *Union of India*[18] and *Delhi Judicial Service Case (Nadiad case)*[16] it was submitted that in the absence of any law having been enacted, self-regulation is the best else directions would amount to Judicial Legislation which is not contemplated under Article 142.

21. In the event there is any publication which is offending, the Court may examine if it is contemptuous or not, and if it is found to be contemptuous, then it ought to be punished under the Contempt of Court Act, being the "law" enacted by Parliament under Article 19(2) of the Constitution.

22. Mr Nariman clarified that he stood by the interim application filed on behalf of his clients for normative guidelines not guidelines in the nature of statutory guidelines.

CQ (Khehar, J.) *Justice J.S. Khehar asked whether prejudice was to be shown in each case of publication and secondly, on the stage of application of the guidelines—three situations arise, (a) before trial, (b) pending trial and (c) after the trial concludes at the punishment stage*."

23. The existing framework, both statutory and non-statutory (Note on Statutory and Non-Statutory was handed over on 27-3-2012 enclosed as *Annexure II*) supports a self-regulatory mechanism rather than any imposition by the Court in the absence of any enactment by Parliament and the same has been recognised by this Hon'ble Court in Destruction of *Public Property case*[19].)

24. The provisions of the Cable Television Act are referred to, which was read, namely, Sections 2, 5 and 6, 11 to 19, he referred to Rules 6 and 7 which lay down programming code and the advertising code and referred to

17 *Romesh Thappar* v. *State of Madras*, AIR 1950 SC 124 : 1950 SCR 594

18 (1998) 4 SCC 409

19 *Destruction of Public & Private Properties* v. *State of A.P.*, (2009) 5 SCC 212

Summary of Arguments

I. Mr F.S. Nariman, Senior Advocate *(contd.)*

the self-regulating mechanism of the Advertisement Council. He also referred to provisions of the Information Technology Act, 2000 (as amended).

25. The Journalistic Guidelines laid down by the Press Council of India (a statutory body constituted under the Press Council Act, 1978) were also placed before the Court to show that the Press Council of India had also laid down guidelines in respect of sub judice matters in print media and the manner of reporting in respect of such matters.

26. C.Q. "Made a reference to Section 327 CrPC and the power to RPD restrict the open trial in certain cases.

27. *CJI* "Can Article 21 be read to overcome Article 19(2)"

28. Reference was made to the Law Commission's 200th Report submitted in 2007, by Justice M.J. Rao, wherein in Chapter VIII (p. 160) it has been recommended that Parliament should amend the Contempt of Court Act, as has been done in England, to empower the courts to pass orders for postponement of publication, but such recommendations are pending and Parliament is yet to pass a law.

29. Mr Nariman continued with the reading of the 200th Report of the Law Commission and in particular the letter of Justice M.J. Rao to the Law Minister.

30. He stated if the position in *Golak Nath*[20] is to be obtained, then guidelines by this Court could be treated as law. However, in view of *Golak Nath*[20] being overturned, in view of the legal position in *Kesavananda Bharati*[21], there needs to be a statutory law and *Constitution* itself does not constitute law in terms of Article 13.

31. While referring to the Letter of the Chairman of the Law Commission annexed to the said Report, it was pointed out like the UK Act of 1981, "postponement order" on the lines of Section 4(2) thereof could be passed by courts (if so enacted here) through under stringent conditions and such orders could be of temporary postponement of publication provided real risk of serious prejudice is proved before any "postponement" orders are passed.

32. The Court (CJI) observed that the Report highlights the dichotomy between "postponement" and "suppression" and clarified that it was concerned with postponement and the "timing" of such postponement.

33. Reliance was placed on the reinstatement of law relating to contempt and it was submitted that, the Court instead of laying down guidelines, may make it clear and lay down the scope under which the High Court or this Hon'ble Court could pass orders for postponement.

20 *Golak Nath* v. *State of Punjab*, AIR 1967 SC 1643

21 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225

Summary of Arguments

I. Mr F.S. Nariman, Senior Advocate *(contd.)*

34. Mr Nariman then referred to the Parliamentary Proceedings (Protection of Publication) Act, 1956, as well as the Parliamentary Proceedings (Protection of Publication) Repeal Act, 1976 and stated that though the 1956 Act permitted reporting of proceedings of Parliament and the right of people to know, in 1976 during the emergency this right was taken away and in 1977 the same was restored. While guidelines may be laid down by this Court it may lead to another constitutional body (a veiled reference to Parliament) to be tempted to once again impose restrictions, which could be disastrous.

35. C.Q. (CJ) *What about the view in Maneka Gandhi*[22]*. He stated that there was difference between suppression and postponement. If postponement is the aim leaving it to the individual court not to be decided, the Supreme Court may lay down instances. Can the Supreme Court do so under Article 142 of the Constitution? He referred to legal points in New Zealand.*

36. The right of people to know was a pre-eminent right and reference was made to views of Justice Mathew in *Bennett Coleman & Co.* v. *Union of India*[23].

37. The fact that there was tension between the Court and the Government kept everyone on other toes. He referred to contempt law as "dog law". Jeremy Bentham's view was that it was a stick to beat the dog and, therefore, punitive in nature.

Court question ***(CJ & DKJ)***

38. How can we frame the guidelines.

There was reference also made to the Irish Supreme Court's view.

Response

39. In the absence of enacted law the question would be whether the remedy is worse than the disease.

40. Though it had to be done which none of us could dispute, the question was the issue of existence of power and whether such guidelines could only be brought by legislation. The effect of this Court's judgment in laying down guidelines may be to protect Ministers which would not be the purpose of it.

41. He referred to pp. 170, 182, 186, 191, 227, 230 and 240 of the 200th Law Commission Report. The Chief Justice referred to pp. 56, 161, 162, 163, 164, 165, 168, 169, 171, 172, 173, 186, 187 and 213.

22 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248

23 (1972) 2 SCC 788

Summary of Arguments

I. Mr F.S. Nariman, Senior Advocate *(contd.)*

42. There was reference to Justice B.P. Jeevan Reddy's, 15th Law Commission Report on the assets of corrupt public servants and the Malimath Committee Report not being implemented.

43. The Chief Justice then asked what constitutes "active" proceedings and requested a note as to at what stage could court intervene.

44. There is no fetter on the power of the Court where the Court is of the opinion, in a sensitive matter, in the interest of decency and fairness, to restrict future publication of such articles which may otherwise be offensive. Though such power has to be sparingly used the publisher in such circumstances has the right to appeal and the Court only for good reason restrict such publication.

45. Mr Nariman referred to *Millers Book on Contempt* and *R. Rajagopal*[24], SCC at pp. 648-49, paras 21 and 22.

46. Ultimately response to the question from the Court Mr F.S. Nariman and Mr Rajeev Dhavan together submitted :

> Anyone, be he accused or an aggrieved person, who genuinely apprehends an infringement of his rights under Article 21 to a fair trial and all that it comprehends, is entitled to approach an appropriate writ court asserting an individual right seek preventive relief, even against the media, relating to publication, and that court is entitled to grant the same,, bearing in mind the principles of reasonableness and proportionality, including the law laid down in *Rajagopal case*[24], and taking into account that pre-censorship should generally be avoided and limited for as short a duration as possible and examining alternative, if any. This would perhaps satisfactorily answer the pertinent question put by the court within the constitutional framework.

II. Mr Soli J. Sorabjee, Senior Advocate

1. The meaning and ambit of the expression "any person" in Article 226 of the Constitution.

(*1*) It is submitted that any private person or body or entity simpliciter is not covered by the expression "any person" in Article 226. However judicial decisions indicate that a person or a non-statutory body or a private entity can be covered under Article 226 if the person discharges public duties or performs important public functions.

(*2*) The Supreme Court in *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust* v. *V.R. Rudani*[1] observed that: (SCC p. 700, para 20)

24 *R. Rajagopal* v. *State of T.N.*, (1994) 6 SCC 632
1 (1989) 2 SCC 691

Summary of Arguments

II. Mr Soli J. Sorabjee, Senior Advocate *(contd.)*

"*20.* … The words 'any person or authority' used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party."

This statement of the law was approved by the Constitution Bench in *Zee Telefilms Ltd.* v. *Union of India*[2], SCC at p. 682. The Court in this case ruled that: (SCC p. 682, para 33)

"*33.* … when a private body exercises its public functions even if it is not a State, the aggrieved person has a remedy not only under the ordinary law but also under the Constitution, by way of a writ petition under Article 226."

(*3*) Reference may be made to the UK Human Rights Act, 1998 where expression "public authority" is defined inter alia to include "any person certain of whose functions are functions of a public nature".

(*4*) Public function is one which is of public importance.

"*97.* … If a given function is of such public importance and so closely related to governmental functions as to be classified as a governmental agency, then even the presence or absence of State financial aid might be irrelevant in making a finding of State action. If the function does not fall within such a description, then mere addition of State money would not influence the conclusion." (See *Sukhdev Singh* v. *Bhagatram Sardar Singh Raghuvanshi*[3], SCC p. 454, para 97).

"*102.* Institutions engaged in matters of high public interest or performing public functions are by virtue of the nature of the function performed government agencies. Activities which are too fundamental to the society are by definition too important not to be considered government function." (See *Sukhdev Singh case*[3], SCC p. 456, para 102)

These tests are to be applied to the facts of a given case having regard to the nature of the function and the activities of the "person".

2. Reputation is part of Article 21 (see *Port of Bombay* v. *Dilipkumar Raghavendranath Nadkarni*[4], *Kiran Bedi* v. *Committee of Inquiry*[5], *State of Bihar* v. *Lal Krishna Advani*[6]).

2 (2005) 4 SCC 649
3 (1975) 1 SCC 421
4 (1983) 1 SCC 124
5 (1989) 1 SCC 494
6 (2003) 8 SCC 361

Summary of Arguments

II. Mr Soli J. Sorabjee, Senior Advocate *(contd.)*

3. Privacy is part of fundamental right under Article 21 (see *S. Rajagopal* v. *State of T.N.*[7]). The Supreme Court in the aforesaid decision in *Zee Telefilms Ltd.*[2] has observed that the rights under Article 17 or 21 can be claimed against non-State actors (see *Zee Telefilms*[2], SCC p. 680, para 28).

4. All freedoms under our Constitution occupy the same position. The preferred position doctrine is not accepted by the Court (see *Madhu Limaye* v. *Sub-Divisional Magistrate, Monghyr*[8], SCC p. 752 : SCR at p. 721). However there is marked judicial solicitude for the fundamental right under Article 19(1)(*a*) and particularly for the freedom of the press. This is evident from the judgment of this Court in *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*[9].

5. It is well settled that the restrictions to be placed on fundamental rights guaranteed by Article 19(1) must be those prescribed under Article 19(2) and none other. If a restriction does not fall under any of the heads of Article 19(2) the same cannot be justified on the ground that the object sought to be achieved is laudable [see *Sakal Papers (P) Ltd.* v. *Union of India*[10], SCC pp. 313 & 315-16 : SCR at pp. 863 & 867-68].

6. The distinction between the effect of a publication on a jury and a judge made in some UK judgments has not been accepted by this Hon'ble Court (see *P.C. Sen, In re*[11]).

7. Prior restraint is not per se unconstitutional. However it can only be justified in the rarest of rare cases namely when the publication sought to be restrained is manifestly libellous and patently violative of privacy and when a decree for damages after years will not provide adequate remedy to the aggrieved party or again when the publication would adversely affect national interest and security. The nature of the restraint, its duration and the attendant circumstances are relevant to determine whether the restraint violates the freedom of the press. The objective of publication ban, its necessity and the proportionality of the ban regarding its effect are material.

8. It is submitted that temporary restraint on publication of the contents of a PIL writ petition till the same comes up for hearing in court cannot be construed as a ban or restraint on publication of court proceedings. The temporary restraint is to protect the right to reputation and privacy both of which are part of Article 21 and to ensure that these fundamental rights are not infringed before the PIL comes up for hearing. Thereafter the press is perfectly free to give a fair and accurate report of the court proceedings. Besides such a temporary restraint is to prevent abuse of process of court. For example, a PIL petition may contain scandalous and baseless allegations

7 (1994) 6 SCC 632
8 (1970) 3 SCC 746
9 (1985) 1 SCC 641
10 AIR 1962 SC 305
11 AIR 1970 SC 1821

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against a party respondent causing grave injury to his or her reputation and privacy. The petitioner may keep his PIL in defect and before it comes up for hearing cause publication of its contents. Thereafter PIL writ petition may not be pressed or may be withdrawn because the objective of injuring the respondent has been achieved by publication in the press. By such course of action judicial assessment of the contents of the PIL and the possibility of strictures by the Court on the petitioner is circumvented. Temporary restraint of limited duration in order to protect the fundamental right of the respondent and to prevent abuse of process of court cannot be regarded as invasion of freedom of the press.

9. Freedom of the press guaranteed in the Article 19(1)(*a*) is not only for the benefit of the owners or proprietors of the newspapers or of the editor or the journalists. In essence it embodies the people's right to know about the working of the administration and about the alleged malfeasance of governmental authorities. A temporary restraint for a few days would not seriously affect the people's right to know.

10. In other jurisdictions in which fundamental right of the freedom of the press is guaranteed orders have been made for postponement of trial reporting the paramount objective being to avoid a substantial risk of prejudice to the administration of justice. The governing principles are that the risk of prejudice must be real and substantial and bans of indefinite duration on reporting must be avoided (see *The Law of Human Rights*, 2000, by Richard Clayton, pp. 1029-30).

11. Prior restraints have been struck down or upheld on the facts of a given case in Canada (see *Constitutional Law of Canada*, 4th Edn., by Hogg, pp. 100-1001).

12. The US judgments are not helpful because the freedom of the press guaranteed by the First Amendment is absolute. There is no provision corresponding to Article 19(2) in the US Constitution. Even so in some cases US courts have granted interim restraint orders where there was pressing overwhelming need. [*See K.A. Abbas* v. *Union of India*[12], SCC at p. 797.]

13. Media interest in a pending case or court proceedings cannot be equated with media trial. Media debate on the core issues involved in a case involving public interest is not media trial. Media trial is carrying on a trial simultaneously and concurrently with a court trial. In other words media cannot during the course of the trial pronounce Mr *A* to be an untrustworthy witness, or Mr *B* to be an honest truthful witness. That would be usurping the jurisdiction of the courts who are the constitutional authorities to decide the guilt or innocence of the person.

12 (1970) 2 SCC 780

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14. Is it open to the Supreme Court to impose a sentence upon a person found guilty of contempt in excess of that prescribed by Section 12 of the Contempt of Courts Act, 1971?

(*1*) It is true that the power of contempt is inherent in the Supreme Court under Article 129 and in the High Court under Article 215. Parliament has declared and prescribed the maximum punishment for contempt in Section 12. This provision has been on the statute since 1971 and its validity has not been questioned.

It is respectfully submitted that courts can supplement the provisions of the Contempt of Court Act where a particular field is not covered by legislation. It cannot supplant or pass orders in breach of statutory provisions.

(*2*) The following decisions of the Supreme Court establish this proposition.

(*a*) In *Prem Chand Garg* v. *Excise Commr.*[13], a Constitution Bench of this Hon'ble Court observed that: (AIR p. 1003, para 14 : SCR pp. 899-900)

> "*14.* … though the powers conferred on this Court by Article 142(1) are very wide, and the same can be exercised for doing complete justice in any case, as we have already observed, this Court cannot even under Article 142(1) make an order plainly inconsistent with the express statutory provisions of substantive law, much less, inconsistent with any constitutional provisions."

(*b*) In *Supreme Court Bar Assn.* v. *Union of India*[14], the Supreme Court observed as follows: (SCC p. 432, para 47)

> "*47.* … Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly. Punishing a contemnor advocate, while dealing with a contempt of court case by suspending his licence to practise, a power otherwise statutorily available *only* to the Bar Council of India, on the ground that the contemnor is also an advocate, is, therefore, not permissible in exercise of the jurisdiction under Article 142. The construction of Article 142 must be functionally informed by the salutary purposes of the article viz. *to do complete justice between the parties*. It cannot be otherwise. As already noticed in a case of contempt of court,

13 AIR 1963 SC 996
14 (1998) 4 SCC 409

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the contemnor and the court cannot be said to be litigating parties." (emphasis in original)

(*c*) In *L.P. Misra* v. *State of U.P.*[15] this Hon'ble Court held as follows: (SCC p. 382, para 12)

"*12.* … It is true that the High Court can invoke powers and jurisdiction vested in it under Article 215 of the Constitution of India but such a jurisdiction has to be exercised in accordance with the procedure prescribed by law."

(*d*) In *Pallav Sheth* v. *Custodian*[16] this Hon'ble Court observed as follows: (SCC p. 566, paras 30-31)

"*30.* There can be no doubt that both this Court and the High Courts are courts of record and the Constitution has given them the powers to punish for contempt. …

31. … the power under Article 129 and/or Article 215 should be exercised in consonance with the provisions of a validly enacted law. In case of apparent or likelihood of conflict the provisions should be construed harmoniously."

(*e*) In *Manish Goel* v. *Rohini Goel*[17] this Hon'ble Court held as follows: (SCC p. 399, para 14)

"*14.* … no court has competence to issue a direction contrary to law nor can the court direct an authority to act in contravention of the statutory provisions. The courts are meant to enforce the rule of law and not to pass the orders or directions which are contrary to what has been injected by law."

The Court further held that: (p. 401, para 19)

"*19.* Therefore, the law in this regard can be summarised to the effect that in exercise of the power under Article 142 of the Constitution, this Court generally does not pass an order in contravention of or ignoring the statutory provisions nor is the power exercised merely on sympathy."

(*f*) In *A.B. Bhaskara Rao* v. *CBI*[18] this Hon'ble Court after an exhaustive analysis of all the authorities on the subject laid down the following propositions: (SCC p. 276, para 30)

"*30.* … (*h*) The power under Article 142 of the Constitution is a constitutional power and not restricted by statutory enactments. However, this Court would not pass any order under Article 142 which would amount to supplanting the substantive

15 (1998) 7 SCC 379
16 (2001) 7 SCC 549
17 (2010) 4 SCC 393
18 (2011) 10 SCC 259

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law applicable or ignoring statutory provisions dealing with the subject. In other words, acting under Article 142, this Court cannot pass an order or grant relief which is totally inconsistent or goes against the substantive or statutory enactments pertaining to the case."

15. Rule of law has been held to be a basic feature of the Constitution. (See *Kesavananda Bharti*[19] and *Coelho*[20]). One of the elements of the rule of law is certainty, acting according to published norms and rules, elimination of caprice and whimsicality. Another basic principle of the rule of law is, "however high you may be the law is above you". An order passed in breach of Section 12 of the Contempt of Courts Act would clearly be in breach of the essential principles of the rule of law. Furthermore such an order would violate Article 21 of the Constitution inasmuch as it would not be in accordance with the procedure prescribed by law viz. Section 12(2).

III. Mr K.K. Venugopal, Senior Advocate

1. Article 21 which injuncts the deprivation of life other than by the procedure established by law is paramount and indefeasible and hence would have primacy over the right of free speech. (See *Kehar Singh* v. *Union of India*[1], SCC para 7, *State of W.B.* v. *Committee for Protection of Democratic Rights*[2], SCC at paras 60-61 and *Nilabati Behera* v. *State of Orissa*[3], SCC para 34)

2. If so, the accused would have the right to ensure that he is tried in accordance with the procedure laid down by the criminal laws, on the basis of evidence let in at the trial; and without the court trying the case being influenced by a parallel trial by media or by comments and discussions by the media, in regard to matters which are sub judice. [See *Manu Sharma* v. *State (NCT of Delhi)*[4], SCC paras 295-302]

3. It would hence be a question of fact whether in a particular case the rights of the accused are being affected by the publication by the media, by interfering or obstructing the course of justice.

4. Just as the concept of obscenity is vague and difficult to define, and as a result "deposits on the Supreme Court of India the responsibility to define obscenity and classify matters coming on media as obscene or otherwise", laying down the parameters as to when publications would "interfere" or "obstruct" the "course of justice" would be a matter for this Hon'ble Court to

19 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225
20 *I.R. Coelho* v. *State of T.N.*, (2007) 2 SCC 1
1 (1989) 1 SCC 204
2 (2010) 3 SCC 571
3 (1993) 2 SCC 746
4 (2010) 6 SCC 1

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define through guidelines. (See *Directorate General of Doordarshan* v. *Anand Patwardhan*[5], SCC paras 22-28)

5. Laying down such guidelines would, by itself, not result in penal consequences. On the other hand, it would be an exercise in the interests of the press and the electronic media themselves, and would mitigate or render the media less vulnerable than a situation in which the press or the media are required to interpret these phrases for themselves.

6. The framework of guidelines would be well within the inherent powers of the Supreme Court of India, especially under Article 142 of the Constitution. As pointed out earlier, rather than impeding free speech, it would assist the media itself as well as all other courts, both civil and criminal, in upholding life and personal liberty under Article 21. (See *Dayaram* v. *Sudhir Batham*[6], SCC paras 6-22)

7. The courts would not penalise directly the violation of such guidelines, though, in a fact situation it could, pursuant to the guidelines (which can never, by their very nature, be exhaustive), or otherwise, conclude that the publication tends to interfere with or obstruct the course of justice. On the other hand it would replicate the powers exercised by the courts for centuries in the case of defamation. The courts in such cases have prevented repetition or the further publication of defamatory material, based on a reasonable inference that the material would be republished by that particular newspaper or channel. (See *Hari Shankar* v. *Kailash Narayan*[7], AIR paras 5-8; *K.V. Ramaniah* v. *Special Public Prosecutor*[8] AIR pp. 199-200, paras 9 and 11; *Shree Maheshwar Hydel Power Corpn. Ltd.* v. *Chitroopa Palit*[9], AIR paras 1(*a*), 1(*b*), 6, 8, 9, 17, 49, 50-60; *ZAM* v. *CFW*[10], EWHC paras 24-26; *A.K. Subbaiah* v. *B.N. Garudachar*[11] and *Shilpa S. Shetty* v. *Magna Publications Co. Ltd.*[12].)

8. Applying this concept to the rights of the accused, where pursuant to the guidelines, or dehors that, the court is satisfied that the publication would be repeated, thus interfering with or obstructing the due course of justice, it would, rather than exercising the powers of contempt, injunct that particular newspaper from republishing any such material so as to protect the rights of the accused under Article 21 of the Constitution.

9. Such a power would be exercised by the High Court under Article 226 of the Constitution, for enforcing the rights of the accused under Article 21,

5 (2006) 8 SCC 433
6 (2012) 1 SCC 333
7 AIR 1982 MP 47
8 AIR 1961 AP 190
9 AIR 2004 Bom 143
10 2011 EWHC 476 (QB)
11 ILR 1987 KAR 100
12 AIR 2001 Bom 176

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as a broad view on the right of an accused to a fair trial being affected by the publication in question has to be taken. (See *Aruna Ramachandra Shanbaug* v. *Union of India*[13], SCC paras 131-33.)

10. If, therefore, such an injunction is being sought only against an offending report being published by a particular newspaper or television channel, based on proof of the propensity of that newspaper or television channel to repeat the publication affecting the fundamental right of the accused under Article 21, no question of a law having to be made under Article 19(2) would arise.

11. The court can certainly exercise jurisdiction, where the law permits, of holding its proceedings in camera, but, postponing publication to the end of the trial would render sterile, the publication as the past would no more be "news". On the other hand, this would defeat the rights of the media, which would follow from Section 4 of the Contempt of Courts Act.

12. There are two sources of power, pursuant to Article 142, which could be exercised by the Supreme Court of India for framing guidelines and consequently for securing the ends of justice. These are:

(*1*) The protection of the rights of the accused guaranteed by Article 21 of the Constitution is a paramount and indefeasible right, and hence would have primacy over all other fundamental rights, including the right of free speech. This is evident from the Contempt of Courts Act itself, which prohibits the publication of any matter which interferes or tends to interfere with or obstructs or tends to obstruct the due course of justice. At the same time, it permits a fair and accurate report of a judicial proceeding before any court. All these are concepts which are not defined by the Contempt of Courts Act through a clear, concise and concrete definition and hence would render the media, print or electronic (hereinafter "media"), vulnerable to being proceeded against under the Contempt of Courts Act. It would, therefore, be in the interest of the administration of justice, the rights of the accused and also for the guidance of the media, to be informed through guidelines enunciated by this Court (which has heard elaborate submissions of counsel) as to when publishing matters relating to cases which are sub judice, interferes with or obstructs or tends to obstruct with the due course of justice. Such guidelines, intended solely for protecting the right and liberty of the accused under Article 21 of the Constitution, can at the most, only incidentally affect or impinge upon the fundamental right under Article 19(1)(*a*) of the Constitution. Furthermore, being an explanation of the prohibition against interference with or obstruction of the due course of justice found in the Contempt of Courts Act, the validity of which is not under challenge, an elaboration of the circumstances under which the media would be contravening these prohibitions will not

13 (2011) 4 SCC 454

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violate Article 19(1)(*a*) of the Constitution. Consequently, such guidelines declared by the Court would not attract Article 19(2) of the Constitution of India.

(*2*) The Supreme Court of India could equally ensure that the media does not interfere with or obstruct the due course of justice and, on the other hand, will subserve the ends of administration of justice, by building the guidelines into the already existing accreditation rules published on the website of the Supreme Court. These guidelines may be imposed as conditions for accreditation, the repeated violation of which by a journalist and hence by a newspaper or by the television channel can result in withdrawal of such accreditation of that newspaper. Since the guidelines would undoubtedly be in the interest of the administration of justice, civil and criminal, it would be difficult to conceive of any newspaper or television channel having any serious objection to accepting accreditation of its representatives, subject to the conditions imposed, including the guidelines, for reporting of matters which are sub judice.

IV. Mr Shanti Bhushan, Senior Advocate

1. The Constitution Bench is considering the framing of guidelines for media reporting on sub judice matters.

2. Any guidelines framed by the court must not infringe the Constitution of India. The court has to take note of the fact that the Constitution has constituted India into a Sovereign Democratic Republic on the lines of United States of America. In such a republic "the people, and not the government possess the absolute sovereignty".

3. The Republican form of Government is altogether different from the British form of Government under which the Crown was Sovereign and the people were subjects. In a republican form of Government, the censorial power is in the people over the Government and not in the Government over the people. The Government in this context means all institutions of governance which would include the executive, the legislature as well as the judiciary.

4. In a democratic republic, it is not only the right, but also the duty of the people to oversee the functioning of all institutions including the Judiciary. In this "function", the media has to play a very important part. It was to enable the people and the Media to vigorously perform this role, that following the American Constitution, the Indian Constitution conferred two fundamental rights in Article 19:

(*i*) to assemble peaceably and without arms; and

(*ii*) to have freedom of speech and expression.

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Parliament can impose only reasonable restrictions on these fundamental rights.

5. Every important issue needs to be vigorously debated by the people and the press, even if the issue is sub judice in a case. It is well known that in many cases, which were sub judice, gross injustice has been avoided only on account of a vigorous debate among the people and the media, and there is no known case in which on account of an open public debate, the Court has decided wrongly and "injustice" was the result.

6. It is for this reason, that it has been recognised that even while vigorously criticising an action of a public authority, if some incorrect statements have been made, even that would not justify placing restrictions on the people and the media, exercising their right of free speech.

7. Even in the case of Judges, it has been held by the US Supreme Court that even the concern for the reputation of courts, did not justify punishment for criminal contempt even if the statement contained half truths and misinformation. The reason given for this view was that if a critic of official conduct was required to guarantee the truth of all his factual assertions, it would lead to "self censorship", which would deter not only false speech but also true speech. The critic would thereby be deterred from voicing his criticism even though he believed that the facts were true and even in fact they were true because he may entertain a doubt whether he could prove in court that the facts were true or may like to avoid the expense of proving them to be true. This would be grossly detrimental to the great cause for which freedom of speech was guaranteed. So the rule recognised was that the critic must not make any statement with actual malice that is with the knowledge that it was false or with reckless disregard of whether it was false or not.

8. In this connection, the following extracts from the decision of the US Supreme Court in *New York Times Co.* v. *L.B. Sullivan*[1] are extremely instructive: (L Ed pp. 700-06)

> "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people'. … 'The maintenance of the opportunity for free political discussion to the end that the Government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.' … 'It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions,' … and this opportunity is to be afforded for 'vigorous advocacy' no less than 'abstract

1 11 L Ed 2d 686 : 376 US 254 (1964)

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discussion'. … The First Amendment, said Learned Hand, J., 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.' … Mr Justice Brandeis, in his concurring opinion in *Whitney* v. *California*[2], gave the principle its classic formulation: (L Ed pp. 1105-06)

> 'Those who won our independence believed … that public discussion is a political duty; and that this should be a fundamental principle of the American Government. They recognised 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. Recognising the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.'

Thus, we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. … The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.

Authoritative interpretations of the First Amendment guarantees have consistently refused to recognise an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker. … The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered'. … As Madison said, 'Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press.' … In *Cantwell* v. *Connecticut*[3], the Court declared: (L Ed p. 1221)

2 71 L Ed 1095 : 274 US 357 (1927)

3 84 L Ed 1213 : 310 US 296 (1940)

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IV. Mr Shanti Bhushan, Senior Advocate *(contd.)*

'In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbour. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or State, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.'

That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need … to survive,' *NAACP* v. *Button*[4], L Ed 2d p. 418, was also recognised by the Court of Appeals for the District of Columbia Circuit in *Sweeney* v. *Patterson*[5] …. Edgerton, J. spoke for a unanimous court which affirmed the dismissal of a Congressman's libel suit based upon a newspaper article charging him with anti-Semitism in opposing a judicial appointment. He said:

Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticise their Governors. … The interest of the public here outweighs the interest of the appellant or any other individual. The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen. Errors of fact, particularly in regard to a man's mental states and processes, are inevitable. … Whatever is added to the field of libel is taken from the field of free debate.'

Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the Judge or his decision. … This is true even though the utterance contains 'half-truths' and 'misinformation'. … Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. … If Judges are to be treated as 'men of fortitude, able to thrive in a hardy climate,' … surely the same must be true of other government officials, such as elected city commissioners. Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

4 9 L Ed 2d 405 : 371 US 415 (1963)

5 128 F 2d 457 (1942), cert denied 87 L Ed 544 : 317 US 678 (1942)

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IV. Mr Shanti Bhushan, Senior Advocate *(contd.)*

If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, 1 Stat 596, which first crystallised a national awareness of the central meaning of the First Amendment. … That statute made it a crime, punishable by a $5000 fine and five years in prison, 'if any person shall write, print, utter or publish … any false, scandalous and malicious writing or writings against the Government of the United States, or either house of the Congress … or the President … with intent to defame … or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States.' The Act allowed the defendant the defence of truth, and provided that the jury were to be Judges both of the law and the facts. Despite these qualifications, the Act was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison. In the famous Virginia Resolutions of 1798, the General Assembly of Virginia resolved that it 'doth particularly protest against the palpable and alarming infractions of the Constitution, in the two late cases of the "Alien and Sedition Acts," passed at the last session of Congress. … (The Sedition Act) exercises … a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto—a power which, more than any other, ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.' …

Madison prepared the report in support of the protest. His premise was that the Constitution created a form of government under which 'The people, not the Government, possess the absolute sovereignty.' The structure of the Government dispersed power in reflection of the people's distrust of concentrated power, and of power itself at all levels. This form of government was "altogether different" from the British form, under which the Crown was sovereign and the people were subjects. 'Is it not natural and necessary, under such different circumstances,' he asked, 'that a different degree of freedom in the use of the press should be contemplated?' … Earlier, in a debate in the House of Representatives, Madison had said: 'If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.' … Of the exercise of that power by the press, his Report

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said: 'In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands....' ... The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government.

* * *

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 a comparable 'self-censorship'. Allowance of the defence 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 defence as an adequate safeguard have recognised 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 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 vigour 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."

9. This celebrated decision of the US Supreme Court has been referred to by this Court in *R. Rajagopal* v. *State of T.N.*[6], SCC in paras 16 to 23, and several important passages from the US judgment have also been extracted. It has also been pointed out in this judgment that the principle of *New York Times Co.* v. *Sullivan*[1] was carried forward by the English courts particularly by the House of Lords in the "*Spy catcher case*[7]".

10. It is submitted that the only guidelines which would be constitutional would be that the media would not publish anything which it knows is not true or which has been published with reckless disregard of whether it was false or not.

6 (1994) 6 SCC 632

7 *Attorney General* v. *Observer Ltd.*, (1990) 1 AC 109 (HL)

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IV. Mr Shanti Bhushan, Senior Advocate *(contd.)*

Does the discussion on the merits of a pending criminal case and its publication in media and the press contravene Article 21 of the Constitution of India?

11. Article 21 provides:

> "**21. *Protection of life and personal liberty***.—No person shall be deprived of his life or personal liberty except according to procedure established by law."

As the final result of a trial may entail the deprivation of life and liberty, the trial process is required to follow whatever procedure has been established by law. Law in the article refers to State made or enacted law.

(*a*) *Ram Chandra Prasad* v. *State of Bihar*[8], AIR p. 1631, para 5 : SCR at p. 52

> "5. … It has been held in *A.K. Gopalan* v. *State of Madras*[9] that in Article 21, the word 'law' has been used in the sense of State-made law and not as an equivalent of law in the abstract or general sense embodying the principles of natural justice, and 'procedure established by law' means procedure established by law made by the State, that is to say, by the Union Parliament or the legislatures of the States."

(*b*) *Shrimati Vidya Verma* v. *Shiv Narain Verma*[10]

(*c*) *A.K. Gopalan* v. *State of Madras*[9]

At present, there is no enacted law which says that when a criminal trial is pending or sub judice, the public shall not discuss the merits of the trial or such public debate shall not be published by the press. Hence, the question of the contravention of Article 21 does not arise.

12. An article of the Constitution necessarily prevails upon any enacted law and any law establishing the procedure under Article 21 would be subject to the fundamental rights conferred by Article 19 namely:

(*a*) Freedom of speech and expression; and

(*b*) Freedom of the press.

13. As pointed out earlier in the original written submissions, a free public debate on any matter of controversy can only lead to a better conclusion and not vice versa and for this reason also, a discussion in the press even relating to the merits of a pending criminal case must be fully permitted. In many well-known criminal cases, like *Jessica Lal Murder case*[11] to *BMW case*[12], justice would have not resulted but for a vigorous debate in the media in relation to the merits of those cases. There is no

8 AIR 1961 SC 1629
9 AIR 1950 SC 27
10 AIR 1956 SC 108
11 *Manu Sharma* v. *State (NCT of Delhi)*, (2010) 6 SCC 1
12 *R.K. Anand* v. *Delhi High Court*, (2009) 8 SCC 106

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known case in which as a result of public discussion of the case in the media, injustice has been the result.

14. Since a trial in India is by a trained Judge and not by a jury consisting of lay persons, there is no real possibility of a Judge, getting swayed by the discussion in the media. It must be presumed that he would be aware of his function to decide a case strictly according to admissible evidence which was laid before him and therefore would not take any media debate into consideration. If some people feel that even a trained Judge might sub-consciously be affected by the media reports, then the proper guidelines to be issued by this Court would be to direct all trial Judges who have to try a case to strictly avoid watching the electronic media or reading the newspapers while he was trying an important criminal case.

15. It should also be remembered that even a decision in a criminal trial is subject to judicial review in the higher courts which would also prevent any injustice being done in a criminal trial even if in a very rare case, the trial Judge happened to get affected by media reports and thereby gave an incorrect judgment.

V. Mr Anil B. Divan, Senior Advocate

1. Article 19(1)(*a*) read with Article 19(2) is a unique provision in the Indian Constitution. Article 19(1)(*a*) freedoms are not absolute but they can only be abridged as specified in Article 19(2). It is well-settled law that the State has no power to impose restrictions except those permissible under Article 19(2).

2. The restrictions imposed by law by the State under Article 19(2) must be "reasonable restrictions" and must be either in the interest of the five segments mentioned (i.e. sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to the three segments mentioned i.e. contempt of court, defamation or incitement to an offence).

3. The legislature cannot impose reasonable restrictions in the interests of the general public as it would be beyond the ambit of Article 19(2).

4. Article 19(1)(*a*) freedoms cannot be abridged to promote the right to life under Article 21 unless they are reasonable restrictions falling within the ambit of Article 19(2). In other words Article 21 cannot be relied upon to impose restrictions "dehors" the limits carved out by Article 19(2).

(*1*) *Sakal Papers (P) Ltd.* v. *Union of India*[1], SCR at pp. 862 and 863

(*2*) *Maneka Gandhi* v. *Union of India*[2] (seven Judges)

(*3*) Bhagwati, J., at p. 283, para 6, at p. 302, para 23

1 AIR 1962 SC 305

2 (1978) 1 SCC 248

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(*4*) Chandrachud, J., at p. 324, para 48, at pp. 327-28, paras 56 and 57

(*5*) Krishna Iyer, J., at p. 350, para 112

(*6*) *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*[3] (three Judges)

(*7*) Venkataramiah, J., at pp. 660-61, para 25 and at p. 684, para 66

Note: Proposition 1 of the submission of Mr K.K. Venugopal will have to be revisited where it is stated that Article 21 will have *Primacy* over "the right of free speech". This is too broadly stated.

In the authorities cited by him, there is no discussion re-interaction between Articles 21 and 19(1)(*a*) freedoms. See the authorities cited by him:

(*1*) *Kehar Singh* v. *Union of India*[4], SCC at pp. 210 and 211, para 7

(*2*) *State of W.B.* v. *Committee for Protection of Democratic Rights*[5], SCC at p. 596, paras 60-61

(*3*) *Nilabati Behera* v. *State of Orissa*[6], SCC at p. 768, para 34

(*4*) See also *Tiller* v. *Atlantic Coast Line Railroad Co.*[7], per Frankfurter, J.

5. Guidelines are framed by the Supreme Court under Articles 32 and 142 (read with Articles 141 and 144) to fill the vacuum in the absence of legislation. The power to issue guidelines is circumscribed by the same limitations as mentioned in Article 19(2). Such guidelines ought not to be either unconstitutional or violate fundamental rights.

(*1*) *Vineet Narain* v. *Union of India*[8], SCC at p. 264, para 49, pp. 265-66, para 51

(*2*) *Vishaka* v. *State of Rajasthan*[9], SCC at pp. 249-50, para 11

(*3*) *Prem Chand Garg* v. *Excise Commr.*[10], Gajendragadkar, J., at SCR pp. 899-900

(*4*) *Naresh Shridhar Mirajkar* v. *State of Maharashtra*[11], SCR at p. 766 *cd*

(*5*) *Supreme Court Bar Assn.* v. *Union of India*[12], SCC at p. 434, para 52, at pp. 437-38, para 56

3 (1985) 1 SCC 641
4 (1989) 1 SCC 204
5 (2010) 3 SCC 571
6 (1993) 2 SCC 746
7 87 L Ed 610, at 618 : 318 US 54 (1943), at 68
8 (1998) 1 SCC 226
9 (1997) 6 SCC 241
10 AIR 1963 SC 996
11 AIR 1967 SC 1
12 (1998) 4 SCC 409

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6. Article 19(1)(*a*) includes the right to know and the right to be informed. Media (print and electronic) are the eyes and ears of the citizen and unless media freedom to report court proceedings is protected the right to know is impaired.

(*1*) *S.P. Gupta* v. *Union of India*[13], SCC at pp. 273-75, paras 64-67

(*2*) *Ministry of Information & Broadcasting* v. *Cricket Assn. of Bengal*[14], SCC at p. 300, para 201

(*3*) *S. Rangarajan* v. *P. Jagjivan Ram*[15], SCC at p. 582, para 8

(*4*) *People's Union for Civil Liberties* v. *Union of India*[16], SCC at pp. 440-42, para 44 for the meaning of the phrase "freedom of speech and expression" where several authorities have been collected.

7. The Supreme Court has ruled that courts have either inherent powers (or powers conferred by statute) which can be exercised suitably within the parameters and principles laid down by the Supreme Court to ensure a fair trial and to secure the due administration of justice on a case-to-case basis. The Supreme Court has balanced the requirement of the "open justice" principle and the "fair trial" doctrine (which includes promoting ends of justice and its due administration). These powers would protect litigants or accused and would subserve the "sub judice" rule to protect fair trial, to promote the ends of justice and its due administration.

8. These principles can be culled out from the Supreme Court ruling in *Naresh Shridhar Mirajkar case*[11]. It is submitted that there is an alternative mechanism and window and the court must consider whether it is at all necessary to frame guidelines re postponement.

See *Naresh Shridhar Mirajkar* v. *State of Maharashtra*[11] SCR at pp. 754-61, 765, 770-73. An analysis of *Naresh Shridhar Mirajkar*[11] with submissions is annexed hereto and marked as *Annexure-A*.

9. Before discussing the question of guidelines regarding postponement it is important to see the approach of US Supreme Court on the First and Fourteenth Amendments which protect freedom of the media which has been approved in India:

(*1*) *Near* v. *Minnesota*[17], US at pp. 1368 and 1371

(*2*) *Romesh Thappar* v. *State of Madras*[18], SCR at p. 602

(*3*) *Kedar Nath Singh* v. *State of Bihar*[19], SCR at pp. 799 and 800 cite with approval the observations of Patanjali Sastri, J. in *Romesh Thappar case*[18].

13 1981 Supp SCC 87
14 (1995) 2 SCC 161
15 (1989) 2 SCC 574
16 (2003) 4 SCC 399
17 75 L Ed 1357 : 283 US 697 (1931)
18 AIR 1950 SC 124
19 AIR 1962 SC 955

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(*4*) *Novva Ads* v. *Deptt. of Municipal Admn. and Water Supply*[20], SCC at p. 56, para 53.

Postponement Guidelines

10. Any guideline which contemplates directions regarding postponement of publication of court proceedings and comments thereon must consider the following cardinal factors:

(*a*) In *Independent Publishing Co.* v. *Attorney General, Trinidad and Tobago*[21], All ER at pp. 516-18, paras 58-68, the Privy Council have stated their conclusions on Issue 1 (which is set out at p. 506) viz. "Is there power at common law to order the publication of a report of open court proceedings to be postponed?" The principal conclusions mentioned are:

(*i*) After referring to various authorities in paras 59 to 64 the Privy Council concluded that:

> *R.* v. *Clement*[22] provides too insecure a foundation on which to rest the existence of such inherent power in the court today. (para 65 p. 517). The Phillimore Committee recommended that legislation should provide for specific circumstances in which a court shall be empowered to prohibit, in public interest, of publication of names or of other matters arising at a trial. (*See* para 66 at pp. 517-18).

(*ii*) If the court is to have the power to make orders against the public at large it must be conferred by legislation, it cannot be found in the common law. (para 67 at p. 518)

(*iii*) Even without legislation it remains open to the court and is generally desirable to explain its concern and warn the press that they would be at risk of contempt proceedings, were they to publish the matter in question. (para 68 at p. 518)

(*iv*) In this case the court granted declaratory relief that "the right to free expression should not be contravened by non-publication orders made in excess of the Court's jurisdiction". (pp. 499-500 of the headnote)

(*b*) The sub judice rule in UK regarding postponement order has been conferred statutorily under Section 4(2) of Contempt of Courts Act, 1981.

(*c*) The entire jurisprudence evolved in the UK and Australia and other common law countries is primarily based on the existence of jury

20 (2008) 8 SCC 42

21 (2005) 1 All ER 499 (PC)

22 (1821) 4 B & Ald 218 : 106 ER 918

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trials in criminal cases as well as in civil cases like Libel and Slander where large damages are awarded by the Jury.

(*d*) The substantial prejudice likely to be caused is because of the concern of the courts that the Jury would be adversely influenced and therefore "fair trial" undermined. This most important factor is totally absent in India.

Analysis of Naresh Shridhar Mirajkar case[11] *and submissions thereon*

11. Is there a vacuum? The *Mirajkar case*[11]: An adequate alternative remedy a nine-Judge Bench in *Naresh Shridhar Mirajkar* v. *State of Maharashtra*[11], the question about the validity of an oral order passed by Tarkunde, J. (then in the Bombay High Court) in a defamation trial was the subject-matter of challenge under Article 32 writ petition. The order directed non-publication of the testimony of a witness for a limited period.

(*a*) The Court discusses the importance of the principle of "open justice" and how the inherent power of the court can on the facts in a given case override "open justice" principles by holding a trial in camera, if the ends of justice clearly and necessarily require. The inherent power must be exercised with great caution, and only if the court is satisfied beyond a 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". *Naresh Shridhar Mirajkar*[11], SCR at pp. 754-59.

(*b*) That the judicial order passed by Tarkunde, J. in the defamation case in the Bombay High Court was not capable of being challenged as violative of fundamental rights. A judicial order could not be the subject-matter of writ jurisdiction under Article 32. (*see* pp. 770-73). The same principle has been accepted in *Rupa Hurra*[23] (*Curative Petition Case*), SCC at pp. 399-403, paras 8-15.

(*c*) Because of the inherent power of the court under Section 151 CPC the Court had jurisdiction to pass an order to give protection by "in camera proceedings" or directing that the evidence of a particular witness would not be published.

(*d*) This inherent power was supported on the principles of fair trial, to promote the ends of justice.

(*e*) The judgment refers to Section 352 of the Code of Criminal Procedure, 1898 which empowers the Court to hold "in camera" proceedings. (Section 327 CrPC, 1973).

(*f*) The *Mirajkar*[11] judgment is sufficient to protect the rights of a fair trial and an order passed by the court in a given case on special circumstances is a sufficient safeguard for the accused as Criminal Procedure Code, 1973 specifically empowers the court to order "in

23 *Rupa Ashok Hurra* v. *Ashok Hurra*, (2002) 4 SCC 388

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camera" proceedings by enacting that the "open court" principle may be departed from. (Section 327 CrPC, 1973)

(*g*) This Hon'ble Court may consider whether the exercise of giving guidelines, is at all necessary when the principles laid down by a nine-Judge Bench continue to hold the field.

Re: Contempt of Court Act, 1971, Section 3 Explanation and Section 3(2)

12. *A.K. Gopalan* v. *Noordeen*[24] was decided on 15-9-1969. In that case, A.K. Gopalan made a statement on 20-9-1967 implicating leaders from opposition parties in the murder of one C.P. Karunakaran. The FIR had been lodged on 12-9-1967. On 23-9-1967, K.P. Noordeen was arrested. A *Malayalam* daily published on 25-9-1967 A.K. Gopalan's statement. The Kerala High Court convicted both A.K. Gopalan and Govinda Pillai (Editor) for contempt. The Supreme Court reversed the conviction of A.K. Gopalan because:

"7. It would be an undue restriction on the liberty of free speech to lay down that even before any arrest has been made there should be no comments on the facts of a particular case." (*per* Sikri, J., at SCC p. 740, para 7.)

The Supreme Court upheld the conviction of Editor Pillai as he published the statement after the arrest when proceedings in Court were imminent.

13. The Contempt of Courts Act, 1971 was enacted on 24-12-1971, after the above judgment. In spite of the above decision, Parliament has not adopted the date of arrest as the starting point for a "pending proceeding" in explanation to Section 3 of the Contempt of Courts Act, 1971. In serious criminal offences the date of the filing of the charge-sheet or challan is relevant for a proceeding to be "pending".

(*See* Law Commission Report 2006, Chapters IV and VII.) Section 3 Explanation specifies the meaning of "pending proceedings". Under Section 3(2) "offending publication" prior to the "pendency" of the proceeding are deemed *not* to be contempt which holds the field.

To show how Near v. Minnesota[17] *has been referred to in US Supreme Court authorities (prior Restraint)*

14. In Proposition 1, Compilation Vol. 1 important Indian authorities where *Near* v. *Minnesota*[17] has been referred to, have been given. The important decisions of the US Supreme Court referring to *Near* v. *Minnesota*[17] are:

(*1*) *Bantam Books Inc.* v. *Sullivan*[25]

This case is related to informal censorship of allegedly "obscene" material (which was invalidated). Held, obscenity is not protected by the

24 (1969) 2 SCC 734

25 9 L Ed 2d 584, at p. 593 : 372 US 58 (1963)

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First and Fourteenth Amendment. But any system of prior restraint of expression comes with a heavy presumption against its constitutional validity and at p. 593, *Near* v. *Minnesota*[17] and other authorities have been referred to.

(*2*) *Southeastern Promotions Ltd.* v. *Conrad*[26]

This case is concerned with the use of a municipal theatre to present the musical production "Hair". The permission asked for was rejected on the ground of "nudity" and "obscenity" on stage. The Supreme Court invalidated the action on the ground of prior restraint on expression lacking in Constitutional validity because required minimum procedural safeguards were absent. *Near* v. *Minnesota*[17] and other authorities referred to at p. 459.

(*3*) *Smith* v. *Daily Mail Publishing Co.*[27]

West Virginia law made it penal for newspapers to publish without prior permission of Juvenile Court, the name of the juvenile offender charged. The Court held the law violative of the First and Fourteenth Amendment. *Near* v. *Minnesota*[17] referred to at pp. 403-04 (Burger, C.J.) and p. 407 (Rehnquist, J., concurring)

(*4*) *Vance* v. *Universal Amusement Co. Inc.*[28]

State statute prior restraint on habitual use of premises relating to obscene material held unconstitutional. No special safeguards at p. 417 (majority opinion) *Near* v. *Minnesota*[17] referred to.

(*5*) *Arcara* v. *Cloud Books Inc*[29]

New York statute challenged allowing closure of premises used for prostitution. Majority upheld validity. Dissent by Blackmun, Brennan, and Marshall, JJ. at p. 579 referred to *Near* v. *Minnesota*[17].

(*6*) *Alexander* v. *United States*[30]

Forfeiture of obscene material after trial, conviction and sentence on racketeering (under RICO Statute). Forfeiture upheld but remand on excessive fines.

At p. 449 *Near* v. *Minnesota*[17] referred to but not applicable.

At p. 450 *Near* v. *Minnesota*[17] principle explained and observed.

"*Near* v. *Minnesota*[17], therefore, involved a true restraint on future speech—a permanent injunction."

At p. 462 *Near* v. *Minnesota*[17] referred to and observed:

26 43 L Ed 2d 448, at p. 459 : 420 US 546 (1975)

27 61 L Ed 2d 399, at pp. 403-04 and 407 : 443 US 97 (1979)

28 63 L Ed 2d 413, at p. 417 : 445 US 308 (1980)

29 92 L Ed 2d 568, at p. 579 (Dissent) : 478 US 697 (1986)

30 125 L Ed 2d 441, at pp. 449-50, 462 and 464 : 509 US 544 (1993)

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"As our First Amendment law has developed, we have not confined to the application of the prior restraint doctrine to its simpler forms, outright licensing or censorship before speech takes place. In considering governmental measures deviating from the classic form of a prior restraint yet posing many of the same dangers to the First Amendment freedoms, we have extended prior restraint protection with some latitude, toward the end of declaring certain governmental actions to fall within the presumption of invalidity. This approach is evident in *Near* v. *Minnesota*[17], the leading case in which we invoked the prior restraint doctrine to invalidate a State injunctive decree."

At p. 464 *Near* v. *Minnesota*[17] referred to and observed:

"In so holding the Court would have ignored, as the Court does today, that the applicability of the First Amendment analysis to a governmental action depends not alone upon the name by which the action is called, but upon its operation and effect on the suppression of speech. *Near*[17], at p. 708, ('the court has regard to substance and not to mere matters of form, and … in accordance with familiar principles … statute[s] must be tested by [their] operation and effect')"

(*7*) *Lawson* v. *Murray*[31]

Near v. *Minnesota*[17] is referred to at p. 271 by Scalia, J. in his concurring opinion as the foundation case in area of prior restraint.

VI. Mr Harish N. Salve, Senior Advocate

Maintainability of present proceedings

1. It is respectfully submitted that it is necessary in public interest for this Hon'ble Court to enunciate, with clarity and precision, the degree of immunity enjoyed by the media against action for libel in the matter of material received from or derived from court proceedings, and also to enunciate what constitutes impermissible intrusion into the rights of the citizens to fair trial under Article 21 of the Constitution. It is also necessary for this Hon'ble Court to enunciate the law and policy that would govern the control of court proceedings to the extent they are covered in the media with the intent and purpose of ensuring that there is no interference or inhibition in the court process and in the candour of communication between judges and lawyers in the course of court proceedings.

2. It is obvious that this Hon'ble Court is not issuing an injunction against any media house or publication—nonetheless instances are replete where Benches of five Judges and larger Benches have decided questions of

31 132 L Ed 2d 269, at p. 271 : 515 US 1110 (1995)

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law and then left it to smaller Benches or other courts to decide matters in accordance with the principles enunciated.

Issues that need to be addressed

3. There are certain issues which have repeatedly arisen and which, it is submitted, need to be addressed. In fact, the submissions by counsels who have supported an unbridled right, and have suggested that this Hon'ble Court should not issue any directions themselves proceed on the premise which needs to be closely examined, namely, whether the right under Article 19 is so encompassing as to override the right of a citizen to the protection of his reputation under Article 21 and the right of an undertrial to a fair trial under Article 21 of the Constitution. This question is to be answered in the backdrop of a larger constitutional issue, namely, whether a derivative right (the right to free press is derived from a citizen's right of freedom of expression) can be construed in a manner as would derogate from the right of a citizen under Article 21 of the Constitution.

4. The specific issues that need to be addressed include the following:

(*a*) The right of the media to publish pleadings in court with the same degree of immunity from the laws of libel as is available to counsel and parties before the court.

(*b*) The right of the media to report on an ongoing basis the purported results of criminal investigations.

(*c*) The right of the media to report ongoing proceedings by quoting judges' comments and counsel submissions, particularly on an ongoing basis.

(*d*) The right of the media to speculate on the outcome of ongoing court proceedings or even criminal trials—cases of trial by media.

5. The first (*a*) and the second (*b*) relates to a citizen's right to privacy and are addressed in that context. The third (*c*) and the fourth (*d*) relates also to the vital issue of court management and conduct of court proceedings in an atmosphere that is conducive to a fair trial or a frank and candid court proceeding.

Publication of Pleadings

6. It is not disputed that in matters relating to the conduct of Government, where there is no question of a slur on the reputation of a person or an institution, the publication of pleadings filed in court indiscriminately may be in poor taste, but would not violate Article 21.

7. However, pleadings in court which carry allegations against persons (whether in public life or in private life) and which are not openly discussed in court cannot be the subject-matter of media comment. It may be clarified that if the media obtains access to a pleading filed in court but not placed in open court, and it chooses to level the allegations which are contained in

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those pleadings, the defence that it quoted court pleadings would not be available in an action for defamation. If the private person whose reputation is affected brings an action for defamation (civil or criminal), the allegations would have to be defended by the publisher by, inter alia, establishing the truth—the defence that they were merely carried from an affidavit placed in the court would not be available. The freedom of speech and the derived right of free press does not carry the right to indiscriminately publish affidavits that have not yet seen judicial scrutiny.

8. The same would be the position as to publication of "leaks" from investigation agencies. It is commonplace to find serious allegations against individuals based on "sources" from various investigation agencies. In an action for defamation, it is obvious that the truth of the allegations would have to be established by the publisher. It is submitted that the freedom of press under Article 19(1)(*a*) would not assist the publishers in its defence that what was carried was an allegation based on the prima facie findings of a investigative agency or worse—on the basis of suspicions of investigative agencies.

Reporting Ongoing Court Proceedings

9. Candour of communication is vital to ensure that the judicial process is free and fair and that the litigants, through their counsel, get a full opportunity to place their point of view before the court. Equally, questions by Judges are designed to evoke response from counsel to address doubts as may arise in the course of a hearing. It is a fundamental principle of the Anglo-Saxon jurisprudence that judges speak through their judgments and not through questions addressed to counsel in the course of submission.

10. It is indisputable that quoting questions raised by the judges as though they were findings of the court has a chilling effect on the conduct of court proceedings. There have been many instances where judges have, in sensitive cases, had to plead (and at times even threaten) with members of the press covering the hearing not to sensationalise the proceedings. It is submitted that the balance between the conduct of court proceedings in an atmosphere that is neither surcharged nor vitiated—a necessary concomitant of the rule of law—and the freedom of the media is a question of constitutional law that needs to be addressed.

11. The right of the media flows from the principle that the courts are open to the public who are interested in its proceedings and the media functions as the link to make available the information as to what transpired in court, thereby, fulfilling the public cause of open proceedings. This, it is submitted, has to be balanced by the chilling effect, which is inevitable if a running commentary, as it were, on ongoing cases based on questions of the judges and responses of counsel.

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12. It is not suggested that the media is to be excluded from court proceedings. It is submitted that it has to be recognised that a court has the power, in appropriate cases, to exclude the media from the hearing or to direct the media to refrain from publishing a particular matter or from publishing in a particular manner. Secondly, any slur cast on the reputation of any person by inaccurate reporting of what transpired in court would be actionable as defamation and the fact that there was a bona fide attempt to report court proceedings would be no defence, if it is established that what was published was the personal opinion of the journalist and not a verbatim report of what transpired in court. A fortiori comments of "anchors" or authors of articles of what they perceive of what is transpiring in court enjoys absolutely no protection whatsoever as an expression of an opinion—if it is established that it is based on a misrepresentation of what transpired in court. "Exchange between counsel and the Bench do not constitute expression of opinion of the court". Reporting of exchanges in court has to be circumspect—and purely factual—any report that suggests that course of an exchange the court has cast any aspersion on any person or functionary is simply wrong. It may also be tendentious. Where reporting, particularly in sensitive cases, consistently misrepresented exchanges in courts as a continuous expression of the opinion of the court, or even where a Judge apprehends that an exchange in courts in an ongoing case, may be misreported, the Judge can injunct publication during the currency of the hearing of the case. Further, action in defamation would lie against any report which suggesting that the court has structured a person or a functionary where the ultimate judgment of the court does not support such a view. The fact that questions were asked in court would not justify a defence that what was reported was factually true for the reason that it was constituted misrepresentation of questions designed to elicit information as expression of opinion.

13. As far as criminal trials are concerned it is clear that any reporting beyond a factual statement of what has transpired in the courtroom would in most cases tend to interfere with the course of trial. The public has a right to be present at the trial, and a member of the public would have no higher right than being a spectator and audience and to be present in the courtroom to see and hear what transpires. A member of the public has no right of access to the material with the investigating agency—which is yet to be produced or to any other private papers, which have not been publicly aired in court. It is respectfully submitted that the right of the media to cover legal proceedings does not extend beyond this right.

14. Any allegations made based on material that has not been publicly aired would be liable to be proceeded with in an action for defamation if it injures the reputation of any citizen and the fact that it was derived from

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court records would be no difference. Additionally at the behest of an accused, in order to protect the sanctity of trial, the court could always injunct any member of the press who has attained access to any record or evidence or material from any source relating to the trial, from publishing such material.

15. It is settled law that the power under Articles 226 and 32 is much wider than the power conferred upon the English courts to issue writs, *Andi Mukta*[1], SCC p. 698, paras 15-17*g*.

16. Indian jurisprudence has extended the principle of fairness to those who discharge public functions. Even the notion of public functions has been significantly expanded in recent times, *BCCI case*[2], SCC p. 681, para 30, p. 698 onwards, paras 86, 106, 115 and 137)

17. The precise nature of the free speech right of the electronic media has been explained by Justice Jeevan Reddy in his concurring judgment in *Ministry of Information and Broadcasting* v. *Cricket Assn. of Bengal*[3], SCC pp. 270-72, 286, 291 and 296. Even in England, a Private Housing Board was considered to be discharging public duties. It was clarified that certain functions of a private body may be public while others continued to be in the private domain — (*Popular Housing and Regeneration Community Assn. Ltd.* v. *Donoghue*[4], All ER p. 621, paras 65-67. There are similar observations regarding educational institutions in Justice Mohan's concurring judgment in *Unni Krishnan*[5], SCC p. 693, paras 77-80.

Relationship of Article 19(1)(a) with Article 21

18. Article 21 is the widest right; certain facets of Article 21 are also enunciated in Article 19. In *Maneka Gandhi case*[6], SCC p. 280, para 5. The right of the media is a derivative right—it has been held to be implicit in Article 19(1)(*a*), *M. Nagaraj*[7], SCC p. 241, para 20. The contention that the right under Article 19(1)(*a*) in some way is superior to the right under Article 21 was expressly rejected, the converse was held to be true, *Noise Pollution case*[8], SCC para 11.

1 *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust* v. *V.R. Rudani*,(1989) 2 SCC 691

2 *Zee Telefilms Ltd.* v. *Union of India*, (2005) 4 SCC 649

3 (1995) 2 SCC 161

4 (2001) 4 All ER 604

5 *Unni Krishnan, J.P.* v. *State of A.P.*, (1993) 1 SCC 645

6 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248

7 *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212

8 *Noise Pollution (5), In re*, (2005) 5 SCC 733

Summary of Arguments

VI. Mr Harish N. Salve, Senior Advocate *(contd.)*

Powers to grant injunctions

19. A court of record has been recognised to enjoy the power to punish for its contempt. The juridical basis of the inherent jurisdiction is the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner (observations in *Supreme Court Bar Assn.* v. *Union of India*[9], SCC p. 420, para 15, *relied on*).

20. The power of this Court *a fortiori* is much wider by virtue of Article 142. As long as it is not contrary to a statute, this Hon'ble Court would have the power to pass such orders as would be necessary to do justice. This power is not "conditioned by any statutory provision" *Bonkya* v. *State of Maharashtra*[10], cited with approval, para 23).

21. Thus, in a civil case, the Court could even quash a criminal prosecution. (*Union Carbide Corpn.* v. *Union of India*[11], SCC para 54.) It is obvious that if it is necessary to injunct publication to ensure fairness of a trial, such a power would be available to a court of record. An order preventing publication of evidence was held to be a valid order by a court conducting a trial. It was held: *Naresh Shridhar case*[12], AIR p. 8, para 21) "[*i*]*f a Judge trying a cause is satisfied that the very purpose of finding truth in the case would be retarded, or even defeated if witnesses are required to give evidence subject to public gaze*", the court would have inherent jurisdiction to hold a trial in camera. It was also held:

> "*21. … if ever a real conflict arises between fair administration of justice itself on the one hand, and public trial on the other, inevitably, public trial may have to be regulated or controlled in the interest of administration of justice*." (*Naresh Shridhar Mirajakar* v. *State of Maharashtra*[12], AIR p. 9, para 21 : SCR pp. 755-56.)

It was further held that: (*Naresh Shridhar case*[12], AIR p. 12, para 43)

> "*43. … If, incidentally as a result of this order, the petitioners were not able to report what they heard in court, that cannot be said to make the impugned order invalid under Article 19(1)(a).*"

SCR p. 762*f* also relied upon Sarkar, J. SCR p. 778 *c-d*, Bachawat, J. SCR p. 808*h*.

22. As a court of record, it has been held that as far as this Hon'ble Court is concerned, the power under Article 129 extends to dealing with the contempt of even subordinate courts. Similarly, the High Court has been

9 (1998) 4 SCC 409
10 (1995) 6 SCC 447
11 (1991) 4 SCC 584
12 AIR 1967 SC 1

Summary of Arguments

VI. Mr Harish N. Salve, Senior Advocate *(contd.)*

held, in a number of cases, as having the power to deal with contempt of itself as well as the subordinate courts, *Delhi Judicial Service case*[13].

23. The role of media and press in a criminal trial was recently discussed in *Manu Sharma case*[14], SCC p. 110, para 295 onwards.

VII. Mr T.R. Andhyarujina, Senior Advocate

1. The relationship between the media and the judiciary is a complex one.

2. The media reports judicial proceedings to inform the public of matters of public interest. The media are the eyes and ears of the general public. They act on behalf of the general public. The media's right to know and their right to publish is neither more nor less than that of the general public as they are trustees of the general public for this purpose. See *Attorney General* v. *Guardian Newspapers Ltd. No. 2*[1]

3. The media has thus an important role in a democratic Constitution to inform the public by fair reporting of every public activity including judicial proceedings. This right is expressly recognised as a part of the freedom of speech given to citizens under Article 19(1)(*a*) of the Indian Constitution.

4. At the same time the essential feature of a democratic Constitution is the due course of justice. It is a fundamental feature of the Constitution that there must be fairness in the administration and conduct of a trial, and no outside power or force should influence the fairness of a judicial proceeding. The public has as much interest in obtaining information of judicial proceedings as maintaining the fairness in administration of the judiciary. It is therefore in the general interest of the community that the authority of the courts should not be impaired and recourse to them should not be subject to unjustifiable influence by media reporting.

5. The other aspect of the complex problem is that the media at times by its irresponsible reporting prior to the trial and during trial not only at times affects the administration of justice but also prejudices the rights of citizens in a judicial proceeding such as parties to litigation, the accused in a trial and witnesses in judicial proceedings. Therefore, the problem is not merely the concern of the judiciary to safeguard its administration from reporting by the media but also safeguarding individual rights of citizens by media reporting which prejudices them in the judicial proceeding. Thus, whilst freedom of reporting court proceedings should be encouraged and protected as a fundamental right, it cannot be allowed where it causes real substantial prejudice to the administration of justice. Any conduct by the media which is prejudicial to the fair administration of justice and undermines the public confidence in the judiciary would in fact be contempt of court. Significantly

13 *Delhi Judicial Service Assn.* v. *State of Gujarat*, (1991) 4 SCC 406

14 *Manu Sharma* v. *State (NCT of Delhi)*, (2010) 6 SCC 1

1 (1990) 1 AC 109 at p. 183 : (1988) 3 All ER 545 at p. 600 (HL)

Summary of Arguments

VII. Mr T.R. Andhyarujina, Senior Advocate *(contd.)*

Article 19(2) of the Constitution states that freedom of speech can be limited by a reasonable restriction in the interest of contempt of court. The contempt of court proceedings are in such cases taken for the protection of the administration of justice.

6. The risk of prejudice to administration of justice by courts has been stated in detail by Lord Reid in the *Sunday Times case*[2], AC at pp. 298-99.

7. Broadly speaking, publication by the media before the verdict, particularly in criminal cases, sometimes prejudices the administration of justice. Secondly, reporting of proceedings during a trial or judicial proceeding may also influence the trial and judicial proceeding. Therefore, in most jurisdictions there is a power in courts to prohibit or postponing reporting of judicial proceeding in the interest of fair administration of justice.

8. In UK till recently it was held that the Courts have such powers in common law but in the latest decision in *Independent Publication Co.* v. *Attorney General, Trinidad & Tobago*[3] the Privy Council has reversed the earlier view that a court had power in common law to order that the publication of a report of open court proceedings can be postponed. The Privy Council held that the power of the court to make orders against the public at large had to be conferred by a legislation. The court differed from the earlier views in *Attorney General* v. *Leveller Magazine Ltd.*[4] and in *R.* v. *Clement*[5]. The Court in *Independent Publication* v. *Attorney General*[3] differed from Lord Denning in *R.* v. *Horsham Justices*[6] who had held: (*Independent Publication case*[3], All ER p. 514, para 49)"

> "*49.* … 'It has long been settled that the courts have power to make an order postponing publication (but not prohibiting it) if the postponement is necessary for the furtherance of justice….' (*Horsham case*[6], All ER p. 285)"

However, the Privy Council at the same time has stated:

> "*49.* … Even without legislation, however, it remains open to the court … to explain its concern and warn the press that they would be at risk of contempt proceedings were they to publish the matter in question" (*Independent Publication case*[3], All ER p. 518, para 68).

9. In United Kingdom Section 4(2) of the Contempt of Courts Act, 1981 gives power to the court to postpone for such period as the court thinks necessary the publication of any report of the proceedings where it appears to be necessary for avoiding substantial risk of prejudice to the administration of justice. Against such an order, there is a right to appeal under Section 159 of the Criminal Justice Act, 1989.

2 *Attorney General* v. *Times Newspapers Ltd.*, 1974 AC 273 (HL)
3 (2005) 1 All ER 499
4 (1979) 1 All ER 745
5 (1821) 4 B & Ald 218 : 106 ER 918
6 (1982) 2 All ER 269

Summary of Arguments

VII. Mr T.R. Andhyarujina, Senior Advocate *(contd.)*

10. In England the Courts by their interpretation of the word "necessary" in Section 4(2) have developed an approach very similar to the principle of proportionality which has become a feature of case law in the European Court of Human Rights and in India.

11. In Canada in the leading case of *Dagenais* v. *Canadian Broadcasting Corpn.*[7], the Supreme Court has held that the discretion conferred by the common law to ban the publication of a court proceedings must be exercised within the boundaries of the Canadian Charter of Rights which guarantees freedom of speech. The traditional common law rule governing publication bans viz. that there must be a real and substantial risk of interference with the right to a fair trial, does not itself provide sufficient protection for freedom of expression. When the right to have a fair trial conflicts with the right to free expression there must be a balancing of the respective rights and a ban should be ordered after an evaluation of the effects of the publication ban outweighing the deleterious effects to the free expression of those affected by the ban. In effect the Court prescribed the proportionality test prevalent in Canada. In *R.* v. *Mentuck*[8] the Supreme Court held that the publication ban should only be ordered when such an order is necessary to prevent a serious risk to the proper administration of justice and when reasonable alternative measures will not prevent the risk and when the salutary effects of the publication ban outweighs the deleterious effects on the rights and interests of the public including the effect on the right to free expression. See in this connection *Constitutional Law of Canada* by Peter W. Hogg, pp. 1023-25.

12. In US because of the constitutional protection against prior restraint on free speech, courts do not have the power to prevent publication of court proceeding. See *Nebraska Press Assn.* v. *Stuart*[9] (see Congressional Edition, Part 3 of US Constitution pp. 1088-90).

13. In India in the leading case of *Naresh Shridhar Mirajkar* v. *State of Maharashtra*[10] the Supreme Court held that the power to prohibit publication of proceedings was essentially the same as the power to hold a trial in camera and such a law empowering a trial in camera is a valid law and does not violate the fundamental right of free speech of reporters. Such a law empowering the court to prohibit a publication of its proceedings is protected by Article 19(2) because the law relates to contempt of court and the restriction is reasonable as it is based on the principle that the publication would interfere with the course of justice in its due administration. It was further held that restraining the publication of the report of proceedings by the High Court does not infringe Article 19(1)(*a*) because it affects the freedom of speech only incidentally and indirectly. To the contrary

7 (1994) 3 SCR 835
8 (2001) 3 SCR 442
9 49 L Ed 2d 683 : 427 US 539 (1976)
10 AIR 1967 SC 1

Summary of Arguments

VII. Mr T.R. Andhyarujina, Senior Advocate *(contd.)*

Hidayatullah, J. dissenting held that Judges acting in the judicial capacity were not beyond the reach of fundamental rights. The view of the majority that a Court by its order cannot violate a fundamental right has been widely criticized. The view of the majority has not found favour with H.M. Seervai in *Constitutional Law of India,* 4th Edn., pp. 393-95.

14. In the aforesaid premises, it is respectively submitted that though a court in India has the inherent power to ban publications in the interest of administration of justice or postpone the publication of a report, the court must in each case evaluate the necessity not only in the interest of administration of justice, the rights of individuals to be protected from publication of the report (Article 21) and also the right to free speech guaranteed by Article 19(1)(*a*) of the Constitution. The court is required to consider a balancing act in each case where an order to ban or to postpone publication is absolutely necessary and the necessity of it overrides the media under Article 19(1)(*a*) and rights of public to be informed by the media.

15. There can be no general rule for a court to impose a ban or postponement of publication, either prior to the adjudication or during the adjudication, as it would depend on the circumstances of each case. The necessity for any such order by a court must depend on the facts of each case, the extent of the prejudice, the effect on individuals involved in the case and the overriding necessity to curb the right to report of judicial proceedings conferred on the media by Article 19(1)(*a*) of the Constitution. Further, if the ban or postponement is imposed by a lower court there should be a right of appeal for correction to a higher court.

VIII. Mr K.T.S. Tulsi, Senior Advocate

Submissions in brief

1. This Court has been a staunch supporter of freedom of press. The right of freedom of speech and expression and that of the press has been zealously guarded, nourished and expanded by the innovative interpretations by this Hon'ble Court. It has been held that freedom of press is not only an essential prerequisite of democracy but mother of all liberties.

2. The three articles, namely, Articles 14, 19 and 21 do not constitute watertight compartments, nor is any of these articles an island. Articles 14, 19 and 21 are not mutually exclusive. They sustain, strengthen and nourish each other. They seek support and also impose restrictions on one another for effectuating the life and content of each of the articles. It is thus, not necessary that each restriction in Article 19 must flow from a law made by Parliament under Clause (2) of Article 19. Such inherent restriction can also be found on harmonious construction of the three articles. If the manner of exercise of a freedom in Article 19 were to nullify or destroy a right under Article 21 the same would not be permissible or reasonable. It is necessary to harmonise the two most precious values under the Constitution, namely, the

Summary of Arguments

VIII. Mr K.T.S. Tulsi, Senior Advocate *(contd.)*

freedom of speech and the right to fair trial. The process of harmonisation can neither be construed as a restriction nor regulation of the right of free speech. Harmonisation is however necessary to give full effect to the comprehensive right to freedom collectively contained in Articles 19 to 22. Article 19 and Article 21, thus must nourish and strengthen each other, not weaken or destroy each other.

3. Trial by newspapers has been held by this Court as the grossest mode of interference in administration of justice. (*Reliance Petrochemicals Ltd.* v. *Indian Express Newspapers Bombay (P) Ltd.*[1]) While faithful reporting of proceedings by the media serves a significant public purpose, but discussion on evidence, launching tirades for and against a party or systematic demonising a party to a case can have the effect of interfering with the right to fair trial.

4. Premature tirade destroys safeguards against testimonial compulsion, right of silence and presumption of innocence.

5. Former Chairman of Law Commission of India, Justice Jagannadha Rao has emphasised that there is a need to restrict press publication if it results in interference of sub judice proceedings.

6. The Press Council of India under the Chairmanship of Justice Jayachandra Reddy has drafted code of conduct in 2005 with respect to norms of journalistic conduct and what per se should not be published. Those guidelines must be considered outer limit beyond which publication could constitute contempt of court.

Submissions in detail

7. *This Court has been a staunch supporter of freedom of press. The right of freedom of speech and expression and that of the press has been zealously guarded, nourished and expanded by the innovative interpretations by this Hon'ble Court. It has been held that freedom of press is not only an essential prerequisite of democracy but mother of all liberties.*

7.1. It has been held by this Court in *I.R. Coelho* v. *State of T.N.*[2] that: (SCC p. 100, para 106)

> "*106.* … freedom of press which, though not separately and specifically guaranteed, has been read as part of Article 19(1)(*a*). If Article 19(1)(*a*) is sought to be amended so as to abrogate such right (which we hope will never be done), the acceptance of the respondent's contention would mean that such amendment would fall outside the judicial scrutiny when the law curtailing these rights is placed in the Ninth Schedule as a result of immunity granted by Article 31-B. The impact of such an amendment shall have to be tested on the touchstone of rights and freedoms guaranteed by Part III of the Constitution. In a given

1 (1988) 4 SCC 592

2 (2007) 2 SCC 1

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VIII. Mr K.T.S. Tulsi, Senior Advocate *(contd.)*

case, *even abridgement may destroy the real freedom of the press and, thus, destructive of the basic structure*." (emphasis supplied)

7.2. In *M. Nagaraj* v. *Union of India*[3] it was held by this Court that: (SCC pp. 243-44, para 26)

"*26.* … freedom of press or religion are not mere values, they are justiciable and capable of interpretation. The values impose a positive duty on the State to ensure their attainment as far as practicable. … secularism, democracy, reasonableness, social justice, etc. are overarching principles which provide linking factor for principle of fundamental rights like Articles 14, 19 and 21. These principles are *beyond the amending power* of Parliament. They pervade all enacted laws and they *stand at the pinnacle of the hierarchy of constitutional values*." (emphasis supplied)

7.3. It has been held in the landmark case of *Bennett Coleman & Co.* v. *Union of India*[4] that if the impugned measure (limitation of number of pages, amongst others) in a case fell within the vice of Article 19(1)(*a*) it was liable to be struck down. It is illustrative of the manner in which the truth and spirit of the *freedom of press is preserved and protected by the courts*. (emphasis supplied)

7.4. In *Express Newspapers (P) Ltd.* v. *Union of India*[5] the Court held that *freedom of speech* and expression guaranteed under Article 19(1)(*a*) of the Constitution *includes the freedom of press* i.e. the freedom of propagation of ideas. Central to the concept of a free press is freedom of political opinion and at the core of that freedom lies the right to criticise the Government, because it is only through free debate and free exchange of ideas that the Government remains the representative of the will of the people and orderly change is effected. When avenues of political expression are closed, the Government by consent of the governed would soon be foreclosed. *Such freedom is the foundation of a free Government of a free people*. (emphasis supplied)

Our Government set-up being elected; we need requisite freedom of any animadversion for our social interest which ordinarily *demands free propagation of views*. Freedom to think as one likes and to speak as one thinks are as a rule indispensable to the discovery and separate of truth and without free speech, discussion may be futile. It needs to be stressed 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 emphasise and one must

3 (2006) 8 SCC 212
4 (1972) 2 SCC 788
5 (1986) 1 SCC 133

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VIII. Mr K.T.S. Tulsi, Senior Advocate *(contd.)*

not forget that the vital importance of freedom of speech and expression involves the freedom to dissent in a free democracy like ours.

7.5. 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.

7.6. 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 under all circumstances but is subject to the restrictions contained in Article 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 license 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.

7.7. It is not correct to say that right to report court proceedings is not a fundamental right. Freedom of speech has been held to include the freedom of press and open court is an indispensable attribute of the justice system. The characteristics of open courts functioning under the full glare of the public flows not merely from public interest, in seeing the manner in which justice is dispensed but it has therapeutic value and purges the society of the outrage that is felt when it confronts injustices and crimes. Open court has its roots in the English Common Law heritage and thus has always respected the right of the media to report its proceedings. The media, in that sense performs a vital public service and is a communicator and a link between the courts of law and the people. The directions are not in anyway meant to restrict the right of media, but merely an endeavour to ensure that the right to fair trial which is as vital as the freedom of speech (both being regarded as part of the Basic Structure of the Constitution), are neither weakened nor destroyed.

7.8. Even in *Naresh Shridhar Mirajkar* v. *State of Maharashtra*[6] it has been held that: (AIR p. 8, para 19)

> "*19.* … journalists, have a fundamental right to carry on their occupation under Article 19(1)(*g*); they have a right to attend proceedings in court … Article 19(1)(*a*) includes their right to publish as journalists a faithful report of their proceedings…."

7.9. In England, all trials are held in open court to which public have free access. There appears to have been a rule in England to that effect. (*Richmond Newspapers Inc.* v. *Virginia*[7]) ... The 1677 Concessions and Agreements of West New Jersey, provided that, "in all public courts of justice for trial of causes, civil or criminal, any person or persons, who are inhabitants of the said province, may freely come and attend such courts. Justice may not be done in a corner or covert manner."

6 AIR 1967 SC 1

7 65 L Ed 2d 973 : 448 US 555 (1980)

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VIII. Mr K.T.S. Tulsi, Senior Advocate *(contd.)*

7.10. Jeremy Bentham in "Rationale of Judicial Evidence" (p. 524), 1827 not only recognised the therapeutic value of open justice but stated that "without publicity all checks are insufficient."

7.11. The early history of open trial reflects widespread acknowledgment, long before there were behavioural scientists, that public trials had significant community therapeutic value. Bentham further states at pp. 130-31 "when shocking crime occurs a community reaction of outrage and public protest often follows. Thereafter open process of justice serves an important purpose, providing outlet for community concern, hostility and emotion."

7.12. According to Mueller in "Problems Posed by Publicity to Crime and Criminal Proceeding"[8], "The accusation, conviction or acquittal operates to restore the imbalance which was created by the offence. Presumption of openness inheres in the very nature of criminal trial. In *Oliver, In re*[9] the US Supreme Court held that (at US p. 226) "in view of this nation's historic distrust in court proceedings, their inherent danger and universal requirements of federal and State Governments demand that criminal trials be public."

7.13. In *Estes* v. *Texas*[10], it was held that "publicity serves to advance several purposes of trial ... secrecy is profoundly inimical to this demonstrative purpose of trial process … closed trial breeds suspicion of prejudice and arbitrariness."

7.14. In *Gannett Co. Inc* v. *DePasquale*[11], Justice Blackburn opined that, "open examination of witness viva voce in presence of all mankind is much more conducive to clearing up truth than private and secret examination."

8. *The three articles, namely, Articles 14, 19 and 21 do not constitute watertight compartments, nor is any of these Articles an island. Articles 14, 19 and 21 are not mutually exclusive. They sustain, strengthen and nourish each other. They seek support and also impose restrictions on one another for effectuating the life and content of each of the articles. It is thus, not necessary that each restriction in Article 19 must flow from a law made by Parliament under Clause (2) of Article 19. Such inherent restriction can also be found on harmonious construction of the three articles. If the manner of exercise of a freedom in Article 19 were to nullify or destroy a right under Article 21 the same would just not be permissible or reasonable. It is necessary to harmonise the two most precious values under the Constitution, namely, the freedom of speech and the right to fair trial. The process of harmonisation can neither be construed as a restriction nor regulation of the right of free speech. Harmonisation is however necessary to give full effect to*

8 110 U Pa L Rev 1, 6 (1961)
9 92 L Ed 682 : 333 US 257 (1948)
10 14 L Ed 2d 543 : 381 US 532 (1965), at pp. 538-39.
11 61 L Ed 2d 608 : 443 US 368 (1979)

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VIII. Mr K.T.S. Tulsi, Senior Advocate *(contd.)*

the comprehensive right to freedom collectively contained in Articles 19 to 22. Article 19 and Article 21, thus must nourish and strengthen each other, not weaken or destroy each other.

8.1. The most authoritative pronouncement on the subject is found in the judgment of *Maneka Gandhi* v. *Union of India*[12], a Bench of seven Hon'ble Judges. In paras 4-7 of the said judgment , Bhagwati, Untwalia, Fazal Ali, JJ. deal with the interplay between Articles 19, 14, 21 in the following manner:

(*a*) Articles 19-21 find place in heading of right to freedom and provide different aspects of freedom.

(*b*) Article 19(1) describes the seven limbs of freedom whereas Clauses 2-6, permit reasonable restrictions.

(*c*) *A.K. Gopalan* v. *State of Madras*[13] made no definite pronouncement on relation between Articles 19 and 21.

(*d*) Article 19(1) deals with particular species or attributes of freedom, whereas Article 21 takes in and comprises the residue.

(*e*) Articles 19 and 21 are not mutually exclusive.

(*f*) The wavelength of *Sambu Nath Sarkar* v. *State of W.B.*[14] and that of *Haradhan Saha* v. *State of W.B.*[15] was not correct.

(*g*) *A.K. Gopalan*[13], proceeded on the assumption that certain articles in the Constitution exclusively deal with specific matters.

(*h*) Doctrine of exclusivity was seriously questioned in *Rustom Cavasjee Cooper* v. *Union of India*[16] and it was overruled by majority.

(*i*) In *Haradhan Saha*[15], MISA was tested on the touchstone of Article 19.

(*j*) *Khudiram Das* v. *State of W.B.*[17] took the same view.

(*k*) In *Master Lal Mohd. Sabir* v. *State of J&K*[18] this Court held that, "the law must therefore now be taken to be well settled that Article 21 does not exclude Article 19 … even if there is a law (with respect to Article 21)…. It would have to meet the challenge of Article 19."

8.2. Justice Chandrachud in para 48 in *Maneka Gandhi*[12] held that: (SCC p. 323) even the fullest compliance with Article 21 is not the journey's end. A law has still to meet a possible challenge under Articles 14 and 19.

12 (1978) 1 SCC 248
13 AIR 1950 SC 27
14 (1973) 1 SCC 856
15 (1975) 3 SCC 198
16 (1970) 1 SCC 248
17 (1975) 2 SCC 81
18 (1972) 4 SCC 558

Summary of Arguments

VIII. Mr K.T.S. Tulsi, Senior Advocate *(contd.)*

(*a*) In *Bank Nationalisation case*[16], *(R.C. Cooper)* the majority held that the assumption in *A.K. Gopalan*[13] that certain Articles of the Constitution deal exclusively with certain matters, cannot be accepted as correct.

(*b*) Though in *R.C. Cooper*[16], the inter relationship of Articles 19 and 31 was considered and not that of Articles 21 and 19, but the basic approach was that it discarded the major premise of *A.K. Gopalan*[13] as incorrect.

(*c*) The interplay of diverse articles of the Constitution guaranteeing various freedoms has gone through vicissitudes.

8.3. Beg, C.J. dealt with this issue in paras 198-202 in *Maneka Gandhi case*[12], as under:

(*a*) The view that Articles 19 and 21 constitute watertight compartments had to be abandoned in *R.C. Cooper*[16], therefore we cannot now revive the overruled doctrine.

(*b*) Constitution must be read as an integral whole with possible overlapping of subject-matter.

(*c*) Different fundamental rights do not represent entirely separate stream of rights which do not mingle. They are all parts of an integral scheme … waters must mix to constitute the grand flow of unimpeded and impartial justice … isolation of various aspects of human freedom is neither realistic nor beneficial but would defeat the very objects of such protection.

8.4. Krishna Iyer, J. in his inimitable style, in a separate but concurrent judgment in para 96 of *Maneka Gandhi*[12] held that: (SCC p. 343)

"*96.* … no Article in Part III is an island but part of a continent, and the conspectus of a whole part gives the direction.… Man is not dissectible…. The proposition is indubitable that Article 21 does not, in a given situation, exclude Article 19 if both rights are breached."

8.5. Harmonisation is necessary not because the court is afraid of criticism, but only because the right of fair trial is required to be harmonised with the right to free speech.

8.6. The very fact that Articles 19, 14, 21 constitute an integral part of rights to freedom in itself justifies the need for harmonisation, as these constitutional postulates provide a much higher justification for harmonising than mere law under Article 19(2).

9. *Trial by newspapers has been held by this Court as the grossest mode of interference in administration of justice.* (*Reliance Petrochemicals Ltd.* v. *Indian Express Newspapers Bombay (P) Ltd.*[1].) *While faithful reporting of proceedings by the media serves a significant public purpose, but discussion on evidence, launching tirades for and against a party or systematic demonising a party to a case can have the effect of interfering with the right to fair trial.*

Summary of Arguments

VIII. Mr K.T.S. Tulsi, Senior Advocate *(contd.)*

9.1. There can be frightening side effects of undue popular pressure on continuity of criminal trial and it can end up paralysing the system of justice.

Dinesh Trivedi v. *Union of India*[19]

9.2. It is difficult to accept that Judges are not affected by what they have read, heard or seen outside court. Discussion on evidence is wrong and pre-trial sounding of trumpet is contrary to public policy. We must not allow trial by newspapers.

Attorney General v. *British Broadcasting Corpn.*[20]

9.3. If media is allowed to prejudice issues and launch tirades, unpopular people will fair very badly in courts. Free, uninhibited and unfettered discussion by the jury in the course of their deliberations is essential to the proper administration of justice. It is important element of that system that jurors should express themselves freely in the jury room without fear of outside disclosure of their views and opinions.

Attorney General v. *Seckerson and Times Newspapers Ltd.*[21]

9.4. Electronic and news media should also play a positive role in presenting to general public as to what actually transpires during the course of hearing, and it should not be published in such a manner so as to get unnecessary publicity for their own paper or news channel. Such a tendency, which is indeed growing fast, should be stopped.

S. Khushboo v. *Kanniammal*[22]

9.5. There is danger, of serious risk of prejudice if the media exercises an unrestricted and unregulated freedom such that it publishes photographs of the suspects or the accused before the identification parades are constituted or if the media publishes statements which outrightly hold the suspect or the accused guilty even before such an order has been passed by the Court. 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.

Manu Sharma v. *State (NCT of Delhi)*[23]

9.6. Freedom of speech and expression sometimes may amount to interference with the administration of justice as the articles appearing in the media could be prejudicial — this should not be permitted.

19 (1997) 4 SCC 306
20 1981 AC 303 (HL)
21 2009 EWHC 1023 (Admn)
22 (2010) 5 SCC 600
23 (2010) 6 SCC 1

Summary of Arguments

VIII. Mr K.T.S. Tulsi, Senior Advocate *(contd.)*

M.P. Lohia v. *State of W.B.*[24]

9.7. Views on sentencing of people outside the criminal justice system, 'the general public' will always be important but they must never be determinative in court. The Court noted that the newspaper and television journalists responded well to the initiatives in the 1980s intended to curb the reporting of crime in ways that needlessly fuelled fear of crime. A similar initiative should now be mounted in relation to sentencing.

Santosh Kumar Satishbhushan Bariyar v. *State of Maharashtra*[25]

9.8. According to recent judgment of Queen's Bench Division in *Attorney General* v. *Associated Newspapers Ltd.*[26] it was held that "publication of photograph of ward with pistol, even though a mistake, constituted contempt." It was further held in para 54, that: (WLR p. 2110)

> "*54.* … criminal courts have been troubled by the dangers to the integrity and fairness of a criminal trial…. Once information is published on the internet, it is difficult if not impossible completely to remove it."
>
> The Court further observed that "instant news requires instant and effective protection for the integrity of a criminal trial."

9.9. In another recent decision of the Queen's Bench division in *Attorney General* v. *M.G.N. Ltd.*[27] the court based its decision on Article 10 of the European Convention of Human Rights. In para 32, it was held that, "the right to receive and impart information is subject to express limitation as may be prescribed for maintenance of authority and impartiality of judiciary as well as right to fair hearing." In para 36 it was noticed that publication in Daily Mirror created substantial risk to the course of justice, thereby constituting contempt under the strict liability rule. The article led the readers to believe that Mr Jeffries was a stalker and murderer. This vilification created a serious risk that his defence would be damaged and would pose substantial risk to the course of justice.

9.10. In *R.* v. *HTV Cymru (Wales) Ltd. ex p*[28] it has been held that the Court can grant injunction to restrain a threatened contempt if it is found necessary and proportional under the circumstances.

9.11. In *Richard Jewell* v. *New York Post*[29], a Deputy Sheriff in New York City was considered to be the head suspect in the Olympic Park Bombing that took place in July 1996. Atlanta Journal called him a fat, failed Sheriff's deputy. In another article, he was described as a home-grown failure and major embarrassment. *The New York Post* published an article on him mentioning that "everybody should be glad they finally got this guy … it

24 (2005) 2 SCC 686
25 (2009) 6 SCC 498
26 (2011) 1 WLR 2097
27 2011 EHWC 2074 (Admn)
28 2002 EMLR 11
29 United States District Court for the Southern District of New York case

Summary of Arguments

VIII. Mr K.T.S. Tulsi, Senior Advocate *(contd.)*

makes people feel safer and better". The newspaper also published his photographs and cartoon. However, Eric Rudolph was convicted of the said crime and jewel was no longer the suspect. Thereafter, he sued *The New York Post* for libel. The newspaper argued that comments made were non-actionable opinions and were based on police statement. The Court, however, held the statements to be libellous, per se, because it exposed the accused to public contempt, ridicule, aversion and disgrace. Even if they were opinions, they led people to believe the allegations to be true. The Court found the comments harsh and not true. Jewell collected undisclosed monetary settlement from *The New York Post* and CNN. However, Atlanta Journal did not settle and they were forced to reveal their sources.

10. *Premature tirade destroys safeguards against testimonial compulsion, right of silence and presumption of innocence.*

10.1. The liberty of press is subordinate to proper administration of justice. (*Rao Harnarain Singh Sheoji Singh* v. *Gumani Ram Arya*[30].)

10.2. Under constitutional and statutory scheme in field of criminal law, confession alleged to have been made by the accused before the police are neither trusted nor admissible as evidence. Yet day in, day out reports of alleged confessions create irreversible prejudice against the accused and destroys vital safeguards afforded under the Constitution.

10.3. Even though confession is not admissible as evidence, it is the effect of its illegal disclosure through the media that cannot be taken back especially when it is repeated day after day, month after month, year after year. Section 162 CrPC prohibits use of any statement made before police officer in course of investigation for any other purpose than inquiry or trial. This bar has been created to protect the accused from being prejudiced by the statements made to police officers. (*Khatri (4)* v. *State of Bihar*[31].)

10.4. This Court has repeatedly referred to a history of more than a century whereby police confessions have been considered untrustworthy. Sections 25 and 26 of the Evidence Act and Sections 162 and 164 CrPC proceed on the same footing. Confessions recorded by police suffer from many infirmities—selective recording, tampering, editing and tailoring. They are, therefore, considered inadmissible. Confession of co-accused is not even evidence as defined under Section 30 of the Evidence Act. The police force continues to function in an oppressive and tyrannical fashion resulting in ever increasing number of custodial deaths. Police officers can easily find their favourite informers, record their confession and implicate whoever they like. All those persons are liable to forfeit their life and liberty at least during investigation. But on account of unholy nexus, even a honourable acquittal may not vindicate the honour and reputation marred by excessive and illegal publicity. This is not only subversive to all civilized notions of justice but is

30 1958 Cri LJ 952 (Punj)
31 (1981) 2 SCC 493

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VIII. Mr K.T.S. Tulsi, Senior Advocate *(contd.)*

violative of right to fair trial guaranteed under Article 21. (Refer *Kartar Singh*[32], para 193.)

10.5. Unholy nexus between police and press results in illegal disclosure of investigation through press even when there is express prohibition under Section 162 CrPC against disclosure of material collected by investigating agency.

10.6. Media's interview of witnesses and discussions on evidence can rob the accused of the important right of cross-examination. (*Mohd. Hussain* v. *State (Govt. of NCT of Delhi)*[33].)

10.7. It has been held in a catena of cases, including, inter alia, the following cases that testimonial compulsion is prohibited under criminal law:

10.7.1. No less serious is the danger that some accused persons at least, may be induced to furnish evidence against themselves which is totally false, out of sheer despair and anxiety to avoid an unpleasant present. Of these dangers the Constitution makers were clearly well aware and it was to avoid them that Article 20(3) was put in the Constitution.

State of Bombay v. *Kathi Kalu Oghad*[34]

10.7.2. Summoning a person who is an accused person before the court to produce documents or things, by virtue of which he is compelled to be a witness against himself, the summons and all proceedings taken thereon will be void.

State of Gujarat v. *Shyamlal Mohanlal Choksi*[35]

10.7.3. Under Section 73 CrPC direction to an accused to give specimen writing can only be issued by the court holding inquiry under CrPC or the court conducting trial of such accused. But where the case is still under investigation, the accused cannot be compelled to give specimen writing.

Sukhvinder Singh v. *State of Punjab*[36]

10.7.4. Mental privacy is an important aspect of personal liberty under Article 21, which is intruded upon while conducting tests such as narco analysis, polygraph and BEAP. Such involuntary disclosure of information is also cruel, inhuman and degrading treatment to an individual thereby violating his right under Article 21. These tests also violate his/her right of fair trial because access to legal advice, which is a component of Article 21 becomes meaningless when test subject is made to reveal information without having conscious control over it.

32 *Kartar Singh* v. *State of Punjab*, (1994) 3 SCC 569
33 (2012) 2 SCC 584
34 AIR 1961 SC 1808
35 AIR 1965 SC 1251
36 (1994) 5 SCC 152

Summary of Arguments

VIII. Mr K.T.S. Tulsi, Senior Advocate *(contd.)*

Selvi v. *State of Karnataka*[37]

10.7.5. Even so, a section of the media has been found to be telecasting the recording such tests, thereby causing permanent and irreversible damage and prejudice to dignity and reputation of the accused.

10.7.6. 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*[38]

11. *Former Chairman of Law Commission of India, Justice Jagannadha Rao has emphasised that there is a need to restrict press publication if it results in interference of sub judice proceedings.*

11.1. Such restrictions are necessary for maintaining authority and impartiality of judiciary. Press cannot be permitted to influence parties, witnesses, judges because if that was allowed they will poison the fountain of justice before it begins to flow.

12. *The Press Council of India under the Chairmanship of Justice. Jayachandra Reddy has drafted code of conduct in 2005 with respect to norms of journalistic conduct and what per se should not be published. Those guidelines must be considered outer limit beyond which publication could constitute contempt of court.*

IX. Mr Parag P. Tripathi, Senior Advocate

1. There is an interplay of at least four different and distinct rights/interests:

(*i*) The fundamental requirement of fair trial i.e. trial by an unbiased jury (wherever applicable) and/or by an impartial judge. This is an aspect, which involves the court.

(*ii*) The right of the accused to a fair trial. This has two elements—

(*a*) the fair trial aspect qua the accused;

(*b*) other rights of the accused, for instance to protect his reputation in public at large, possible economic losses due to adverse publicity, etc.

(*iii*) The right to know of citizens at large particularly in respect of what is transpiring in court, is a right attributable to both Articles 19(1)(*a*) and 21.

37 (2010) 7 SCC 263

38 (1996) 6 SCC 354

Summary of Arguments

IX. Mr Parag P. Tripathi, Senior Advocate *(contd.)*

(*i*) For right to know under Article 21, see *Reliance Petrochemicals Ltd.* v. *Proprietors of Indian Express Newspaper*[1], SCC p. 613, para 34

(*ii*) For right to know under Article 19(1)(*a*), see *State of U.P.* v. *Raj Narain*[2], SCC p. 453, para 74

(*iv*) Freedom of speech including the freedom of press is relatable to Article 19(1)(*a*), which in India has been referred to as a conditional right (*Reliance Petrochemicals Ltd.*[1], SCC p. 605, para 15).

2. The two judgments, one each of the Indian and American Supreme Courts, which deal with the issue of reporting sub judice matters, are (*i*) *Reliance Petrochemicals Ltd.*[1]; and (*ii*) *Nebraska Press Assn.* v. *Stuart*[3]. The former raised the issue as to whether an injunction passed by the Supreme Court restraining publication of a sub judice aspect should continue or not. The latter, namely Nebraska, was an American case where the State Courts had passed a partial restraint on publication in respect of pre-trial and trial proceedings in a sensational murder case involving the Kellie family.

3. Interestingly, as noted in *Nebraska*[3], Chief Justice Hughes in *Near* v. *Minnesota*[4] had held that "Freedom of press is not an absolute right, and the State may punish its abuses".

4. The judgment in *Reliance Petrochemicals*[1] refers and reiterates the same, notwithstanding its stringent criticism by Seervai (p. 766, para 10.133, 4th Edn.). The following aspects in *Reliance Petrochemicals*[1] judgment are noteworthy:

(*i*) The reference to the possible and potential tension between the freedom of speech and fair trial (*Reliance case*[1], SCC pp. 604-05, para 17).

(*ii*) The growth of the doctrine in the US Supreme Court has occurred through the medium of two stirring dissents, namely, (*a*) Holmes, J. dissent in *Abrams* v. *United States*[5]; and (*b*) Frankfurter, J. in *Bridges* v. *California*[6].

(*iii*) In *Abrams case*[5], Justice Homes laid down the "clear and present danger" test, with the felicitous expression that it is only the "present danger of immediate evil or an intent to bring about …" "that warrants congressional intervention (L Ed p. 1179 : US at p. 628)".

5. Frankfurter, J. reiterated in *Bridges* v. *California*[6], though as a dissent in that case, that freedom of speech "was not so absolute or irrational a conception so as to imply paralysis of the means for protection of all the freedoms secured by the Bill of Rights" (*Reliance case*[1], SCC p. 605, para 17)

1 (1988) 4 SCC 592
2 (1975) 4 SCC 428
3 49 L Ed 2d 683 : 427 US 539 (1976)
4 75 L Ed 1357 : 283 US 697 (1931)
5 63 L Ed 1173 : 250 US 616 (1919)
6 86 L Ed 192 : 314 US 252 (1941)

Summary of Arguments

IX. Mr Parag P. Tripathi, Senior Advocate *(contd.)*

6. In *Pennekamp* v. *Florida*[7], Frankfurter, J. reiterated that the judiciary could not function properly if "what the press does is reasonably calculated to disturb the judicial judgments in its duty and capacity to act solely on the basis of what is before the court" (*Reliance case*[1], SCC p. 606, para 20)

7. The test, which found favour of the unanimous American Supreme Court in *Nebraska*[3] was the test propounded by Learned Hand, J. in *United States* v. *Dennis*[8], namely, the test of "gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger" (p. 699, Part VI).

8. The Indian Supreme Court in *Reliance Petrochemicals*[1] adopted this test by referring to its similarity with the concept of balance of convenience in the functional sense of Anglo-Saxon Common Law.

9. The thrust therefore of American case law, which was instructively relied upon by the Indian Supreme Court appears to be that the tension between free speech and free trial is a recognised tension and has to be resolved broadly by considering the test of "gravity of the evil discounted by its improbability ….", which in a loose sense, is the constitutional adoption of the balance of convenience doctrine.

10. *Nebraska*[3] judgment represents the unanimous view of the Supreme Court, even as the plurality of the judgment is instructive:

(*i*) Trial by jury in criminal cases is fundamental to the American scheme of justice (p. 692, para 4).

(*ii*) Fair trial in a fair tribunal is a basic requirement of due process (Headnote 4 at p. 693).

(*iii*) The real issue before the Nebraska Court was whether the means employed by the State Court in restraining publication of sub judice proceedings "were foreclosed by another provision of the Constitution" viz. the First Amendment (p. 695).

(*iv*) In *Near* v. *Minnesota*[4], Hughes, J. made it clear that freedom of press is not an absolute right and the State may punish its abuse (p. 696).

(*v*) The common thread running through the American Supreme Court judgments is that prior restraint on speech and publication is the most serious and the least tolerable infringement on the First Amendment Rights (p. 697).

(*vi*) Thus, by definition, such prior restraint has an immediate and irreversible sanction (p. 698).

(*vii*) The authors of the Bill of Rights did not undertake to assign priorities between the First Amendment (freedom of speech, etc.) and the Sixth Amendment (free trial, etc.) ranking one superior to other (p. 699).

(*viii*) Nonetheless, it is clear that barriers to prior restraint remain high.

7 90 L Ed 1295 : 328 US 331 (1946)

8 183 F 2d 201 at 212 (1950), affd, 95 L Ed 1137 : 341 US 494 (1951)

Summary of Arguments

IX. Mr Parag P. Tripathi, Senior Advocate *(contd.)*

(*ix*) The test therefore, is as enumerated by Learned Hand, J., namely, "gravity of evil discounted by its improbability".

(*x*) The law is ably summed upon in Headnote 11 at p. 704 in the leading judgment[3] of Burger, J.

11. The twin principles are: (*a*) as a general rule, in this trade-off between the two fundamental rights viz. right to freedom of speech and expression, and right to fair trial, the right to freedom of speech and expression shall not be abridged; (*b*) but the former does not has an absolute sanction under all circumstances, even though the barriers to prior restraint remain high and the presumption against such restraint continues intact.

12. As far as the argument on economic loss or protection of economic interest of a party is concerned, it may be pointed out that in India, protection of economic rights is not a part of fundamental rights with the right of property, having been expressly withdrawn from the ambit of Article 19(1).

13. Even in US, the Supreme Court has noted and followed this same principle in Footnote 4 in *United States* v. *Carolene Products Co.*[9] This Footnote 4 was noted by the Indian Supreme Court in *Govt. of A.P.* v. *P. Laxmi Devi*[10]: (SCC p. 752, para 85)

> "*85.* In the famous Footnote Four in *United States* v. *Carolene Products Co.*[9], Stone, J. of the United States Supreme Court observed: (L Ed. p. 1241) 'There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.'
>
> In a letter to Stone in the first *Flag Salute case*[11], in which Stone was the lone dissenter, Frankfurter, J. said:
>
> > 'I am aware of the important distinction which you so skilfully adumbrated in your Footnote 4.... In *Carolene Products Co. case*[9] I agree with that distinction; I regard it as basic. I have taken over that distinction in its central aspect ... in the present opinion by insisting on the importance of keeping open all those channels of free expression by which undesirable legislation may be removed, and keeping unobstructed all forms of protests against what are deemed invasions of conscience.' "

14. In our respectful submission, this does not enter calculus as to how to reconcile the tension between the free speech and free trial. The economic rights stand on a somewhat lower footing in the order of priority.

9 82 L Ed 1234 : 304 US 144 (1938)

10 (2008) 4 SCC 720

11 *Minersville School District* v. *Gobitis*, 84 L Ed 1375 : 310 US 586 (1940)

Summary of Arguments

IX. Mr Parag P. Tripathi, Senior Advocate *(contd.)*

Conclusion

15. To conclude, therefore, the clear and present danger test is originally enunciated by Holmes, J. as a dissenting minority in *Abrams*[5] and subsequently followed along with the useful test laid down by Learned Hand, J. of the "gravity of the evil discounted by its improbability of occurrence" provides respectfully a sufficient and workable guidelines and parameters by which this tension between the free speech and fair trial can be resolved.

16. The result has to be necessarily on a case-to-case basis, applying what the Supreme Court in *Reliance Petrochemicals*[1] referred to as the constitutional balance of convenience. In this view of the matter, though this aspect may be reiterated, there may not be need for any further or fresh guidelines.

X. Mr Kailash Vasdev, Senior Advocate

Submissions on behalf of the Broadcast Editors' Association

Judicial activism including judicial legislation restricts the jurisdiction of the Supreme Court to interpret the law and in the process remove any lacunae to fill the gaps in the legislation and lay down the law with reference to the dispute before it, but it cannot declare a new law or general obligations in the manner that the legislature does.

1. Judiciary can only interpret laws but has no power to lay down a new law of general application. It may fill the gaps by a purposive construction of the legislation and has always acted cautiously in not legislating in the way in which the legislature can legislate. This Hon'ble Court has always been restrained in such matters (*P. Ramachandra Rao* v. *State of Karnataka*[1]). It has also been held that the courts are not to enlarge the scope of legislation. A court can interpret the law but not legislate. While interpreting statutes, courts have always avoided stepping into the shoes of the legislature. They have followed the rule of literal construction and avoided addition or substitution of words. Likewise courts have refrained from legislating. They have assiduously left this domain to the legislatures as courts retain the power of judicially reviewing and testing the validity of legislation on settled legal norms based on principles of testing the constitutionality of statutes. Legislation by the courts will be not be open to such tests and will be outside the scope and ambit of judicial review which is a basic feature of the Constitution.

2. Under the Constitutional scheme the doctrine of separation of powers outlines the functions of each of the limbs—legislature, judiciary and the executive. It is not for one to transgress into the domain of the other.

1 (2002) 4 SCC 578

Summary of Arguments

X. Mr Kailash Vasdev, Senior Advocate *(contd.)*

3. In *State of U.P.* v. *Jeet S. Bisht*[2], S.B. Sinha, J. dealt with the topic of separation of powers in the following terms: (SCC pp. 617-18, para 78)

> "*78.* Separation of powers in one sense is a limit on *active jurisdiction* of each organ. But it has another deeper and more relevant purpose: to act as *check and balance* over the activities of other organs. Thereby the *active jurisdiction* of the organ is not challenged; nevertheless there are *methods of prodding* to communicate the institution of its excesses and shortfall in duty. Constitutional mandate sets the dynamics of this communication between the organs of polity. Therefore, it is suggested to not understand separation of powers as operating in vacuum. Separation of powers doctrine has been reinvented in modern times." (emphasis in original)

This Hon'ble Court does not have the jurisdiction to frame guidelines and/or impose conditions on press reporting in exercise of its inherent jurisdiction under Article 142 of the Constitution of India or otherwise.

4. Article 142 of the Constitution grants a jurisdiction to this Hon'ble Court which is materially different from the inherent powers ensuring to a court under the Code of Civil Procedure or the Criminal Procedure Code. It is subject to the provisions of any law made in this behalf by Parliament, and grants to this Hon'ble Court as respects the whole of the territory of India, all and every power to make any order for the purposes of securing the attendance of any person, the discovery or production of any document(s), or the investigation or punishment of any contempt of itself.

5. The jurisdiction conferred by Article 142 is subject to any laws made in this behalf by Parliament. It is not the grant of any inherent jurisdiction. A Bench of five Hon'ble Judges of this Hon'ble Court in suo motu exercise of jurisdiction has examined the powers of this Hon'ble Court under Articles 129, 142 and 144 in *Supreme Court Bar Assn.* v. *Union of India*[3]. This Hon'ble Court has held inter alia: (SCC pp. 431-32, paras 47-48)

> "*47.* The plenary powers of this Court under Article 142 of the Constitution are inherent in the court and are *complementary* to those powers which are *specifically conferred on the court by various statutes though are not limited by those statutes*. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers are of very wide amplitude and are in the nature of *supplementary* powers. This power exists as a separate and independent basis of jurisdiction apart from the statutes. It stands upon the foundation and the basis for its exercise may be put on a different and perhaps even wider footing, *to prevent injustice* in the process of litigation and *to do complete justice between the parties*. This plenary jurisdiction is, thus, the residual source of power which this Court may

2 (2007) 6 SCC 586

3 (1998) 4 SCC 409

Summary of Arguments

X. Mr Kailash Vasdev, Senior Advocate *(contd.)*

draw upon as necessary *whenever it is just and equitable to do so* and in particular to ensure the observance of the due process of law, *to do complete justice between the parties*, while administering justice according to law. There is no doubt that it is an indispensable adjunct to all other powers and is free from the restraint of jurisdiction and operates as a valuable weapon in the hands of the court to prevent 'clogging or obstruction of the stream of justice'. It, however, needs to be remembered that the powers conferred on the court by Article 142 being curative in nature cannot be construed as powers which authorise the court to *ignore* the substantive rights of a litigant while dealing with a cause pending before it. This power cannot be used to 'supplant' substantive law applicable to the case or cause under consideration of the court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly. Punishing a contemnor advocate, while dealing with a contempt of court case by suspending his licence to practice, a power otherwise statutorily available *only* to the Bar Council of India, on the ground that the contemnor is also an advocate, is, therefore, not permissible in exercise of the jurisdiction under Article 142. The construction of Article 142 must be functionally informed by the salutary purposes of the article viz. *to do complete justice between the parties*. It cannot be otherwise. As already noticed in a case of contempt of court, the contemnor and the court cannot be said to be litigating parties.

48. The Supreme Court in exercise of its jurisdiction under Article 142 has the power to make such order as is *necessary for doing complete justice* 'between the parties in any cause or matter pending before it'. The very nature of the power must lead the Court to set limits for itself within which to exercise those powers and ordinarily it cannot disregard a statutory provision covering a subject, except perhaps to balance the equities between the conflicting claims of the litigating parties by 'ironing out the creases' *in a cause or matter before it*. Indeed this Court is not a court of restricted jurisdiction of only dispute-settling. It is well recognised and established that this Court has always been a law-maker and its role travels beyond merely dispute-settling. It is a 'problem-solver in the nebulous areas' (see *K. Veeraswami* v. *Union of India*[4]) but the substantive statutory provisions dealing with the subject-matter of a given case cannot be altogether ignored by this Court, while making an order under Article 142. Indeed, these constitutional powers cannot, in any way, be *controlled* by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise *may come directly in conflict* with what has been expressly

4 (1991) 3 SCC 655

Summary of Arguments

X. Mr Kailash Vasdev, Senior Advocate *(contd.)*

provided for in a statute dealing expressly with the subject."

(emphasis in original)

6. In *State of W.B.* v. *Committee for Protection of Democratic Rights*[5] (decided on 17-2-2010, Bench: Hon'ble K.G. Balakrishnan, C.J. and Panchal, P. Sathasivam, D. Jain and R.V. Raveendran, JJ.) : (SCC pp. 581-82 & 593, paras 12-13 & 52)

"*12*. Relying heavily on the observations of the Constitution Bench in *Supreme Court Bar Assn.* v. *Union of India*[3] to the effect that: (SCC p. 432, para 47)

> '*47*. … Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly.'

The learned counsel contended that when even Article 142 of the Constitution cannot be used by this Court to act contrary to the express provisions of law, the High Court cannot issue any direction ignoring the statutory and constitutional provisions.

13. The learned counsel went to the extent of arguing that even when the State police is not in a position to conduct an impartial investigation because of extraneous influences, the court still cannot exercise executive power of directing the police force of another State to carry out investigations without the consent of that State. In such a situation, the matter is best left to the wisdom of Parliament to enact an appropriate legislation to take care of the situation. According to the learned counsel, till that is done, even such an extreme situation would not justify the court upsetting the federal or quasi-federal system created by the Constitution.

* * *

52. It is manifest from the language of Article 245 of the Constitution that all legislative powers of Parliament or the State Legislatures are expressly made subject to other provisions of the Constitution, which obviously would include the rights conferred in Part III of the Constitution. Whether there is a contravention of any of the rights so conferred, is to be decided only by the constitutional courts, which are empowered not only to declare a law as unconstitutional but also to enforce the fundamental rights by issuing directions or orders or writs of or 'in the nature of' mandamus, certiorari, habeas corpus, prohibition and quo warranto for this purpose."

7. In *Destruction of Public and Private Properties* v. *State of A.P.*[6], this Hon'ble Court while dealing with the powers of the Court to issue directions

5 (2010) 3 SCC 571

6 (2009) 5 SCC 212

Summary of Arguments

X. Mr Kailash Vasdev, Senior Advocate *(contd.)*

to meet situations relating to the media, appointed a Committee to give a report. After the report was submitted to the Court, it ordered that: (SCC p. 238, para 33)

> "*33.* The suggestions are extremely important and they constitute sufficient guidelines which need to be adopted. But we 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. The writ petitions are disposed of."

Prior restraint of publication of news by a judicial fiat has been expressly rejected by this Hon'ble Court and will not be in consonance with the rights granted by Article 19(1)(a) of the Constitution of India.

8. This aspect which arises from the rights of the press is no longer res integra. This Hon'ble Court in *R. Rajagopal* v. *State of T.N.*[7] considering the correctness of imposing a prior ban on publication of a defamatory article in the press has held: (SCC pp. 648-49, paras 21-22)

> "*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 the United Kingdom or the 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

7 (1994) 6 SCC 632

Summary of Arguments

X. Mr Kailash Vasdev, Senior Advocate *(contd.)*

emerging from the English and the 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 Co.* v. *United State*[8], popularly known as the Pentagon Papers case, 'any system of prior restraints of (freedom of) expression comes to this 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."

(emphasis in original)

Freedom of the press is and has been accepted to be a right under Article 19(1)(a) of the Constitution of India and can only be circumscribed for the reasons in Article 19(2) of the Constitution of India.

9. In this the Hon'ble Court has held that freedom of speech and expression guaranteed by Article 19(1)(*a*) includes freedom of the press. This right is subject only to the restrictions contemplated under sub-clause (2), where restrictions can be imposed for reasons of "sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, preserving decency, preserving morality, in relation to contempt, court, defamation, or incitement to an offence". These would mean and include statutes such as the Official Secrets Act, IPC, CrPC, or for the purposes of "Public Order" (Schedule VII List II Entries I and II). While examining the scheme of the Constitution, and the guarantees available to the press under Article 19(1)(*a*) of the Constitution this Hon'ble Court has zealously protected the freedom of the press when there are restrictions:

(*i*) by way of duties on news prints (*Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*[9]),

8 29 L Ed 2d 822 : 403 US 713 (1971)

9 (1985) 1 SCC 641

Summary of Arguments

X. Mr Kailash Vasdev, Senior Advocate *(contd.)*

(*ii*) resumption of leases and or grants of lands given to the media (*Express Newspapers (P) Ltd.* v. *Union of India*[10]),

(*iii*) to report and criticise judgments in *Sham Lal, In re*[11],

(*iv*) this Hon'ble Court has held that the freedom of the press includes the right to receive information and ideas through any medium (*Hamdard Dawakhana* v. *Union of India*[12]). Examining the rights of the press this Hon'ble Court has held that public criticism of events is essential for the working of democracy (*Bennett Coleman and Co.* v. *Union of India*[13]).

10. Freedom of the press has become particularly important in India where while establishing a welfare State, individual rights have often been relegated to the background. Interestingly, the rights of the press to report events and present/invite views have been protected *LIC* v. *Manubhai D. Shah*[14]. *Odyssey Communications (P) Ltd.* v. *Lokvidayan Sanghatana*[15].

11. In matters relating to freedom of speech and expression the Hon'ble Court in *Bobby Arts International* v. *Om Pal Singh Hoon*[16] has emphasised that even guidelines for censorship are required to ensure that artistic expressions and creative freedom are not unduly curbed.

12. In *Maneka Gandhi* v. *Union of India*[17], Hon'ble Bhagwati, J. held: (SCC pp. 305-06, para 29)

"*29.* … Democracy is based essentially on free debate and open discussion, for that is the only corrective of governmental 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."

13. The only restrictions which can be imposed on the rights of the press which are akin to the rights of an individual under Article 19(1)(*a*) can be curtailed only by the conditions enumerated in Article 19(2) and no other (*Sakal Papers (P) Ltd.* v. *Union of India*[18]).

10 (1986) 1 SCC 133
11 (1978) 2 SCC 479
12 AIR 1960 SC 554
13 (1972) 2 SCC 788
14 (1992) 3 SCC 637
15 (1988) 3 SCC 410
16 (1996) 4 SCC 1
17 (1978) 1 SCC 248
18 AIR 1962 SC 305

Summary of Arguments

X. Mr Kailash Vasdev, Senior Advocate *(contd.)*

That Parliament has not enacted any law for regulating or controlling, reporting/covering issues by the press. It is not open for this Hon'ble Court to lay down guidelines for reportage. There are adequate safeguards and remedies available to a person who may claim to be affected by a press report and/or by an action of the press.

14. The law of contempt is available to a court or a person for proceeding against a report which is alleged to have transgressed its jurisdiction. These remedies have been dealt with in a catena of cases and adverted to by counsel in the course of hearing. They are available in the submissions of Dr Dhawan and Mr Nariman.

15. The right available to the court under the Contempt of Court Act has not been used by the courts. The Attorney General is the Guardian of contempt and is counsel of people and not of State and if law of contempt was followed no guidelines as being proposed are required.

Personal liberties guaranteed by Article 21 cannot be deprived except according to the procedure established by law. These rights have to satisfy Articles 14 and 19(1)(a) of the Constitution. The rights enshrined under Article 21 are sustained and nourished by those in Articles 14 and 19.

16. It is obvious that Article 21 though couched in negative language affirmed the fundamental right to life and personal liberties. Personal liberty came for consideration in *Kharak Singh* v. *State of U.P.*[19] where the majority of the Hon'ble Judges took the view that personal liberty is used in the article as a term to include within itself all the varieties of rights which go to make up personal liberties other than those dealt with in the several clauses of Article 19(1). Articles 19(1) and 21 are not mutually exclusive.

17. It is now settled that the validity of a law given under Article 21 must be tested with reference to Articles 14 and 19 as has been held in *Maneka Gandhi* v. *Union of India*[17]. In *Maneka Gandhi* v. *Union of India*[17], Hon'ble M.H. Beg and Y.V. Chandrachud, C.J. and V.R. Krishna Iyer, P.N. Bhagwati, N.L. Untwalia, S. Murtaza Fazal Ali and P.S. Kailasam, JJ. held that the analogy of the freedom of press being included in the right of free speech and expression is wholly misplaced because the right of free expression incontrovertibly includes the right of a freedom of press. Para 6 of the said judgment reads, inter alia, as under: (SCC p. 326, para 53)

> "*53.* Article 19(1)(*a*) guarantees to Indian citizens the right to freedom of speech and expression. It does not delimit that right in any manner and there is no reason, arising either out of interpretational dogmas or pragmatic considerations, why the courts should strain the language of the article to cut down the amplitude of that right. The plain meaning of the clause guaranteeing free speech and expression is that Indian citizens are entitled to exercise that right wherever they choose, regardless of geographical considerations, subject of course to the

19 AIR 1963 SC 1295

Summary of Arguments

X. Mr Kailash Vasdev, Senior Advocate *(contd.)*

operation of any existing law or the power of the State to make a law imposing reasonable restrictions 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, as provided in Article 19(2). The exercise of the right of free speech and expression beyond the limits of Indian territory will, of course, also be subject to the laws of the country in which the freedom is or is intended to be exercised. I am quite clear that the Constitution does not confer any power on the executive to prevent the exercise by an Indian citizen of the right of free speech and expression on foreign soil, subject to what I have just stated. In fact, that seems to me to be the crux of the matter, for which reason I said, though with respect, that the form in which the learned Attorney General stated his proposition was likely to cloud the true issue. The Constitution guarantees certain fundamental freedoms and except where their exercise is limited by territorial considerations, those freedoms may be exercised wheresoever one chooses, subject to the exceptions or qualifications mentioned above."

18. In *T.V. Vatheeswaran* v. *State of T.N.*[20], this Hon'ble Court in para 20 held that: (SCC p. 78)

"*20.* … Articles 14, 19 and 21 are not mutually exclusive. They sustain, strengthen and nourish each other. They are available to prisoners as well as free men."

19. Procedure established by law in Article 21 has been used in the sense of enacted law and means the procedure prescribed by this law of the State as held in *A.K. Gopalan* v. *State of Madras*[21] subsequently affirmed which view has been constantly followed by this Hon'ble Court in subsequent decisions.

20. Article 21 is couched in negative term and does not give any positive right to the State. A law under Article 21 means a law enacted by legislation and not by way of guidelines framed by courts as these laws have to be tested on the touch stone of Articles 14 and 19.

21. The guidelines cannot be laid by this Hon'ble Court. [See *Destruction of Public & Private Properties*[6], SCC paras 30, 31 and 33]

Personal liberty under Article 21 of the Constitution includes freedom of thought and expression.

22. In *Francis Coralie Mullin* v. *UT of Delhi*[22], it has been held that: (SCC pp. 618-19, para 8)

"*8.* … the right to life includes the right to live with human dignity … namely, the bare [necessity] of life … and facilities for reading, writing and expressing [one's self] in diverse [form]…."

20 (1983) 2 SCC 68
21 AIR 1950 SC 27
22 (1981) 1 SCC 608

Summary of Arguments

X. Mr Kailash Vasdev, Senior Advocate *(contd.)*

23. In *Maneka Gandhi case*[17], it has been held that: (SCC p. 280, para 5)

> "*5.* … The expression 'personal liberty' in Article 21 is of the widest amplitude and [includes] variety of rights which go to constitute … liberty of man and some of them have been … given additional protection under Article 19."

It has further been held that: (SCC pp. 281-83, para 6)

> "*6.* We may at this stage consider the interrelation between Article 21 on the one hand and Articles 14 and 19 on the other. We have already pointed out that the view taken by the majority in *A.K. Gopalan case*[21] was that so long as a law of preventive detention satisfies the requirements of Article 22, it would be within the terms of Article 21 and it would not be required to meet the challenge of Article 19. This view proceeded on the assumption that 'certain articles in the constitution exclusively deal with specific matters' and where the requirements of an article dealing with the particular matter in question are satisfied and there is no infringement of the fundamental right guaranteed by that article, no recourse can be had to a fundamental right conferred by another article. This doctrine of exclusivity was seriously questioned in *Rustom Cavasjee Cooper case*[23] and it was overruled by a majority of the Full Court, only Ray, J., as he then was, dissenting. The majority Judges held that though a law of preventive detention may pass the test of Article 22, it has yet to satisfy the requirements of other fundamental rights such as Article 19. The ratio of the majority judgment in *Rustom Cavasjee Cooper case*[23] was explained in clear and categorical terms by Shelat, J., speaking on behalf of seven Judges of this Court in *Sambhu Nath Sarkar* v. *State of W.B.*[24] The learned Judge there said: (*Sambhu Nath case*[24], SCC p. 879, para 39)
>
> > '*39.* In *A.K. Gopalan case*[21] the majority court had held that Article 22 was a self-contained code and therefore a law of preventive detention did not have to satisfy the requirements of Articles 19, 14 and 21. The view of Fazal Ali, J., on the other hand, was that preventive detention was a direct breach of the right under Article 19(1)(*d*) and that a law providing for preventive detention had to be subject to such judicial review as is obtained under clause (5) of that Article. In *Rustom Cavasjee Cooper* v. *Union of India*[23], the aforesaid premise of the majority in *A.K. Gopalan case*[21] was disapproved and therefore it no longer holds the field. Though *Rustom Cavasjee Cooper case*[23] dealt with the interrelationship of Articles 19 and 31, the basic approach to construing the fundamental rights guaranteed in the different provisions of the Constitution

23 *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248

24 (1973) 1 SCC 856

Summary of Arguments

X. Mr Kailash Vasdev, Senior Advocate *(contd.)*

adopted in this case held the major premise of the majority in *A.K. Gopalan case*[21] to be incorrect.'

Subsequently, in *Haradhan Saha* v. *State of W.B.*[25] also, a Bench of five Judges of this Court, after referring to the decisions in *A.K. Gopalan case*[21] and *Rustom Cavasjee Cooper case*[23], agreed that the Maintenance of Internal Security Act, 1971, which is a law of preventive detention, has to be tested in regard to its reasonableness with reference to Article 19. That decision accepted and applied the ratio in *Rustom Cavasjee Cooper case*[23] and *Sambhu Nath Sarkar case*[24] and proceeded to consider the challenge of Article 19 to the constitutional validity of the Maintenance of Internal Security Act, 1971 and held that the Act did not violate any of the constitutional guarantees enshrined in Article 19. The same view was affirmed once again by a Bench of four Judges of this Court in *Khudiram Das* v. *State of W.B.*[26] Interestingly, even prior to these decisions, as pointed out by Dr Rajeev Dhavan, in his book, 'The Supreme Court of India' at p. 235, reference was made by this Court in *Master Lal Mohd. Sabir* v. *State of J&K*[27] to Article 19(2) to justify preventive detention. The law, must, therefore, now be taken to be well settled that Article 21 does not exclude Article 19 and that even if there is a law prescribing a procedure for depriving a person of 'personal liberty' and there is consequently no infringement of the fundamental right conferred by Article 21, such law, insofar as it abridges or takes away any fundamental right under Article 19 would have to meet the challenge of that article. This proposition can no longer be disputed after the decisions in *Rustom Cavasjee Cooper case*[23], *Shambhu Nath Sarkar case*[24] and *Haradhan Saha case*[25]. Now, if a law depriving a person of 'personal liberty' and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation, ex hypothesi it must also be liable to be tested with reference to Article 14. This was in fact not disputed by the learned Attorney General and indeed he could not do so in view of the clear and categorical statement made by Mukherjea, J., in *A.K. Gopalan case*[21] (AIR p. 103, para 196) that Article 21

'presupposes that the law is a valid and binding law under the provisions of the Constitution having regard to the competency of the legislature and the subject it relates to and does not infringe any of the fundamental rights which the Constitution provides for',

25 (1975) 3 SCC 198
26 (1975) 2 SCC 81
27 (1972) 4 SCC 558

Summary of Arguments

X. Mr Kailash Vasdev, Senior Advocate *(contd.)*

including Article 14. This Court also applied Article 14 in two of its earlier decisions, namely, *State of W.B.* v. *Anwar Ali Sarkar*[28] and *Kathi Raning Rawat* v. *State of Saurashtra*[29] where there was a special law providing for trial of certain offences by a speedier process which took away some of the safeguards available to an accused under the ordinary procedure in the Criminal Procedure Code. The special law in each of these two cases undoubtedly prescribed a procedure for trial of the specified offences and this procedure could not be condemned as inherently unfair or unjust and there was thus compliance with the requirement of Article 21, but even so, the validity of the special law was tested before the Supreme Court on the touchstone of Article 14 and in one case, namely, *Kathi Raning Rawat case*[29], the validity was upheld and in the other, namely, *Anwar Ali Sarkar case*[28], it was struck down. It was held in both these cases that the procedure established by the special law must not be violative of the equality clause. That procedure must answer the requirement of Article 14."

24. In *Kharak Singh* v. *State of U.P.*[19], it has been held that: (AIR p. 1306, para 31)

"the right of personal liberty in Article 21 [implies] a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures."

25. The expression "life" used in that Article 21 cannot be confined only to the taking away of life i.e. causing death. In *Munn* v. *Illinois*[30], Field, J., defined "life" in the following words: (L Ed p. 90)

"… something more … than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world."

"The expression '"liberty" is given a very wide meaning in America. It takes in all the freedoms. In *Bolling* v. *Sharpe*[31], the Supreme Court of America observed that the said expression was not confined to mere freedom from bodily restraint and that liberty under law extended to the full range of conduct which the individual was free to pursue. But this absolute right to liberty was regulated to protect other social interests by the State exercising its powers, such as police power, the power of

28 AIR 1952 SC 75
29 AIR 1952 SC 123
30 24 L Ed 77 : 94 US 113 (1876)
31 98 L Ed 884 : 347 US 497 (1954)

Summary of Arguments

X. Mr Kailash Vasdev, Senior Advocate *(contd.)*

eminent domain, the power of taxation, etc. The proper exercise of the power which is called the due process of law is controlled by the Supreme Court of America The concept of personal liberty has been succinctly explained by Dicey in his book on *Constitutional Law*, 9th Edn. The learned author describes the ambit of that right at pp. 207-08 thus: "The right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification."

26. Blackstone in his *Commentaries on the Laws of England*, Book 1, at p. 134, observed:

"Personal liberty" includes "the power to locomotion of changing situation, or removing one's person to whatsoever place one's inclination may direct, without imprisonment or restraint, unless by due course of law." In *A.K. Gopalan case*[21], it is described to mean liberty relating to or concerning the person or body of the individual; and personal liberty in this sense is the antithesis of physical restraint or coercion. The expression is wide enough to take in a night to be free from restrictions placed on his movements. The expression "coercion" in the modern age cannot be construed in a narrow sense. In an uncivilised society where there are no inhibitions, only physical restraints may detract from personal liberty, but as civilisation advances the psychological restraints are more, effective than physical ones. The scientific methods used to condition a man's mind are in a real sense physical restraints, for they engender physical fear channelling one's actions through anticipated and expected groves. So also the creation of conditions which necessarily engender inhibitions and fear complexes can be described as physical restraints. Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security.

… If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. If so understood, all

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X. Mr Kailash Vasdev, Senior Advocate *(contd.)*

the acts of surveillance under, Regulation 236 infringe the fundamental right of the petitioner under Article 21 of the Constitution.

… namely, whether the petitioner's fundamental right under Article 19(1)(*d*) is also infringed. What is the content of the said fundamental right? It is argued for the State that it means only that a person can move physically from one point to another without any restraint.' This argument ignores the adverb "freely" in clause (*d*). If that adverb is not in the clause, there may be some justification for this contention; but the adverb "freely" gives a larger content to the freedom mere movement unobstructed by physical restrictions cannot in itself be the object of a person's travel. A person travels ordinarily in quest of some objective. He goes to a place to enjoy, to do business, to meet friends, to have secret and intimate consultations with others and to do many other such things. If a man is shadowed, his movements are obviously constricted. He can move physically, but it can only be a movement of an automation. How could a movement under the scrutinising gaze of the policemen be described as a free movement? The whole country is his jail. The freedom of movement in clause (*d*) therefore must be a movement in a free country i.e. in a country where he can do whatever he likes, speak to whomsoever he wants, meet people of his own choice without any apprehension, subject of course to the law of social control. The petitioner under the shadow of surveillance is certainly deprived of this freedom. He can move physically, but he cannot do so freely, for all his activities are watched and noted. The shroud of surveillance cast upon him perforce engender inhibitions in him and he cannot act freely as he would like to do."

27. In *State of W.B.* v. *Committee for Protection of Democratic Rights*[5], the Constitution Bench has held: (SCC p. 575)

"Being the protectors of civil liberties of the citizens, the Supreme Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly. Therefore, a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law."

28. There is necessarily a public interest in the dissemination of news and information. Any guidelines to regulate a restrain on publication of news items would be restricted to the boundaries of India and would not in any manner restrict the electronic media, the foreign media or the media outside

Summary of Arguments

X. Mr Kailash Vasdev, Senior Advocate *(contd.)*

India from publishing the article/news items which could be transmitted over the airwaves and Internet through the myriad websites.

The presumption that the media reports affect trial and decisions of the Judges is misconceived and challenges the wisdom of the Judges.

29. It is the inner strength of Judges alone that can save the judiciary.

30. In *S.P. Gupta* v. *Union of India*[32] it has been held that: (SCC pp. 221 & 223-24, para 27)

> "*27.* … the principle of independence of the judiciary is not an abstract conception but it is a living faith which must derive its inspiration from the constitutional charter and its nourishment and sustenance from the constitutional values. It is necessary for every Judge to remember constantly and continually that our Constitution is not a non-aligned national charter. It is a document of social revolution which casts an obligation on every instrumentality including the judiciary, which is a separate but equal branch of the State, to transform the status quo ante into a new human order in which justice, social, economic and political will inform all institutions of national life and there will be equality of status and opportunity for all. … If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. … Judges should be of stern stuff and tough fibre, unbending before power, economic or political, and they must uphold the core principle of the rule of law which says, 'Be you ever so high, the law is above you'. This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy…."

31. The media can make a considerable contribution to these investigations by providing access to, and engaging the support of, the general public. In this sense, an effective media strategy is an integral part of an investigative strategy, rather than a presentational luxury. The media can take up the time and resources of the investigative team, particularly in the early days of an enquiry. It is possible to achieve a number of complementary goals: the main messages can be deployed through the media; the demands of the media can be effectively serviced; relevant appeals can be made to the public and other investigative objectives met; the interests of other groups can be served.

32 1981 Supp SCC 87

Summary of Arguments *(contd.)*

XI. Mr Sidharth Luthra, Senior Advocate

Instances of acts of publication/reportage which prejudice rights under Article 21 of the accused, victims and witnesses

1. There are three stages in a criminal case:

(*a*) Initiation of action (by a complaint in Court under Section 200 CrPC or by registration of an FIR under Section 154 CrPC) and investigation which is considered part of judicial proceedings under Explanation 2 to Section 193 IPC.

(*b*) Post cognizance (Section 190 CrPC), during trial and till conclusion by judgment and if convicted, order on sentence under Section 235 CrPC (Sessions Trial), Section 248 CrPC (Warrants case triable by the Magistrate), and Section 255 CrPC (Summons case triable by the Magistrate)

(*c*) Post conclusion of trial and till conclusion of appellate proceedings

2. Prejudice at all three stages can be caused and has been caused as stated below:

(*a*) Prejudging the issue in the mind of the Judge, witnesses, the victim or his family.

Illustration: Selective and sensational press releases of excerpts of material prior to or at the day of hearing of the matter.

(*b*) Creating adverse public opinion against the accused and creating a hostile environment for holding the trial.

Illustration: Release of excerpts of incriminating material prior to verification/investigation of its authenticity such as radio tapes in amongst others pioneer, TV today open and outlook. Open recorded that the contents were unverified.

(*c*) Creating adverse public opinion so that witnesses cannot depose freely and fairly.

(*d*) Irresponsible criticism of the judgment post-conviction.

Illustration: Open letter written by a lawyer attributing motives to the judgment in *Shivani Bhatnagar murder case*[1]. Contempt proceedings have been instituted by the Delhi High Court.

(*e*) Personal attacks on the Judge which may deter him from performing his duty without fear or favour.

(*f*) Release of name of victims/witnesses pending investigation and remarks on their conduct.

1 *Ravi Kant Sharma* v. *State*, (2011) 183 DLT 248

Summary of Arguments

XI. Mr Sidharth Luthra, Senior Advocate *(contd.)*

Illustration: Filming of residence and disclosure of identity of a victim of an organised crime contract killing whose identity had been suppressed on security concerns till then.

(*g*) Interviewing the victims/witnesses and revealing their identity.

Illustration: *Delhi Bomb Blast case* (2008)

A 14-year-old boy (witness) was presented before the media by the police shortly after the blast.

(*h*) Interviewing the relatives/colleagues/friends of the accused.

Illustration: In *M.P. Lohia* v. *State of W.B.*[2], an article appearing in a magazine regarding a criminal investigation which was based on interview of the family of the deceased, giving their version of the tragedy was deprecated by this Hon'ble Court and it was held that the same lead to interference with the administration of justice.

(*i*) Influencing the witnesses/victims by openly debating the allegation with them.

Illustration: *Arushi Talwar Murder case*

Surat Singh v. *Union of India*[3] and others pending before this Hon'ble Court, order dated 9-8-2010.

(*j*) Publication of comments about nature and gravity of allegations without verifying the same leading to adverse consequences.

Illustration: *Delhi School Teacher case*

Court on its Own Motion v. *State*[4]

A sting operation by media showing a school teacher purportedly forcing girl student into prostitution. Shocked by the said incident and consequent to public outcry, Director of Education suspended the teacher and dismissed her from service. In subsequent news item published in HT it was stated a girl shown as student who was allegedly been forced into prostitution by teacher was neither school teacher nor prostitute but budding journalist eager to make name in media world. Further, a charge-sheet was filed where no concrete evidence was found against the teacher. Guidelines were given.

(*k*) Holding debates and talk shows with lawyers appearing in the matter, both for the prosecution and defence, both at the pre-trial stage and during trial.

2 (2005) 2 SCC 686

3 WP (C) No. 316 of 2008, order dated 9-8-2010 (SC)

4 (2008) 146 DLT 429

Summary of Arguments

XI. Mr Sidharth Luthra, Senior Advocate *(contd.)*

Illustration: *2G Scam case*[5] (2011)

(*l*) Giving media coverage to a matter at the investigation stage may pressurise the investigating agency to arrest an accused where no arrest is otherwise required or warranted.

(*m*) Attempts to carry out sting operations on the victims/witnesses.

Illustration: *NDTV sting operation in the BMW hit-and-run case*

R.K. Anand v. *Delhi High Court*[6]

(*n*) Publishing or showing material against the conduct of the accused; for example adverse remarks about the accused who pleads silence or absconds fearing arrest. The statements given by the investigation officer and prosecution lawyers to the media.

Illustration: In *Rajendran Chingaravelu* v. *CIT*[7], this Hon'ble Court held that: (SCC p. 465, para 21)

> "*21.* … There is [also] a growing tendency among investigating officers (either police or other departments) to inform the media, even before the completion of investigation, that they have caught a criminal or an offender. … Even where a suspect surrenders or a person required for questioning voluntarily appears, it is not uncommon for the investigating officers to represent to the media that the person was arrested with much effort after considerable investigation or a chase. Similarly, when someone voluntarily declares the money he is carrying, media is informed that huge cash which was not declared was discovered by their vigilant investigations and thorough checking. Premature disclosures or 'leakage' to the media in a pending investigation will not only jeopardise and impede further investigation, but many a time, allow the real culprit to escape from law."

(*o*) Release of investigation materials or pleadings in the public domain without verification.

Illustration: Release of the CAG Report and release of 2G judgment on cancellation of licences before it was pronounced.

(*p*) Salacious remarks and imputation about the accused/witness/ victim or investigator participating in a criminal trial.

Illustration: *Delhi School Teacher case*[4]

(*q*) Remarks pre-judging what the investigation would conclude.

Illustration: *2G Scam case*[5] (2011)

(*r*) Post cognizance assumption and hypothetical conclusion.

5 *Centre for Public Interest Litigation* v. *Union of India*, (2012) 3 SCC 1
6 (2009) 8 SCC 106
7 (2010) 1 SCC 457

Summary of Arguments

XI. Mr Sidharth Luthra, Senior Advocate *(contd.)*

(*s*) Parallel and continuous commentary about the conclusion of a case including orders on cognizance, issue of process, charge, final judgment or order on sentence and also bail before the orders are passed.

Instances where publication by the media have been beneficial

For initiation of action/investigation

Cash for Questions matter

(*Raja Ram Pal* v. *Hon'ble Speaker, Lok Sabha*[8]), *Aniruddha Bahal* v. *State*[9] (SLP dismissed on 17-10-2011)

3. A private channel had telecast a programme on 12-12-2005 based on sting operation conducted by it depicting 10 MPs of the Lok Sabha and Rajya Sabha extracting money as consideration for raising certain question in the House. This led to extensive publicity in the media. The Presiding Officers of each House of Parliament instituted inquiries through separate committees. In another private channel telecast a problem on 19-12-2005 in Rajya Sabha in relation to implementation of the Member of Parliament Local Area Development Scheme. This incident was also referred to this Committee.

4. The report of the inquiry concluded that the evidence against the ten members of Lok Sabha was incriminating; the plea that the video footages were doctored/morphed/edited had no merit, there was no valid reason for the Committee to doubt in authenticity of the video footage; the allegations of acceptance of money by the said ten members had been established which acts of acceptance had a direct connection with the work of Parliament and constituted such conduct on their part as was unbecoming of Members of Parliament and also unethical and calling for strict action.

Tehelka defence deals scam[10]

5. In a sting operation lasting months, exposure of defence deals were done.

Navy War Room Leak[11] (2007)

6. Sensitive, classified information was being smuggled out of the war room and transferred to civilians linked to the global arms trade that was exposed by the media.

Scorpene deal (2006)

7. Existence of middlemen and kickbacks in the Scorpene submarine deal was exposed by the media.

8 (2007) 3 SCC 184

9 (2010) 172 DLT 268

10 **Ed.**: *See Bangaru Laxman* v. *State*, (2012) 1 SCC 500; *Jayalakshmi Jaitly* v. *Union of India*, (2002) 64 DRJ 1; *Tarun J. Tejpal* v. *Jayalakshmi Jaitly*, ILR (2008) 1 Del 35

11 *CBI* v. *Abhishek Verma*, (2009) 6 SCC 300

Summary of Arguments

XI. Mr Sidharth Luthra, Senior Advocate *(contd.)*

National Rural Health Mission (NRHM) scam

8. Uttar Pradesh NRHM Scam is a corruption scandal in the Indian State of Uttar Pradesh, in which top politicians and bureaucrats are alleged to have siphoned off a massive sum (estimated at 10,000 crore) from the National Rural Health Mission, a central government program meant to improve health care delivery in rural areas. At least five people are said to have been murdered in an attempt to cover up large-scale irregularities. In November 2011, two Ministers of the government forced to resign following media outcry after the killing of the two Chief Medical Officers remain unsolved.

During pending proceedings

Radhika Girotra case (1990-2009)

9. The case related to molestation of 14-year-old Ruchika Girotra in 1990 by the Inspector General of Police Shambhu Pratap Singh Rathore (S.P.S. Rathore) in Haryana, India. After she made a complaint, the victim, her family, and her friends were systematically harassed by the police leading to her eventual suicide. On 22-12-2009, after 19 years, 40 adjournments, and more than 400 hearings, the court finally pronounced Rathore guilty under Section 354 IPC (molestation) and sentenced him to six months imprisonment and a fine. The media extensively covered the case creating public opinion against the delay caused in delivering the judgment

NDTV Sting Operation in the BMW hit-and-run case

R.K. Anand v. *Delhi High Court*[6]

10. This Hon'ble Court held that the sting telecast by NDTV was indeed in larger public interest and it served an important public cause.

Priyadarshini Mattoo case[12] (1996-2010)

11. Priyadarshini Mattoo was a 25-year-old law student who was found raped and murdered at her house in New Delhi on 23-1-1996. On 17-10-2006, the Delhi High Court found Santosh Kumar Singh guilty on both counts of rape and murder and on October 30 of the same year sentenced him to death. On 6-10-2010, the Hon'ble Supreme Court commuted the death sentence to life imprisonment. Santosh Kumar Singh, the son of a Police Inspector General, had earlier been acquitted by a trial court in 1999, and the High Court decision was widely perceived in India as a landmark reversal and a measure of the force of media pressure in a democratic setup. This decision went in favour because the facts were not presented correctly in the lower court. The intense media spotlight also led to an accelerated trial, unprecedented in the tangled Indian court system.

12 *Santosh Kumar Singh* v. *State*, (2010) 9 SCC 747

Summary of Arguments

XI. Mr Sidharth Luthra, Senior Advocate *(contd.)*

Zahira Sheikh — Tehelka Sting operation[13] (2005)

12. Madhu Srivastava, former BJP legislator was caught on the sting confessing to have bribed Zahira Sheikh a key witness in the Best Bakery case to retract her testimony. While Zahira was later convicted for perjury there was no criminal action against Srivastava.

XII. Ms Madhavi Divan, Advocate†

I. Fair Trial under Article 21 denotes an "Open Trial"

> "… 'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.' 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the Judge himself while trying undertrial."[1]

1. Openness and publicity are inherent and integral to the right to a fair trial under Article 21. Every undertrial is entitled to a trial which is *open*, speedy and fair. There is no inconsistency between an open, public trial and a fair trial as openness and publicity themselves ensure fairness of the trial. Under the open justice rule, the primary beneficiary of openness and publicity is the person being tried — it is to ensure that he gets justice. The most fundamental principle of justice is that not only must it be done, it must be seen to be done. Public access to trials has been held to serve an important "sunshine" function. In the celebrated constitutional case of *Scott* v. *Scott*[2], Lord Halsbury declared that "Every court in the land is open to every subject of the King." John Lilburne, also known as Freeborn John, the English political Leveller who coined the term "freeborn rights"[3], stated at his treason trial in 1649:

> "The Court must uphold the first fundamental liberty of an Englishman, that all courts of justice always ought to be free and open for all sorts of peaceable people to see, behold and hear and have free access unto; and no man whatsoever ought to be tried in holes or corners, or in any place where the gates are shut and barred."[4]

13 *Zahira Habibullah Sheikh (5)* v. *State of Gujarat*, (2006) 3 SCC 374

† Author of *Facets of Media Law*, 1st Edn. 2006 (Eastern Book Company, Lucknow)

1 Jeremy Bentham quoted in *Scott* v. *Scott*, 1913 AC 417, p. 477 : (1911-13) All ER Rep 1 (HL), p. 30; quoted with approval in *Naresh Shridhar Mirajkar* v. *State of Maharashtra*, AIR 1967 SC 1 and *Samarias Trading Co. (P) Ltd.* v. *S. Samuel*, (1984) 4 SCC 666. Also see *Vineet Narain* v. *Union of India*, (1998) 1 SCC 226 : 1998 SCC (Cri) 307.

2 1913 AC 417

3 Freeborn rights are rights with which every human being is born.

4 Cromwell's judges, confident that the jury would obey their orders to convict Lilburne, ruled that the court's doors must remain open at all times "that all the world may know with what candour and justice the court does proceed against you." The jury, more impressed by Lilburne than the prosecution, acquitted Lilburne, inviting cheers from the spectators. See *Robertson and Nichole on Media Law*, 5th Edn. Ch. 8.

Summary of Arguments

XII. Ms Madhavi Divan, Advocate *(contd.)*

2. The importance of the concept of the open justice system has been known for several centuries. In *Blackstone's Commentaries on the Laws of England*[5], it was stated:

> "This open examination of witnesses *viva voce,* in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk…"

3. The same principle has been recognised by the United States Supreme Court in *Gannette Co. Inc.* v. *DePasquale*[6]:

> "As early as 1685, Sir John Hawles commented that open proceedings were necessary so "that suits may be discovered in civil *as well as* criminal matters."

4. In *Pennekamp* v. *Florida*[7], Frankfurter, J. said:

> "Of course trials must be public and the public have a deep interest in trials."

5. In *Craig* v. *Harney*[8], Douglas J. said:

> "A trial is a public event. What transpires in the courtroom is public property."

6. In *Edmonton Journal* v. *Alberta (Attorney General)*[9] the Supreme Court of Canada has endorsed Wigmore's reasoning as to the evidentiary consequences of the requirement for hearing in public:

> "… 'Its operation tending to *improve the quality of testimony* is twofold. Subjectively, it produces in the witness' mind a disinclination to falsify; first, by stimulating the instinctive responsibility to public opinion; symbolised in the audience, and ready to scorn a demonstrated liar; and next, by inducing the fear of exposure of subsequent falsities through disclosure by informed persons who may chance to be present or to hear of the testimony from others present. Objectively, it secures the presence of those who by possibility may be able to furnish testimony in chief or to contradict falsifiers and yet may not have been known beforehand to the parties to possess any information.
>
> The operation of this latter reason was not uncommonly exemplified in earlier days in England, where *attendance at court* was a common mode of passing the time for all classes of persons.… The same advantage is gained, and much relied on, in more modern times, when the publicity given by newspaper reports of trials is often the means of securing useful testimony.'[10]" (emphasis in original)

5 (1768) Vol III, c. 23, p. 373
6 61 L Ed 2d 608 : 443 US 368 (1979)
7 90 L Ed 1295 : 328 US 331 (1946)
8 91 L Ed 1546 : 331 US 367 (1947)
9 (1989) 2 SCR 1326 (Can)
10 *Wigmore on Evidence*, Vol. 6, para 1834

Summary of Arguments

XII. Ms Madhavi Divan, Advocate *(contd.)*

7. In the UK, following the Human Rights Act of 1998, the House of Lords have reaffirmed the importance of the open justice principle. In *S (A child), In re*[11], Lord Steyn said:

> "*30.* … A criminal trial is a public event. The principle of open justice puts, as has often been said, the Judge and all who participate in the trial under intense scrutiny. The glare of *contemporaneous publicity* ensures that trials are properly conducted. It is a valuable check on the criminal process. Moreover, the public interest may be as much involved in the circumstances of a remarkable acquittal as in a surprising conviction. Informed public debate is necessary about all such matters. *Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice.* It promotes the value of the rule of law."[12] (emphasis supplied)

8. The House of Lords repeatedly emphasised that the freedom of expression exercised by the media applies "with equal force to the freedom of the press to report criminal trials in progress and after verdict".[13]

9. Although Article 6 of the European Convention of Human Rights which provides the right to a fair trial recognises that in certain situations "the press and public may be excluded from all or part of the trial"[14], the European Court of Human Rights has reiterated the importance of public hearings:

> "The court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in Article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society…."[15]

11 (2005) 1 AC 593 : (2004) 3 WLR 1129 (HL)

12 *S (A Child), In re*, pp. 607-08, para 30

13 *S (A Child), In re*, p. 607, para 28

14 Article 6 of the ECHR reads:

> "**6.** ***Right to a fair trial***.—(1) In the determination of his civil rights and [the] obligations or of any criminal charge against him everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and [the] public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

15 *Diennet* v. *France*, (1995) 21 EHRR 554, para 33

Summary of Arguments

XII. Ms Madhavi Divan, Advocate *(contd.)*

10. In India, the Code of Criminal Procedure recognises the open justice rule. Section 327 reads:

> "**327. *Court to be open*.**—(1) The place in which any criminal court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them:
>
> Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the court.
>
> (2) Notwithstanding anything contained in sub-section (1) the inquiry into and trial of rape or an offence under Section 376, Section 376-A, Section 376-B, Section 376-C or Section 376-D of the Indian Penal Code (45 of 1860) shall be conducted *in camera*:
>
> Provided that the presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the court.
>
> Provided further that *in camera* trial shall be conducted as far as practicable by a woman Judge or Magistrate.
>
> (3) Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the court:"

11. The Supreme Court of India has recognised and endorsed the open justice rule in several rulings, including *Naresh Shridhar Mirajkar* v. *State of Maharashtra*[16], *Kehar Singh* v. *State (Delhi Admn.)*[17] and *Mohd. Shahabuddin* v. *State of Bihar*[18]. In particular, this Hon'ble Court has recognised that the purpose of the open justice rule is to ensure that the accused is fairly tried and not unjustly condemned:

> "*195.* In open dispensation of justice, the people may see that the State is not misusing the State machinery like the police, the prosecutors and other public servants. The people may see that the accused is fairly dealt with and not unjustly condemned."[19]

12. In *Mohd. Shahabuddin* v. *State of Bihar*[18], this Hon'ble Court quoted with approval, the important "sunshine" function of public access to trials:

> "*124.* Beth Hornbuckle Fleming in his article 'First Amendment Right of Access to Pre-trial Proceedings in Criminal Cases'* neatly recounts the benefits identified by the Supreme Court of the United States in some of the leading decisions. He categorises the benefits as the 'fairness' and

16 AIR 1967 SC 1

17 (1988) 3 SCC 609 : 1988 SCC (Cri) 711

18 (2010) 4 SCC 653 : (2010) 2 SCC (Cri) 904

19 *Kehar Singh* v. *State (Delhi Admn.)*, (1988) 3 SCC 609, p. 705, para 195

* **Ed.**: 32 Emory LJ 619 (1983)

Summary of Arguments

XII. Ms Madhavi Divan, Advocate *(contd.)*

'testimonial improvement' effects on the trial itself, and the 'educative' and 'sunshine' effects beyond the trial. He then proceeds to state:

> 'Public access to a criminal trial helps to ensure the fairness of the proceeding. The presence of public and press encourages all participants to perform their duties conscientiously and discourages misconduct and abuse of power by Judges, prosecutors and other participants. Decisions based on partiality and bias are discouraged, thus protecting the integrity of the trial process. Public access helps to ensure that procedural rights are respected and that justice is applied equally.
>
> Closely related to the fairness function is the role of public access in assuring accurate fact finding through the improvement of witness testimony. This occurs in three ways. First, witnesses are discouraged from committing perjury by the presence of members of the public who may be aware of the truth. Second, witnesses like other participants, may be encouraged to perform more conscientiously by the presence of the public, thus improving the overall quality of testimony. Third, unknown witnesses may be inducted to come forward and testify if they learn of the proceedings through publicity.
>
> Public access to trials also plays a significant role in educating the public about the criminal justice process. Public awareness of the functioning of judicial proceedings is essential to informed citizen debate and decision making about issues with significant effects beyond the outcome of the particular proceeding. Public debate about controversial topics, such as, exclusionary evidentiary rules, is enhanced by public observation of the effect of such rules on actual trials. Attendance at criminal trials is a key means by which the public can learn about the activities of police, prosecutors, attorneys and other public servants, and thus make educated decisions about how to remedy abuses within the criminal justice system.
>
> Finally, public access to trials serves an important "sunshine" function. Closed proceedings, especially when they are the only judicial proceedings in a particular case or when they determine the outcome of subsequent proceedings, may foster distrust of the judicial system. Open proceedings enhance the appearance of justice and thus help to maintain public confidence in the judicial system.' "[20]

II. Societal and Public purpose of open justice

13. Apart from ensuring fairness to the accused, publicity of court proceedings serves another important public purpose. It enhances public

20 *Mohd. Shahabuddin*, (2010) 4 SCC 653, pp. 702-03, para 124

Summary of Arguments

XII. Ms Madhavi Divan, Advocate *(contd.)*

knowledge, and appreciation of the working of the law and administration. Wigmore on Evidence states:

> "… 'The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy.'[21]"

14. It is not only in the public interest to see proper conduct in the administration of justice, but more importantly, there is a therapeutic value to the public seeing criminal laws in operation purging society of the outrage experienced with the commission of crimes.[22]

15. In *Richmond Newspapers Inc.* v. *Virginia*[23], the U.S. Supreme Court observed as follows:

> "When a shocking crime occurs, a community reaction of outrage and public protest often follows. *See* H. Weihofen, *The Urge to Punish* 130-131 (1956). Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help," as indeed they did regularly in the activities of vigilante "committees" on our frontiers. "The accusation and conviction or acquittal, as much perhaps as the execution of punishment, operat[e] to restore the imbalance which was created by the offense or public charge, to reaffirm the temporarily lost feeling of security and, perhaps, to satisfy that latent 'urge to punish.' Mueller, "Problems Posed by Publicity to Crime and Criminal Proceedings[24],
>
> Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done—or—even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner." US at p. 567. It is not enough to say that results alone will satiate the natural community desire for "satisfaction". A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been

21 Quoted with approval in *Edmonton Journal* v. *Alberta* (Attorney General), (1989) 2 SCR 1326 (Can)

22 *Kartar Singh* v. *State of Punjab*, (1994) 3 SCC 569, para 269, p. 684 : 1994 SCC (Cri) 899

23 65 L Ed 2d 973 : 448 US 555 (1980)

24 100 U Pa L Rev 1, 6 (1961)

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XII. Ms Madhavi Divan, Advocate *(contd.)*

corrupted. To work effectively, it is important that society's criminal process "satisfy the appearance of justice," *Offutt* v. *United States*[25], and the appearance of justice can best be provided by allowing people to observe it."

16. The publicity of court cases enables the ordinary citizens to be informed about matters of public interest. Openness is a safeguard against judicial error and misconduct. It is also an effective deterrent against perjury.

17. In Canada, the Supreme Court has emphasised the importance of the public scrutiny of the court. In *Attorney General of Nova Scotia* v. *MacIntyre*[26], it was observed:

> "… Many times it has been urged that the 'privacy' of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule, the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings. The following comments of Laurence J. in *R.* v. *Wright*[27], are apposite and were cited with approval by Duff, J. in *Gazette Printing Co.* v. *Shallow*[28]:
>
> > '… Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance [to the public] that the proceedings of courts of justice should be universally known. *The general advantage to the country in having these proceedings made public, more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings*.' " (emphasis supplied)

18. In *Edmonton Journal* v. *Alberta (Attorney General)*[9], the Canadian Supreme Court thus summarised the public purpose of the open justice rule:

> "In summary, the public interest in open trials and in the ability of the press to provide complete reports of what takes place in the courtroom is rooted in the need (*1*) to maintain an effective evidentiary process; (*2*) to ensure a judiciary and juries that behave fairly and that are sensitive to the values espoused by the society; (*3*) to promote a shared sense that our courts operate with integrity and dispense justice; and (*4*) to provide an ongoing opportunity for the community to learn how the justice system operates and how the law being applied daily in the courts affects them."

25 99 L Ed 11 : 348 US 11 (1954)
26 (1982) 1 SCR 175 (Can), p. 185
27 8 TR 293
28 (1909) 41 SCR 339 (Can), p. 348

Summary of Arguments

XII. Ms Madhavi Divan, Advocate *(contd.)*

19. In India too, this overriding public interest in maintaining public confidence in the administration of justice, over and above the interest of the individual has been recognised in *Zahira Habibullah H. Sheikh* v. *State of Gujarat*[29].

> "*35.* This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crimes being public wrongs in breach and violation of public rights and duties, which affect the whole community as a community and are harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interests of society are not to be treated completely with disdain and as persona non grata. Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice—often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the Judges as impartial and independent adjudicators."[30]

III. Media in India has no higher constitutional status than the ordinary citizen

20. Unlike the First Amendment to the American Constitution, the Indian Constitution does not make a specific or separate provision for the freedom of the press.

21. In India, the media derives its right from the right to freedom of speech and expression available to the citizen. Thus, the media has the same rights, no more and no less than any individual to write, publish, circulate or broadcast. In a case that arose in pre-independent India, the Privy Council held: (IA p. 169)

> "… The freedom of the journalist is an ordinary part of the freedom of the subject and to whatever lengths the subject in general may go, so

29 (2004) 4 SCC 158 : 2004 SCC (Cri) 999

30 *Zahira Habibullah*, p. 184, para 35

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XII. Ms Madhavi Divan, Advocate *(contd.)*

also may the journalist, but, apart from the statute law, his privilege is no other and no higher. … No privilege attaches to his position."[31]

22. The framework for analysing media rights remains much the same in post-independence India. In *M.S.M. Sharma* v. *Krishna Sinha*[32], the Supreme Court observed:

"*13.* … A non-citizen running a newspaper is not entitled to the fundamental right to freedom of speech and expression and, therefore, cannot claim, as his fundamental right, the benefit of the liberty of the Press. Further, being only a right flowing from the freedom of speech and expression, the liberty of the Press in India stands on no higher footing than the freedom of speech and expression of a citizen and that no privilege attaches to the Press as such, that is to say, as distinct from the freedom of the citizen. In short, as regards citizens running a newspaper the position under our Constitution is the same as it was when the Judicial Committee decided *Arnold* v. *King Emperor*[31] and as regards non-citizens the position may even be worse."[33]

23. In other words, the media enjoys no special immunity or elevated status compared to the citizen and is subject to the general laws of the land, including those relating to taxation. However, in post-independent India both the citizen and citizen-owned media enjoy a constitutional guarantee under Article 19(1)(*a*) that was hitherto absent.

IV. The media as a 'trustee' or 'surrogate' for the public

24. Although in theory, the press enjoys no status which is higher than that of the ordinary citizen, in practice, it does. Ordinary citizens are not allowed free access in the way the press does, as for instance, they do not enjoy the privilege of sitting in the press benches as journalists do. It is necessary to appreciate why the press enjoys these special privileges: (AC p. 183)

"… It is not because of any special wisdom, interest or status enjoyed by the proprietors, editors or journalists. It is because the media are the eyes and ears of the general public. They act on behalf of the general public. Their right to know and their right to publish is neither more nor less than that of the general public. Indeed it is that of the general public for whom they are trustees."[34]

25. In other words, the special privileges if any enjoyed by the media in having access to and being able to report on on-going court proceedings is on account of their position as trustees of news and information for the general public. This is quite apart from the fundamental right to speech and

31 *Arnold* v. *King Emperor*, (1913-14) 41 IA 149 : AIR 1914 PC 116

32 AIR 1959 SC 395

33 *M.S.M. Sharma*, AIR p. 402, para 13

34 Lord Donaldson, the *Attorney General* v. *Guardian Newspapers Ltd.*, (No.2), (1990) 1 AC 109 : (1988) 3 All ER 545 (HL), p. 600

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expression which the press/media enjoys under Article 19(1)(*a*) as does any other citizen.

26. In *Richmond Newspapers Inc.* v. *Virginia*[35], the Supreme Court of the United States, while emphasising the importance of public trials described the media as "surrogates for the public". Chief Justice Burger observed:

> "Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard…."

27. In *Reynolds* v. *Times Newspapers Ltd.*[36], Lord Nicholls of Birkenhead described the position thus:

> "… It is through the mass media that most people today obtain their information on political matters. Without freedom of expression by the media, freedom of expression would be a hollow concept. The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment."

28. Since courtrooms have limited capacity, there may be occasion where not every person who wishes to attend can be accommodated. In such situations, reasonable restrictions on general access are traditionally imposed including preferential seating for media representatives.[37]

29. Long before the recognition of the statutory right to information under the Right to Information Act, 2005, this Hon'ble Court had recognised and reiterated the constitutional right to information which flows from Article 19(1)(*a*) itself.[38] The right to be informed about the process of justice delivery is part of the right to information of the citizen under Article 19(1)(*a*).

30. In a case before the Canadian Supreme Court, *Ford* v. *Quebec (Attorney General)*,[39] it was held that freedom of expression "protects listeners as well as speakers". In other words, members of the public have a

35 65 L Ed 2d 973 : 448 US 555 (1980), pp. 572-73

36 (2001) 2 AC 127, p. 200 : (1999) 3 WLR 1010 (HL)

37 *Gannet Co. Inc.* v. *DePasquale*, 443 US 368, at pp. 397-98

38 *Romesh Thappar* v. *State of Madras*, AIR 1950 SC 124, para 11, pp. 128-129; *Indian Express Newspapers* v. *Union of India*, (1985) 1 SCC 641, para 68 see p. 686; *State of U.P.* v. *Raj Narain*, (1975) 4 SCC 428, p. 453, para 74; *S.P. Gupta* v. *Union of India*, 1981 Supp SCC 87, pp. 273-75, paras 64, 65, 67; *Reliance Petrochemicals Ltd.* v. *Indian Express Newspapers Bombay (P) Ltd.*, (1988) 4 SCC 592, p. 613, para 34; *Tata Press Ltd.* v. *MTNL*, (1995) 5 SCC 139; *Research Foundation for Science* v. *Union of India*, (2005) 10 SCC 510; *Dinesh Trivedi* v. *Union of India*, (1997) 4 SCC 306; *Ministry of Information & Broadcasting* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161; *Union of India* v. *Assn. for Democratic Reforms*, (2002) 5 SCC 294; *PUCL* v. *Union of India*, (2003) 4 SCC 399; *Onkar Lal Bajaj* v. *Union of India*, (2003) 2 SCC 673

39 (1988) 2 SCR 712 (Can)

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right to information pertaining to all public institutions which includes the courts. The ordinary members of the public are not in a position to access information about the functioning of the court nor are they in a position to attend court trials. The information therefore about court proceedings can only be communicated to the public from newspapers or other media. In *Edmonton Journal* v. *Alberta (Attorney General)*[9], the Canadian Supreme Court observed:

> "[A]s listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role. It is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples, nor mothers or fathers house-bound with young children, would find it possible to attend court. Those who cannot attend rely in large measure upon the press to inform them about court proceedings—the nature of evidence that was called, the arguments presented, the comments made by the trial Judge—in order to know not only what rights they may have, but how their problems might be dealt with in court. It is only through the press that most individuals can really learn of what is transpiring in the court. They as 'listeners' or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media."

V. Exceptions to the publicity rule

31. Publicity of proceedings is not an absolute rule. A number of statutes restrict, empower or require the court to restrict admission to certain court proceedings and the publication of such proceedings. For instance in India we have the following statutory restrictions:

> (*i*) Section 228-A of the Indian Penal Code, 1860 inserted by the Criminal law Amendment Act, 1983 prohibits the publication of the name of a victim of a sexual offence and of publication of proceedings relating to such an offence.[40] The publication of the name of a victim would be immune from liability where there is a written order of the officer in charge of the police station or investigating officer acting in good faith for the purpose of the investigation, where the publication is by the victim herself or with her written authority, or where she is dead, is a minor or of unsound mind, by her next of kin. The printing or publication of such proceedings may be allowed with the previous permission of the court. The printing or publication of a High Court or Supreme Court judgment would not amount to an offence under this provision. The breach of this provision is punishable with up to two years imprisonment and a fine. The wide language of Section 228-A would not

40 Penal Code, 1860, Section 228-A(2)

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prohibit a bona fide comment on a court judgment convicting or acquitting a person of the specified offence. A fair comment on a case that has been heard and decided by a court of law is protected from liability for contempt of court[41] and from defamation[42]. There is no reason to think that Section 228-A prevents such fair comment.

(*ii*) The Indian Divorce Act, 1869 which pertains to matrimonial cases between persons professing the Christian faith, provides that the whole or any part of the proceedings under the Act may be heard behind closed doors in certain circumstances.[43]

(*iii*) Section 33 of the Special Marriage Act, 1954 provides that proceedings under the Act shall be conducted in camera, if either party desires or if the district court so thinks fit to direct.

(*iv*) Section 43 of the Parsi Marriage and Divorce Act, 1936 provides that a suit preferred under the Act shall be tried within closed doors should either of the parties so desire.

(*v*) Section 22 of the Hindu Marriage Act, 1955 provides that a proceeding under the Act shall be conducted in camera if either party so desires or if the court thinks fit, and prohibits the printing or publication of any matter relating to such a proceedings without the previous permission of the court.

(*vi*) Section 14 of the Official Secrets Act, 1923 empowers the court to exclude the public from proceedings under the Act by an order made on the ground that the publication of any evidence given or any statement to be made in the course of the proceedings would be prejudicial to the safety of the State.

(*vii*) Section 4 of the Contempt of Courts Act, 1971 which permits the publication of reports of judicial proceedings is subject to Section 7 of the same Act the effect of which is to prohibit a publication of a proceeding sitting in chambers or in camera, where it is contrary to any enactment, prohibited on grounds of public policy or in 'exercise of powers vested in it' or of information relating to proceedings held in chambers or in camera for reasons connected with the security of the State or public order or relating to secret process, discovery or invention which is an issue in the proceedings.

(*viii*) Section 30 of the erstwhile Prevention of Terrorism Act, 2002 (POTA) permitted the holding of proceedings in camera where the life of the witness was in danger.[44]

32. Even apart from these statutory exceptions, publicity of proceedings can be restricted 'in the interests of justice'. In *Naresh Shridhar Mirajkar* v. *State of Maharashtra*[16], the Supreme Court held that the court has the

41 Contempt of Courts Act, 1971, Section 5

42 Penal Code, 1860, Section 499, Fifth Exception

43 Divorce Act, 1869, Section 53

44 Prevention of Terrorism Act, 2002 has been repealed with effect from 21-9-2004

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inherent power under Section 151 of the Civil Procedure Code to order a trial to be held in camera, but that this power must be exercised with great caution and only where the court is satisfied beyond doubt that the ends of justice would be defeated if the case were to be tried in open court.

> "*21.* … While emphasising the importance of public trial, we cannot overlook the fact that the primary function of the Judiciary is to do justice between the parties who bring their causes before it. If a Judge trying a cause is satisfied that the very purpose of finding truth in the case would be retarded, or even defeated if witnesses are required to give evidence subject to public gaze is it or is it not open to him in exercise of his inherent power to hold the trial in camera either partly or fully? If the primary function of the court is to do justice in causes brought before it, then on principle, it is difficult to accede to the proposition that there can be no exception to the rule that all causes must be tried in open court. If the principle that all trials before courts must be held in public was treated as inflexible and universal, and it is held that it admits of no exceptions whatever, cases may arise where by following the principle, justice itself may be defeated. 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 emphasise that this inherent power must be exercised with great caution and it is only if the court is satisfied beyond a 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. In this connection it is essential to remember that public trial of causes is a means, though important and valuable, to ensure fair administration of justice; it is a means, not an end. It is the fair administration of justice which is the end of judicial process and so, if ever a real conflict arises between fair administration of justice itself on the one hand, and public trial on the other, inevitably, public trial may have to be regulated or controlled in the interest of administration of justice. That, in our opinion, is the rational basis on which the conflict of this kind must be harmoniously resolved."[45]

33. While the principle laid down cannot be faulted, whether it ought to have been applied in the facts of that case is questionable. The matter arose out of a sensational libel suit in the Bombay High Court. One of the witnesses for the defence who had made an affidavit of facts in different

45 *Naresh Shridhar*, AIR pp. 8-9, para 21

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proceedings, considered relevant for the libel suit, but did not adhere to them in these proceedings, made a request that his evidence be withheld from publication on the ground that publication of reports of his earlier deposition had caused loss to his business. The presiding Judge orally ordered that the witness's deposition should not be reported in newspapers. The petitioners challenged the order on the ground, *inter alia*, that their rights under Article 19(1)(*a*) had been infringed and that the gag order could not be justified on any ground under Article 19(2). The petitioners contended that truthful reports of proceedings could not be banned. The Supreme Court, by a majority of 8:1 dismissed the petition, applying the reasoning set out above. Hidayatullah, J. the lone dissenting voice, thought it an astounding proposition that a witness could seek protection because his truthful statement would harm his own business. The Judge held that Section 151 of the Civil Procedure Code on which reliance was placed, in spite of its very generous and wide language could not be used to confer a discretion on the court to turn its proceedings which should be open and public into a private affair.[46]

34. The majority went on to hold that such a judicial decision in the interests of the administration of justice cannot be held to be contrary to the fundamental right under Article 19(1)(*a*). Applying the direct effect test, the court came to the conclusion that if, as an incidental consequence of the order, the proceedings could not be reported, there could not be said to be any constitutional infirmity in the order.[47] It was further held that the law empowering the court to prohibit publication of proceedings was within the reasonable restrictions contemplated by Article 19(2) which includes restrictions in relation to contempt of court. An obstruction to the administration of justice is tantamount to contempt of court and therefore, prohibition of the publication intended to prevent an obstruction to justice was within the scope of Article 19(2).[48]

35. The Court however, sounded a note of caution, while adopting the reasoning of Viscount Haldane L.C. in *Scott* v. *Scott*[2]:

> "*23.* … the power of an ordinary court of justice to hear in private cannot rest merely on the discretion of the Judge or on his individual view that it is desirable for the sake of public decency or morality that the hearing should take place in private. If there is any exception to the broad principle which requires the administration of justice to take place in open court, that exception must be based on the application of some other and over-riding principle which defines the field of exception and does not leave its limits to the individual discretion of the Judge."[49]

46 *Naresh Shridhar*, AIR pp. 27-28, para 98
47 *Naresh Shridhar*, AIR p. 12, para 43
48 *Naresh Shridhar*, AIR pp. 21-22, para 77
49 *Naresh Shridhar*, AIR p. 9, para 23

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VI. Caution against expanding statutory exceptions

36. It is significant to note that in the UK, the House of Lords has cautioned against expanding the exceptions to the circumstances under which the open trial rule may be relaxed. In *S. (A Child), In re*[11] Lord Steyn observed while refusing to invoke the inherent jurisdiction of the court in going beyond the scope of the statutory exception under which publicity of the trial could be restricted in the interests of the privacy of a child:

> "*26.* While Article 8(1) is engaged, and none of the factors in Article 8(2) justifies the interference, it is necessary to assess realistically the nature of the relief sought. This is an application for an injunction beyond the scope of Section 39, the remedy provided by Parliament to protect juveniles directly affecting by criminal proceedings. No such injunction in the past been granted under the inherent jurisdiction or under the provisions of the ECHR. There is no decision of the Strasbourg Court granting injunctive relief to non-parties, juvenile or adult, in respect of publication of criminal proceedings. ... The verdict of experience appears to be that such a development is a step too far."[50]

37. The House of Lords observed that there were several statutory provisions providing for restricted reporting and held that not only was there a "legislative choice" in not extending the right to restrain publicity of .proceedings but further that the court had no power to create further exceptions to the general principle of open justice:

> "*20.* … There are also numerous statutory provisions, which provide for discretionary reporting restrictions: *see* for example, Section 8(4) of the Official Secrets Act, 1920. Given the number of statutory exceptions, it needs to be said clearly and unambiguously that the court has no power to create by a process of analogy, except in the most compelling circumstances, further exceptions to the general principle of open justice.
>
> *21.* … in regard to children not concerned in a criminal trial, there has been a legislative choice not to extend the right to restrain publicity to them. This is a factor which cannot be ignored."[51]

38. In an earlier case, *R.* v. *Legal Aid Board, ex p Kaim Todner*[52], Lord Woolf MR observed: (QB p. 977, paras 4-5)

> "*4.* … The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of the proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's

50 *S (A Child)*, (2005) 1 AC 593, p. 606, para 26

51 *S (A Child)*, AC pp. 604-05, paras 20-21

52 1999 QB 966 : (1998) 3 WLR 925 (CA)

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confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely. …

5. Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it. However Parliament has recognised there are situations where interference is necessary."

39. In UK as in India, Parliament has created numerous exceptions to the ordinary rule of open court proceedings in the interests of justice. CPR r 39.2 shows the nature of the exception. It provides as follows:

"**39.2.** ***General rule — hearing to be in public***.—(*1*) The general rule is that a hearing is to be in public.

(*2*) The requirement for a hearing to be in public does not require the court to make special arrangements for accommodating members of the public.

(*3*) A hearing, or any part of it, may be in private if:—

(*a*) publicity would defeat the object of the hearing;

(*b*) it involves matters relating to national security;

(*c*) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;

(*d*) a private hearing is necessary to protect the interests of any child or [patient];

(*e*) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing;

(*f*) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate; or

(*g*) the court considers this to be necessary, in the interests of justice.

(*4*) The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness."

VII. The proportionality test

40. Internationally, the courts have applied the proportionality test to determine whether a particular provision restricting reporting of court proceedings is excessive in the light of the object sought to be achieved. For instance, in *Edmonton Journal* v. *Alberta (Attorney General)*[9], the Canadian Supreme Court held that Section 30(1) of the Alberta Judicature Act was excessive and disproportionate in the restrictions which it contains and went much further than was necessary to protect the objectives of the legislation. In the process it significantly reduced the openness of the courts. It was held that any need to protect the privacy of the parties, their children or of the

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witnesses, or to ensure a fair trial could have been accomplished by far less sweeping measures. It was held by Cory J.:

> "Nor can it be said that there is the requisite proportionality between the overly restrictive provisions of Section 30(1) and the important right to report freely upon trial proceedings. In today's society it is the press reports of the trials that make the courts truly open to the public. The principle that courts must function openly is fundamental to our system of justice. The public's need to know is undeniable. Section 30 by its restrictive ban on publication results in a very substantial interference with freedom of expression and significantly reduces the openness of the courts. Any need for the protection of privacy of witnesses or children could be readily accomplished by far less sweeping measures. For example, it could be accomplished by the exercise of discretion by the trial Judge to prohibit publication or to hold in-camera hearings in those few circumstances where it would be necessary to do so in order to protect the privacy interest of parties, their children or witnesses."

41. It is clear from the above that only the least restrictive measures must be adopted while restricting the open justice rule. Likewise, in *S (A Child), In re*[11], the House of Lords also held that the proportionality test was applicable in determining the justification for interfering or restricting the open justice rule.

VIII. The role of the courts in India

42. The courts serve an extremely important public function in any democratic society. They are the forum not only for the resolution of disputes between citizens but also for the resolution of disputes between citizens and the State. As society and the polity evolves the more important becomes the function of the courts. This is particularly true of India whose emergence on the global firmament in the last decade has been attributed to not only it enormous human capital and enterprise but also in no small measure to its independent judiciary and free media. India is quite unique in the monumental role that the higher judiciary is playing in the democratic system. The last couple of decades have seen a sea change in the role of the higher judiciary in India. In the public eye, the courts are increasingly associated with their activist role in the form of public interest litigation and less with their traditional role as adjudicators of private interest. It is hard to find any issue relevant to the public arena on which the courts have not left their imprint. The superior courts in the country have taken on an activist mantle on wide ranging issues from forests, air pollution, corruption in public life, school admissions and gender equality. The higher judiciary has been looked upon by sections of the public as the last hope for redress against public and governmental failure. The Supreme Court of India is the highest court in the largest democracy in the world and exercises a profound impact on the day to day life of well over a billion people, one sixth of humanity. As

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a a result of the hugely significant role that the higher courts play in the lives of citizens across the country, it becomes all the more important that the courts remain as open as possible to public scrutiny. Any measures to restrict public access to court proceedings or to report court proceedings must be viewed in the light of the wide-reaching functions and role that the courts play in the lives of citizens, whether or not they have invoked the jurisdiction of the b court or are parties to proceedings before the court.

Conclusion

43. From the above propositions, the following principles emerge:

43.1. In any democratic society, the open justice rule must always be the norm and 'covertness' the exception. The right to open justice flows from the right to a fair trial. It also flows from the right of the public to information c under Article 19(1)(*a*). The media, apart from exercising its own right to freedom of expression under Article 19(1)(*a*) is serving a larger public purpose by facilitating the carriage of information otherwise not available or easily accessible to the public. Thus, by reporting court proceedings, the media is enabling the fulfilment of the public's right to information about the d working of the courts under Article 19(1)(*a*).

43.2. It is significant to note that under the open justice rule, reporting must be "contemporaneous" as recognised by the House of Lords in *S (A child), In re*[11]. That reporting may take place at any stage (which would include contemporaneous reporting) is reflected in Section 4 of the Contempt of Courts Act, 1971.

e **43.3.** Fair comment must be permitted even during the pendency of the case. So long as a comment is temperate and balanced, there can be no objection to such comment. In PILs, for instance, interim orders are passed from time to time, which may have an impact on several parties who are not before the Court. These interim orders, may hold the field for several years. Thus the case remains sub judice. The situation may be beyond the control of f an affected party who is not before the Court and it may be unfair to altogether deny him the right to fair comment on an interim order which may impact his rights.

43.4. Likewise, even in criminal cases reporting and fair comment ought to be permitted even during the pendency of the trial. It is important to note g that in the *BMW case*[53], the media played a vital and positive role in exposing the rot in the criminal justice system by resorting to a sting operation showing the nexus between the prosecution and the defence. It was absolutely essential that such an expose took place during the pendency of the trial. If the right to report were to be postponed to the end of the trial, the entire purpose of the expose would have been lost.

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53 *R.K. Anand* v. *Delhi High Court*, (2009) 8 SCC 106 : (2010) 2 SCC (Cri) 563

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43.5. There are exceptions to the open justice rule in the form of statutory exceptions carved out below, in the interests of privacy and the right to a fair trial. The Legislature has contemplated various situations in which a public trial may compromise the interests of a litigant and therefore express provision has been made for excluding access in those specific cases. As the House of Lords held in *S (A child), In re*[11] referred to extensively hereinabove, the Court has no power to create further exceptions to the general principle of open justice except in the most compelling of circumstances. Section 7(*b*) of the Contempt of Courts Act, 1971 also recognises that the court may "on grounds of public policy or in exercise of any power vested in it, expressly prohibit the publication of all information relating to the proceeding or of information of the description which is published." This indicates that there can be an embargo on publication in certain exceptional situations and a breach thereof would amount to contempt. However, even this power to prohibit publications must be exercised with great caution and sparingly as *Mirajkar case*[16] recognises.

43.6. While exercising the inherent power of the court to prohibit publication, the Court must bear in mind,

(*i*) while balancing the competing interests in favour of and against reporting, that:

> "… The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings."

(Duff, J. in *Gazette Printing Co.* v. *Shallow*[54]) and

(*ii*) that the restriction must not fall foul of the proportionality principle inasmuch as if a restriction is necessary, it must be the least restrictive measure. *Edmonton Journal* v. *Alberta (Attorney General)*[9].

43.7. It is significant to note that this Hon'ble Court had held in *A.K. Gopalan* v. *Noordeen*[55], that proceedings can be said to be imminent from the time of arrest and prejudicial reports from the time of the arrest would be contemptuous. However, the Contempt of Courts Act of 1952 which was in force at the time that the matter was decided did not define contempt. On the other hand, barely two years after this case was decided, the Contempt of Courts Act, 1971 came into force and this new Act not only defined "contempt of court" but also specifically excluded from the purview of contempt reports which " interfere or tend to interfere with or obstructs or tends to obstruct the course of justice in connection with any civil or criminal proceeding *pending* at the time of publication if at that time the publisher had

54 (1909) 41 SCR 339 (Can), p. 359

55 (1969) 2 SCC 734

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no reasonable grounds for believing that the proceeding was *pending*. The expression pending has been explained in Section 3 itself in the case of a criminal proceedings relating to the commission of an offence it is said to be pending from the time the charge-sheet of challan is filed or the court issues a summons or warrant against the accused. When the Legislature has *chosen* to expressly exclude such publications when the case is not "pending" then to hold otherwise may amount to rewriting the law. The Law Commission in its 200th Report has rightly pointed out the problems arising from this position and has recommended that a proceeding must be treated as pending from the time of arrest. However, this recommendation must be accepted by the Legislature and the statute amended accordingly before the same is followed.

43.8. While it must be recognised that misreporting and indiscretions do occasionally take place, the solution for the same would be to generate better awareness and education, not only amongst media people but all other participants from the public who wittingly or otherwise contribute to such misreporting or indiscretions. It is necessary to recognise that the media does not function in a vacuum. It is assisted actively by people from all walks of life: for instance, the police who sometimes leak information to the media, doctors who may reveal the results of medical examinations during the pendency of the trial, lawyers who may comment on sub judice matters and so on. The private television media is only about two decades old in India and self regulation is gradually taking shape in the last few years. Given the enormous revolution in information technology over the last few years, it will take sometime before we can reach the right balance on media reporting. The solution would not be to expand the scope of restrictions beyond what already exists under statute, but rather to first create awareness both the media and the public and all those who are part of the criminal justice system so that the interests of justice are met. The example of the Canadian Judicial Council and the UK may be referred to.

43.9. Finally, it must be recognised that the global trend leans towards more and more transparency taking into account the rapid strides in technology. For instance, in several jurisdictions, even live televisation of court proceedings is being permitted. Further, rules are in place even for live blogging and tweeting from the courtroom. While it may be debatable as to whether we in India are ready to introduce such changes, what these international developments show is that the global trends support live reporting and greater transparency, rather than more restrictions.

43.10. This Hon'ble Court may consider whether a beginning ought to be made with transcriptions of proceedings being carried out. These may be accessed by the media for a small fee so that media persons can ensure accuracy in reporting.

The Judgment of the Court was delivered by

S.H. KAPADIA, C.J.—

INTRODUCTION

1. Finding an acceptable constitutional balance between free press and administration of justice is a difficult task in every legal system.

FACTUAL BACKGROUND

2. Civil Appeals Nos. 9813 and 9833 of 2011 were filed challenging the order dated 18-10-2011[1] 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[2], this Court issued show-cause notice to the Securities and Exchange Board of India (SEBI), Respondent 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. Pursuant to the aforesaid order dated 28-11-2011[2], on 4-1-2012, an affidavit was filed by Sahara explaining the manner in which it proposed to secure its liability to the OFCD-holders during the pendency of the civil appeals.

4. On 9-1-2012 both the appeals were admitted[3] for hearing. However, IA No. 3 for interim relief filed by Sahara was kept for hearing on 20-1-2012.

5. On 20-1-2012 it was submitted by the learned counsel for SEBI that what was stated in the affidavit of 4-1-2012 filed by Sahara inter alia setting out as to how the liabilities of Sahara India Real Estate Corpn. Ltd. (SIRECL) and Sahara Housing Investment Corpn. Ltd. (SHICL) were to be secured was insufficient to protect the OFCD-holders. 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[4] over for three weeks for that purpose.

6. On 7-2-2012 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 the investors as

1 *Sahara India Real Estate Corpn. Ltd.* v. *SEBI*, Appeal No. 131 of 2011, order dated 18-10-2011 (SAT)

2 *Sahara India Real Estate Corpn. Ltd.* v. *SEBI*, (2012) 12 SCC 610

3 *Sahara India Real Estate Corpn. Ltd.* v. *SEBI*, Civil Appeal No. 9813 of 2011, order dated 9-1-2012 (SC) wherein it was directed:

"*1.* The civil appeals are admitted. Hearing expedited. Interim order granted by this Court on 28-11-2011, shall continue to operate.

2. Place IA No. 3 of 2012 of hearing along with the affidavits on 20-1-2012."

4. *Sahara India Real Estate Corpn. Ltd.* v. *SEBI*, IA No. 3 in Civil Appeal No. 9813 of 2011, order dated 20-1-2012 (SC) wherein it was directed:

"The interlocutory applications shall stand over for three weeks."

precondition for stay of the impugned orders dated 23-6-2011 and 18-10-2011[1] 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.

7. A day prior to the hearing of IA No. 3, on 10-2-2012, one of the news channels flashed on TV the details of the said proposal which had been communicated only inter partes and which was obviously not meant for public circulation. The television channel concerned also named the valuer who had done the valuation of the assets proposed to be offered as security. On 10-2-2012 there was no information forthcoming from SEBI of either acceptance or rejection of the proposal.

8. The above facts were inter alia brought to the notice of this Court at the hearing of IA No. 3 on 10-2-2012 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[5]:

> "We are distressed to note that even 'without prejudice' proposals sent by the learned counsel for the appellants to the learned counsel for SEBI have 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 the learned counsel on both sides to make written application to this Court in the form of an IA so that appropriate orders could be passed by this Court with regard to reporting of matters, which are sub judice."

9. Pursuant to the aforesaid order, IAs Nos. 4 and 5 came to be filed by Sahara. According to Sahara, IAs Nos. 4 and 5 raise a question of general public importance. In the said IAs 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

1 *Sahara India Real Estate Corpn. Ltd.* v. *SEBI*, Appeal No. 131 of 2011, order dated 18-10-2011 (SAT)

5 *Sahara India Real Estate Corpn. Ltd.* v. *SEBI*, (2012) 12 SCC 611

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."

10. 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 partes are privileged from public disclosure. That, the 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 12 Rules 1, 2 and 3 of the 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 the 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 7-2-2012 by one side to the other in the matter of providing security in an ongoing matter.

11. In the IAs, it has been further stated that this Court has observed in *State of Maharashtra* v. *Rajendra Jawanmal Gandhi*[6] (SCC p. 403, para 37) 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.

12. Accordingly, vide IAs 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."

13. 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 the Court, this

6 (1997) 8 SCC 386 : 1998 SCC (Cri) 76

Court should give appropriate directions or frame such guidelines as may be deemed appropriate.

14. 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.

15. 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 28-3-2012, the 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 IAs Nos. 4, 5 and 10. This clarification is important for the reason that some of the 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.

CONSTITUTIONALISATION OF FREE SPEECH

Comparative law: Differences between the US and other common law experiences

US approach

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*†, the courts have evolved procedural devices aimed at neutralising the effect of *prejudicial publicity* like change of venue, ordering retrial, reversal of conviction on appeal (which, for the sake of brevity, is hereinafter referred to as "*the neutralising 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 recognised, albeit in exceptional cases (see *Near* v. *Minnesota*[7]) by the courts evolving neutralising techniques.

18. In 1993, Chief Justice William Rehnquist observed[8]: "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."

English approach

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 the Parliament and courts. However, after the judgment of ECHR in *Sunday Times* v. *United Kingdom*[9], 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 (*sic* England) 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 a 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, the 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,

† *People* v. *Orenthal James Simpson*, No. BA097211 (Cal Sup Ct, 1995)

7 75 L Ed 1357 : 283 US 697 (1931)

8 William Rehnquist, "Constitutional Courts—Comparative Remarks" in Paul Kirchhof & Donald P. Kommers (Eds.), *Germany and its Basic Law: Past, Present and Future* (1993) 412, 413

9 (1979) 2 EHRR 245

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 *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*[9]) may still apply in certain cases. In the circumstances, it is 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 court's order is violated, contempt action would follow.

20. In *Home Office* v. *Harman*[10] 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 equalisation 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 general)*[11].]

European Continental approach

21. ***The continental approach*** seeks ***to protect the 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

9 *Sunday Times* v. *United Kingdom*, (1979) 2 EHRR 245
10 (1983) 1 AC 280 : (1982) 2 WLR 338 : (1982) 1 All ER 532 (HL)
11 2008 QCCA 2516 (Can LII)

impartiality of the proceedings but also with other individual and societal interests. Thus, *narrowly focused 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 on Human Rights, presumption of innocence needs to be protected. The European Court 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 (*sic* Austria) have taken a similar stance. Article 6(2) of the European Convention on 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, 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 *Chintamanrao* v. *State of M.P.*[12]

Canadian approach

22. Before Section 1 of the Canadian Charter of Rights and Freedoms, 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 the judgment of the Supreme Court of Canada in *Dagenais* v. *Canadian Broadcasting Corpn.*[13], 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. the 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—emphasised the right to a fair trial over the free expression 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

12 AIR 1951 SC 118 : 1950 SCR 759

13 (1994) 3 SCR 835 (Can SC)

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*[13], 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*[14] that *Dagenais*[13] 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.

Australian approach

23. 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.

New Zealand approach

24. It recognises 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

13 *Dagenais* v. *Canadian Broadcasting Corpn.*, (1994) 3 SCR 835 (Can SC)
14 2001 SCC 76 : (2001) 3 SCR 442 (Can SC)

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 an 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 *Maneka Gandhi* v. *Union of India*[15].

Decisions of the Supreme Court on "prior restraint"

26. In *Brij Bhushan* v. *State of Delhi*[16] 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*[17] this Court upheld pre-censorship imposed for a *limited period* and right of representation to the Government against such restraint under the 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 *K.A. Abbas* v. *Union of India*[18] this Court upheld *prior restraint* on exhibition of motion pictures subject to the 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

15 (1978) 1 SCC 248
16 AIR 1950 SC 129 : (1950) 51 Cri LJ 1525
17 AIR 1957 SC 896
18 (1970) 2 SCC 780 : AIR 1971 SC 481

the courts (see *Binod Rao* v. *Minocher Rustom Masani*[19] and *C. Vaidya* v. *D'Penha*[20]).

30. The question of prior restraint arose before this Court in 1988, in *Reliance Petrochemicals Ltd.* v. *Indian Express Newspapers Bombay (P) Ltd.*[21] 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*"[22]. 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 *Naresh Shridhar Mirajkar* v. *State of Maharashtra*[23] 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 instils 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 case*[23] if the necessities of administration of justice so demand [see *Kehar Singh* v. *State (Delhi Admn.)*[24]]. Even in the US, the said principle of open justice yields to the said necessities of administration of justice (see *Globe Newspaper Co.* v. *Superior Court*[25]). The entire law has been reiterated once again in the judgment of this Court in *Mohd. Shahabuddin* v. *State of Bihar*[26], affirming the judgment of this Court in *Mirajkar case*[23].

32. Thus, the principle of open justice is not absolute. There can be exceptions in the interest of administration of justice. In *Mirajkar*[27], 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[23] that apart from Section 151 of

19 (1976) 78 Bom LR 125
20 Special Civil Application No. 141 of 1976, decided on 22-3-1976 (Guj) (Unreported)
21 (1988) 4 SCC 592 : AIR 1989 SC 190
22 *Schenck* v. *United States*, 63 L Ed 470 : 249 US 47 (1919)
23 AIR 1967 SC 1
24 (1988) 3 SCC 609 : 1988 SCC (Cri) 711 : AIR 1988 SC 1883
25 73 L Ed 2d 248 : 457 US 596 (1982)
26 (2010) 4 SCC 653 : (2010) 2 SCC (Cri) 904
27 *Naresh Shridhar Mirajkar* v. *Justice Tarkunde*, (1965) 67 Bom LR 214

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 AIR 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 include 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 AIR para 12). The judgment of this Court in *Mirajkar*[23] was delivered by a Bench of nine Judges and is binding on this Court.

33. At this stage, it may be noted that the judgment of the Privy Council in *Independent Publishing Co. Ltd.* v. *Attorney General of Trinidad and Tobago*[28] has been doubted by the Court of Appeal in New Zealand in *Vincent Ross Siemer* v. *Solicitor General*[29]. In any event, on the inherent powers of the courts of record we are bound by the judgment of this Court in *Mirajkar*[23]. 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.*[21] and *Mirajkar*[23] were delivered in civil cases. However, in *Mirajkar*[23], this Court held that *all courts* which have inherent powers i.e. the Supreme Court, the High Courts and the 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 the 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, suffice it 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 the 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

23 *Naresh Shridhar Mirajkar* v. *State of Maharashtra*, AIR 1967 SC 1

28 (2005) 1 AC 190 : (2004) 3 WLR 611 (PC)

29 2012 NZCA 188

21 *Reliance Petrochemicals Ltd.* v. *Indian Express Newspapers Bombay (P) Ltd.*, (1988) 4 SCC 592

the Code of Civil Procedure to pass orders prohibiting publication of court proceedings. In *Mirajkar*[23], this Court referred to the principles governing courts of record under Article 215 (see AIR 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 Assn.* v. *State of Gujarat*[30] and *Supreme Court Bar Assn.* v. *Union of India*[31]). As such a declaration has been made in the Constitution that the said powers *cannot be taken away* by any law made by 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*[32], 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 the suspect is arrested. This Court has held in *Ram Autar Shukla* v. *Arvind Shukla*[33] 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* (3rd Edn., Butterworth, London 1996)]. Trial by newspaper comes

23 *Naresh Shridhar Mirajkar* v. *State of Maharashtra*, AIR 1967 SC 1
30 (1991) 4 SCC 406
31 (1998) 4 SCC 409
32 (1969) 2 SCC 734
33 1995 Supp (2) SCC 130

in the category of acts which interferes with the course of justice or due administration of justice (see Nigel Lowe and Brenda Sufrin, *Law of Contempt*, p. 5 of 4th Edn.). According to Nigel Lowe and Brenda Sufrin (p. 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*[34].) 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 the 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 that 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.*[35] As stated, in most common law jurisdictions, discretion is given to the courts to evolve *neutralising devices* under contempt jurisdiction such as postponement of the trial, retrials, 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 recognised as a human right in *Ranjitsing Brahmajeetsing Sharma* v. *State of Maharashtra*[34] 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, the 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

34 (2005) 5 SCC 294 : 2005 SCC (Cri) 1057
35 (1994) 6 SCC 632

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 misinformation, 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 the extent of prejudice, the effect on individuals involved in the case, the overriding 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. THE 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 neutralising techniques to balance free speech and fair trial whereas in Canada, they are justified on the touchstone of Section 1 of the Charter of Right. 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 *Ministry of Information & Broadcasting* v. *Cricket Assn. of Bengal*[36] 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 (SCC 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 *E.M. Sankaran Namboodripad* v. *T. Narayanan Nambiar*[37] 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. the 1971 Act) is silent the courts have discretion" (para 31). This is more so when the said enactment is required to be interpreted in the light of Article 21. We would like to quote hereinbelow para 6 of the above judgment which reads as under: (SCC p. 331)

> "*6*. 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." (emphasis supplied)

39. The question before us is whether such "postponement orders" constitute restrictions under Article 19(2) as read broadly by this Court in *Cricket Assn. of Bengal*[36]?

40. As stated, right to freedom of expression under the First Amendment in US is absolute which is not so under the Indian Constitution in view of

36 (1995) 2 SCC 161
37 (1970) 2 SCC 325 : 1970 SCC (Cri) 451 : AIR 1970 SC 2015

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 the American Constitution rather than Indian or Canadian jurisprudence, since the 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 court's 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 *neutralising 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 the Indian Constitution. In certain cases, even the 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 courtrooms. These aspects come within the scope of Article 19(1) and Article 21. When rights of equal weight clash, the Courts have to evolve balancing techniques or measures based on recalibration 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 the 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 recognised 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 straitjacket 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 *Cricket Assn. of Bengal*[36]. 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*[15] (p. 284), it is now well settled that the 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 the directive principles have been taken into consideration by this Court in several cases (see the recent judgment of this Court in *Society for Unaided Private Schools of Rajasthan* v. *Union of India*[38]). Similarly, in *Dharam Dutt* v. *Union of India*[39], 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

36 *Ministry of Information & Broadcasting* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161

15 *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248

38 (2012) 6 SCC 1

39 (2004) 1 SCC 712

Article 19(1)(*a*). Ultimately, such orders of postponement are only to *balance* conflicting public interests or rights in Part III of the Constitution. They also satisfy the requirements of justification under Article 14 and Article 21.

43. 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 p. 275 of *Constitution of India* by D.D. Basu, 14th Edn.). 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, the 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 neutralising devices or techniques evolved by the courts effectuate a balance between conflicting public interests.

44. It is well settled that precedents of this Court under Article 141 and the Comparative Constitutional Law help 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).

45. The postponement order is, as stated above, a *neutralising 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.

46. 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 neutralising 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.

47. 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*.

48. 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.

49. For the aforestated reasons, we hold that subject to the 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

50. 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 neutralising device (balancing test) would not be an unreasonable restriction and on the contrary would fall within the proper constitutional framework.

MAINTAINABILITY

51. As stated above, in the present case, we heard various stakeholders 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.

52. 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 a 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 the 1971 Act is concerned. 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 impending and perverting the course of justice. That is all which is done by this judgment.

53. 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.

Conclusion

54. Accordingly, IAs Nos. 4-5 and 10 are disposed of. For the reasons given above, we do not wish to express any opinion on the merit of the other IAs. Consequently, they are dismissed.