CHAPTER 4

JUDICIAL APPROACH

Ever since the beginning of print media, controversies have kept rising as to what extent media houses should exercise their freedom of press. The Constitution of India has nowhere specifically mentioned freedom of press and hence, press has no specific express right under the Constitution. However, it is read under freedom of speech and expression. Time and again,the judicial approach of Courts has been such as to provide relief to the media and let them have a firm base to stand upon. The Courts have exercised their independence of judiciary to a great extent as the legislature is silent upon freedom of press. Several issues pertaining to what should be the freedom of press and what should be the reasonable restrictions while exercising the said freedom have been decided by Hon'ble Supreme Court of India and several other Hon'ble High Courts. Not only that, when electronic media and more recently the social media came into the picture, the challenges before Hon'ble Courts have increased considering the powerful communication levels and widespread usage of electronic and social media as compared to the print media.

In case of ***Ram Lila Maidan***[311], major observations in respect of freedom of speech and expression as also the restrictions therein were made in following words:

1. It is significant to note that the freedom of speech is the bulwark of democratic Government. This freedom is essential for proper functioning of the democratic process. The freedom of speech and expression is regarded as the first condition of liberty. It occupies a preferred position in the hierarchy of liberties, giving succor/relief and protection to all other liberties. It has been truly said that it is the mother of all other liberties. Freedom of speech plays a crucial role in the formation of public opinion on social, political and economic matters. It has been described as a "basic human right", "a natural right" and the like. With the development of law in India, the right to freedom of speech and expression has taken within its ambit the right to receive information as well as the right of press.

[311] AIR 2012 SC(Supp) 266

2. The State has a duty to protect itself against certain unlawful actions and, therefore, may enact laws which would ensure such protection. The right that springs from Article 19(1)(a) is not absolute and unchecked. There cannot be any liberty absolute in nature and uncontrolled in operation so as to confer a right wholly free from any restraint. Had there been no restraint, the rights and freedoms may become synonymous with anarchy and disorder.[312]

3. No person can be divested of his fundamental rights. They are incapable of being taken away or abridged. All that the State can do, by exercise of its legislative power, is to regulate these rights by imposition of reasonable restrictions on them. Upon an analysis of the law, the following tests emerge:-

a) The restriction can be imposed only by or under the authority of law. It cannot be imposed by exercise of executive power without any law to back it up.

b) Each restriction must be reasonable.

c) A restriction must be related to the purpose mentioned in Article 19(2).

4. For adjudging the reasonableness of a restriction, factors such as the duration and extent of the restrictions, the circumstances under which and the manner in which that imposition has been authorized, the nature of the right infringed, the underlining purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, amongst others, enter into the judicial verdict.[313]

5. A restriction imposed in any form has to be reasonable and to that extent, it must stand the scrutiny of judicial review. It cannot be arbitrary or excessive. It must possess a direct and proximate nexus with the object sought to be achieved. Whenever and wherever any restriction is imposed upon the right to freedom of speech and expression, it must be within the framework of the prescribed law, as subscribed by Article 19(2) of the Constitution.

[312]State of West Bengal v. SubodhGopal Bose [AIR 1954 SC 92]
[313]Chintamanrao and Anr. v. State of Madhya Pradesh (AIR 1951 SC 118)

The above judgment has carefully and meticulously pointed at how freedom of speech and expression can turn into anarchy and mayhem in absence of reasonable restrictions, be it case of an individual or the media. Media acting in this direction can often lead to severe consequences whereby cases of paid news, media trial, etc. come to surface. Such scenarios have an extremely high potential of influencing the nation's political, social and legal picture and media should avoid such gimmicks merely for high TRP or profit motives. Reasonable restrictions should be respected and freedom of speech and expression must be exercised only so far as it does not hinder the restrictions.

A discussion of several judgments in light of respective media fields, viz. print, electronic and social media is given below:

(4.1) Article 19(1)(a) and Print media:

Print media which pertains to communicating news, entertainment, advertisements and other information through paper form in newspapers, magazines, tabloids, journals, etc. was the only source of media during initial years. As the electronic media was not that developed and social media was hardly in picture, print media carried the entire weightage of imparting all sorts of news across the nation. Being the single source of communication, it gave birth to numerous issues from time and again which were challenged in Supreme Court.

In case of ***Srinivas vs. State of Madras***[314], it was held that the freedom of speech and expression includes liberty to propagate not one's views only. It also includes the right to propagate or publish the views of other people.In case of ***RomeshThapper vs. State of Madras***[315], the circulation of petitioner's weekly journal was prohibited by Madras Government in their State by exercising powers u/s. 9(1-A) of Maintenance of Public Order Act 1949. It was held that the expression "freedom of speech and expression" connotes also publication and thus the freedom of press is included in this category. Free propagation of ideas is the necessary objective and this may be done on the platform or through press. The freedom of propagation of ideas is secured by freedom of circulation. Liberty of circulation is essential to that freedom as the liberty of

[314] AIR 1931 Madras 70
[315] AIR 1950 SC 124

publication. Indeed, without circulation the publication would be of little value. The said law was held invalid as it banned entry and circulation of journal. Thus, the factor of circulation was heavily harped upon in the judgment given in this case considering that ideas through press can be shared with one and all only by having liberty of circulation failing which the ideas though available cannot be shared. Liberty of circulation as also liberty of publication of views and ideas were equally important and absence of either of them would fail the purpose of the entire structure itself.

In case of ***Express Newspapers vs. Union of India,***[316] petitioners challenged the validity of the Working Journalists Act 1955. The object of the said Act was to regulate the service-related conditions of the employees in print media, namely conditions like payment of gratuity, wage fixation, work hours, leave sanction, etc. It was contended that the Act would adversely affect financial position of newspaper forcing it to curtail its regulation and eventually be stopped thus narrowing the scope for dissemination of information and violating Article 19(1)(a). It was held that the press was not immune from laws of general application or ordinary forms of taxation or laws of industrial relations. The Act was passed to ameliorate the service conditions of workmen in newspaper industry and hence, the restrictions imposed were reasonable on the right guaranteed by Article 19(1)(a).

In case of ***Sakal Papers P. Ltd. Vs. Union of India***[317], petitions were filed against the state by two readers, shareholders as also the company publishing the Marathi newspaper challenging the constitutional validity of the Newspaper (Price and Page) Act 1956. The said Act empowered central government to regulate the price of newspapers in relation to their pages and allocation of space for advertising matter.The publishing company also challenged the Daily Newspapers (Price and Page) Order 1960 passed by the government under the Newspaper Act to put such regulations in place. Effect of the Act and of the impugned Order was to regulate the number of pages according to the price charged, prescribe the number of supplements to be published and prohibit the publication and sale of newspapers in contravention of any Order made under Section 3 of the Act. The Act also provided for regulating by an Order under S. 3, the sizes and

[316] AIR 1958 SC 578
[317] AIR 1962 SC 305

area of advertising matter in relation to the other matters contained in newspaper. Penalties were also prescribed for contravention of the provision of the Act or Order. According to petitioners, the said Act and Order were violated their right of freedom of speech and expression guaranteed under Article 19(1)(a).

The Court held that by providing maximum number of pages for the particular price charged, effect of the said Act and Order was to compel newspapers either to reduce the number of pages or to raise the prices. If the number of pages were reduced, it would restrict the dissemination of news and views published by the newspaper whereas if the prices were increased, it would negatively affect the circulation. In either case Article 19(1)(a) would be affected as the freedom of newspaper to publish desired number of pages as also strive for maximum circulation is a vital aspect of free speech. It was also observed that the right to freedom of speech cannot be taken away with the object of restricting business activities. Accordingly, the Newspaper Act and Newspaper Order were held unconstitutional as they were directly infringing right to freedom of speech and expression.

In case of ***Bennett Coleman and Co. vs. Union of India***[318], the petitioners who were newspaper publishers challenged the restrictions on import of newsprint under Import Control Order 1955 as also the manner in which this was being used by newspapers under the Newsprint Order 1962. Also, the latest Newsprint Policy 1972-73 came into implementation adding several restrictions as below:

(i) No new newspapers may be started by establishments owning more than two newspapers if atleast one of which is a daily newspaper;
(ii) Total number of pages in a newspaper may not exceed ten;
(iii) Increase in number of pages may not be more than 20% for newspapers that are under ten pages;
(iv) No interchangeability of newsprint may be permitted between different newspapers of the same establishment or between different editions of the same paper.

[318] AIR 1973 SC 106

In accordance with this policy, petitioners could not make adjustments in circulation even within the quota limit and hence challenged it for being in violation of Article 19(1)(a).

It was argued on behalf of respondents that the fundamental rights being available only to natural persons cannot be enjoyed by companies and also that emergency powers under Article 358 barred any challenge on ground of fundamental rights. The respondents also stated that instead of an "effects test", a subject-matter test of restriction should be applied according to which restrictions became valid as they regulated commercial operations of newspapers in order to prevent monopolies by which any effect on freedom of expression was incidental.

The Supreme Court in its judgment made several observations, some of which are:

(i) The fact that the petitioners are companies could not be a bar to award relief for violation of the rights of shareholders and editorial staff.

(ii) Bar under Article 358 did not apply to laws passed before proclamation of emergency and hence newsprint policy could be challenged as a continuation of previous year's policy and relevant orders.

In respect of freedom of press, following observations were made:

(iii) Freedom of the press was an essential element of Article 19(1)(a) and the absence of an express mention of such freedom as a special category was irrelevant.

(iv) Free press was to be regarded as an essential element of freedom of expression in general.

(v) Shortage of newsprint can be tackled by fixing the quotas but direct interference in terms of page limits is not justified as limiting the pages would affect economic viability of newspapers considering that either advertisements or news content will have to be reduced. In either case, freedom of expression will be harmed.

(vi) Freedom of press had quantitative as also qualitative elements and hence quantitative controls constituted restrictions on freedom of expression. Since they were not justified on the basis of shortage of newsprint, they could not be considered to be reasonable restrictions.

Accordingly the Newsprint Policy 1972-73 was held as unconstitutional though the Newsprint Order and Import Control Order were not struck down. The vitality of the judgment was that it gave importance to the significance of free press over ever-changing economic policies. Limitation on pages in a newspaper cannot be made without reducing the advertorial content or the news itself. Advertisements in themselves often have a content of informing the people about new products, government schemes, amended laws, notifications, etc. and hence reducing them would directly lead to increased cost whereas if news itself were curbed, it would directly hamper the right of free press.

In case of **Indian Express Newspaper vs. Union of India,**[319]Supreme Court had to decide the validity of import duty on newsprint as per Customs Tariff Act 1975 and auxiliary duty under the Finance Act 1981 as modified by notifications under Customs Act 1962 w.e.f. March 1 1981. There was no customs duty on newsprint before this notification was implemented. It was contended on behalf of petitioners that due to imposition of this duty had led to adversely affecting the printing costs and circulation of newspaper thus creating a crippling effect not only on freedom of expression under Article 19(1)(a) but also on the freedom to practice any trade or occupation under Article 19(1)(g).Also, as India's foreign exchange was sound during that period there was no immediate need for such imposition creating interference in fundamental rights. Also, the petitioners contended that principle of equality before law as enshrined under Article 14 of Constitution was violated as the newspapers had to be classified into small, medium and large newspapers for imposing the duty which in itself was arbitrary. On the other hand, respondents Union of India contended that the public interest involved in taxation was to increase government revenue and the exemption granted to newsprint was unjustified and hence removable by government.

The Supreme Court in its verdict partially favoring the Union of India held that publishing newspapers was a part of newspaper industry and hence, like other industries, government was empowered to levy taxes affecting the publication of newspapers. The Court further allowed classification of newspapers into small, medium and large based on

[319] (1985) 1 SCC 641

economic considerations as non-arbitrary as it had a rational nexus with the objective of taxation. However, it was also observed that where the power of taxation encroached upon freedom of expression under Article 19(1)(a), the restriction on freedom mush be within reasonable restrictions. The Court held that under Article 19(2), freedom of expression can be restricted on ground of "public interest". Accordingly, two basic principles must be borne in mind, firstly being that newspapers enjoy the benefits of government services like all other industries and must accordingly contribute a reasonable share of government revenue through taxation and secondly that the burden of taxation must not be excessive. The Court directed the government to re-examine the taxation policy by evaluating whether it constituted an excessive burden on the newspapers as government's contention stand about it being irrelevant was itself incorrect and the notification had to be revised by considering this factor.

The case thus highlighted the vitality of media's role as fourth pillar of democracy which had to be protected from executive interference. The burden of taxation on newspapers must be such that they can be feasibly discharged without crumbling under its very weight. Excessively imposing taxes on media would disable the newspaper in performing its duty of publishing and circulating newspapers and once the prices were increased, it would also affect the sales. Thus, to surmise, the judgment expanded freedom of press to dimensions beyond direct regulation of newspapers to economic control.

In case of ***Express Newspapers P. Ltd. vs. Union of India***[320], the constitutional validity of a notice of re-entry upon forfeiture of lease as also threatened demolition of Express Buildings on ground of being violative of Article 19(1)(a) was challenged. Under a lease agreement, petitioner was allotted certain plots by Government of India for construction of its press building which was accordingly constructed. However, it was alleged by Lt. Governor of Delhi that the new Express Building was constructed in contravention of municipal corporation laws and notice for demolition of the same was immediately issued. The petitioners stated that the construction of new building was in conformity with lease deed as also with express sanction of lessor, Union of India. They

[320] 1986 AIR 872

contended that as the impugned notices had a direct impact on freedom of press, the same be withdrawn. The Court in its judgment held that the impugned notices did constitute a direct and immediate threat to the freedom of press and were violative of not only Article 19(1)(a) but also of right to equality under Article 14 and were hence declared invalid because they were sent with malafide intent to create hindrances in smooth functioning of the Indian Express newspaper.

In case of ***Samaresh Bose vs. Amal Mitra***,[321] complaint was filed by an advocate against the author and publishers, complaining that the novel 'Prajapati' which was published in a journal of good reputation and wide circulation namely "SarodiyaDesh" contains matters which are obscene and both the accused persons have, sold, distributed, printed and exhibited the same which has the tendency to corrupt the morals of those in whose hands the said 'SarodiyaDesh' may fall and the reading public as well" and "both the accused persons have committed an offence punishable under S. 109 and 292, IPC. On the basis of the said complaint and after compliance with the necessary formalities, a criminal case was filed against both the accused persons and the Chief Presidency Magistrate of Calcutta declared the impugned novel as obscene and both the accused were held guilty with following reasons u/s. 292, IPC and convicted for two months imprisonment and a nominal fine. Against the judgment and order passed by learned Chief Presidency Magistrate both the accused preferred an appeal to the High Court at Calcutta. The complainant also filed a criminal revision in the High Court for enhancement of the sentence imposed by the Chief Presidency Magistrate on the two accused persons.

On behalf of the appellants it was contended that neither the novel as a whole nor any part thereof can be considered to be obscene within the meaning of S. 292, I.P.C. Also it was contended that in various portions of the novel and in particular the marked portions which were considered by the Chief Presidency Magistrate and also the High Court, various slang words might have been used and the description of the incidents including the description of various parts of female body may be verging on vulgarity and may offend sophisticated minds, but the same cannot be considered to be obscene, as the same cannot have any tendency of depraving and corrupting the minds of persons whose

[321] AIR 1986 SC 967

minds are open to such immoral influences and the same cannot also suggest to the minds of the young people of either sex or to persons of more advanced years thoughts of any impure and libidinous character. It was also submitted that the novel depicts the feelings, thoughts, actions and the life of Sukhen who is the hero of the novel and is its main character; and through the speeches, thoughts and actions of Sukhen the novel seeks to condemn and criticise various aspects of life in society now prevailing in its various strata. He submitted that slang words and almost vulgar language had to be used in keeping with the character of Sukhenwho was accustomed to the use of only such language. He argued that if different kinds of words, cultured and sophisticated, were to be used in the thoughts, speeches and actions of Sukhen, the entire portrayal of Sukhen's character would become unreal and meaningless. He argued that true art and literature require that the character sought to be portrayed must be so depicted as to make it real and artistic; and, if for achieving that purpose the language which the kind of person sought to be portrayed indulges in is put into his mouth it does not become obscene. He also argued that in literature as also in life there is a good deal of distinction between obscenity and vulgarity though both may be offensive to any sophisticated mind. It was his submission that it is obscenity in literature which attracts the provisions of S. 292, I.P.C. and that the word 'obscenity' which was not defined in the Code has come up for consideration in various cases and has been judicially interpreted by various Courts including this Court. He also argued that the book in issue had a social purpose to serve and has been written with the main object of focusing the attention of persons interested in literature to the various ills and maladies ailing and destroying the social fabric and the author who is a powerful writer has used his talents for achieving the said purpose.

The State on the other hand supported the judgment of Chief Presidency Magistrate and the High Court affirming the judgment of the Chief Presidency Magistrate. He submitted that the novel has to be judged in the background of the conditions prevailing in the society at the time when the novel was written. He further submitted that the learned Chief Presidency Magistrate and the learned Judge of the High Court both had read the novel carefully a number of times and on their own appreciation of the merits of the novel they both had come to the conclusion after considering all the

submissions which were made on behalf of the accused persons that the novel in question was obscene.

The Court held that the book in question was not obscene within the meaning of S. 292, I.P.C. It agreed with Judge of the High Court that there was nothing in this or in the subsequent passages relating to characters namely, Neela, Vanita and Shama which amounted to pornography nor had the author indulged in a description of the sex act or used any language which can be classed as vulgar. Whatever has been done is done in a restrained manner though in some places there may have been an exhibition of bad taste, leaving it to the more experienced to draw the inferences, but certainly not sufficient to suggest to the adolescent anything which is depraving or lascivious. For people who are literate and interested in books referring to sex, innumerable books are readily available which contain references to sex. Their purpose is not, and they have not the effect of stimulating sex impulses in the reader but may form part of a work of art or are intended to propagate ideas or to instil a moral.

It was further observed that the concept of obscenity would differ from country to country depending on the standards of morals of contemporary society. What is considered as a piece of literature in France may be obscene in England and what is considered in both countries as not harmful to public order and morals may be obscene in some othercountry. But to insist that the standard should always be for the writer to see that the adolescent ought not to be brought into contact with sex, or that if they read any references to sex in what is written whether that is the dominant theme or not they would be affected, would be to require authors to write books only for the adolescents and not for the adults. In early English writings authors wrote only with unmarried girls in view but society has changed since then to allow litterateurs and artists to give expressions to their ideas, emotions and objectives with full freedom except that it should not fall within the definition of 'obscene' having regard to the standards of contemporary society in which it is read. The standards of contemporary society in India are also fast changing. The adults and adolescents have available to them, a large number of classics, novels, stories and pieces of literature which have a content of sex, love and romance. As observed in Udeshi's case (AIR 1965 SC 881) if a reference to sex by itself is considered

obscene, no books can be sold except those which are purely religious. In the field of art and cinema also the adolescent is shown situations which even a quarter of a century ago would be considered derogatory to public morality, but having regard to changed conditions are more taken for granted without in any way tending to debase or debauch the mind. What has to be seen is that whether a class, not an isolated case, into whose hands the book, article or story falls suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thoughts aroused in their minds. The charge of obscenity must, therefore, be judged from this aspect."

The Court also held that in judging the question of obscenity, the Judge in the first place should try to place himself in the position of the author and from the view point of the author the judge should try to understand what is it that the author seeks to convey and what the author conveys has any literary and artistic value. The Judge should thereafter place himself in the position of a reader of every age group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have in the minds of the readers. A Judge should thereafter apply his judicial mind dispassionately to decide whether the book in question can be said to be obscene within the meaning of S. 292, I.P.C. by an objective assessment of the book as a whole and also of the passages complained of as obscene separately.

Referring to the publication “SarodiyaDesh”, the Court observed that it was an immensely popular journal amongst Bengalis of both sexes as also in all the age groups and the book printed therein cannot be considered as obscene. Reference to kissing, description of body and figures of the female characters in the book and suggestions of acts of sex by themselves may not have the effect of depraving, debasing and encouraging the readers of any age to lasciviousness and the novel on these counts, may not be considered to be obscene. Likewise because of the slang language used as also the episodes in relation to sex life narrated in the novel, appear vulgar and may create a feeling of disgust and revulsion. The mere fact that the various affairs and episodes with emphasis on sex have been narrated in slang and vulgar language may shock a reader who may feel disgusted by the book does not resolve the question of obscenity.

Thus the Apex Court set aside Lower Court order stating that the observations made by them and recorded earlier go to indicate that in their thinking there was a kind of confusion between vulgarity and obscenity. It clarified that a vulgar writing is not necessarily obscene. Vulgarity arouses a feeling of disgust and revulsion and also boredom but does not have the effect of depraving, debasing and corrupting the morals of any reader the novel, whereas obscenity has the tendency to deprave and corrupt those whose minds are open to such immoralities.The Court stated that the author has used the offensive language as also frequent sexual descriptions so as to focus the readers' attention on such characters in real life. The author intends to expose various evils and ills pervading the society and to pose with particular emphasis the problems which ail and afflict the society in various spheres. He has used his own technique, skill and choice of words which may, in his opinion, serve properly the purpose of the novel.

The Court thus allowed the appeal andthe judgment of the lower court was set aside. The appellants were acquitted of the charges framed against them and the novel was held as neither obscene nor offending S. 292, I.P.C. merely for using sexual descriptions and slang language at several places. The sole purpose of any literature cannot be to protect adolescents from getting exposure to offensive language and if it were so, only religious literature would have to be made available. Where any literature requires descriptions or slang words which have been used only to emphasize on the character but do not have obscenity at the core cannot be considered as offending under the law. In judging the question of obscenity, the judge in the first place should try to place himself in the position of the author and from the viewpoint of the author, the judge should try to understand what is it that the author seeks to convey and whether what the author conveys has any literary and artistic value. Judge should thereafter place himself in the position of a reader of every age group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have on the minds of the reader.

The case of ***R. Rajagopal vs. State of Tamilnadu and others***[322] involved a question concerning the freedom of press vis-a-vis the right to privacy of the citizens of

[322] AIR 1995 SC 264

this country. It also raised the question as to the parameters of the right of the press to criticize and comment on the acts and conduct of public officials. The petitioners in this case were the editor, associate editor, printer and publisher of a Tamil weekly magazine `Nakkheeran', published from Madras. They had sought issuance of an appropriate writ, order or direction under Art. 32 of the Constitution, restraining the respondents, viz., (1) State of Tamil Nadu, (2) Inspector General of Prisons, Madras and (3) Superintendent of Prisons (Central Prison), Salem, Tamil Nadu from interfering with the publication of autobiography of the condemned prisoner, Auto Shankar, in their magazine. The said Shankar alias Gauri Shankar alias Auto Shankar was charged and tried for as many as six murders and was convicted and sentenced to death. His appeal was dismissed and it was stated that his mercy petition to the President of India was pending for consideration. During his period in prison, Shanker wrote his autobiography of nearly 300 pages which highlighted close nexus between him and several IAS, IPS and other officers, some of whom were indeed his partners in several crimes. The presence of several such officers at the house warming ceremony of Auto Shankar's house was proved by the video cassette and several photographs taken on the occasion.The prisoner requested his advocate to ensure that his autobiography is published in the petitioners' magazine, `Nakkheeran' and affirmed this desire in several letters written to his advocate and the first petitioner. The petitioners announced prior to releasing the autobiography that very soon the magazine would be coming out with the sensational life history of Auto Shankar. This announcement sent shock waves among several police and prison officials who were afraid that their links with the condemned prisoner would be exposed. They forced the said prisoner, by applying third degree methods, to write letters addressed to the second respondent (Inspector General of Prisons) and the first petitioner requesting that his life-story should not be published in the magazine.

Auto Shankar wrote his autobiography running into 300 pages while confined in Chenglepat sub jail during the year, 1991. The autobiography was handed over by him to his wife, Smt. Jagdishwari, with the knowledge and approval of the jail authorities, for being delivered to his advocate, Sri Chandrasekharan.Simultaneously, certain correspondence ensued between the petitioners and the prison authorities in this connection. Ultimately, the Inspector General of Prisons wrote the impugned letter dated

June 15, 1994 to the first petitioner. The letter stated that the petitioner's assertion that Auto Shankar had written his autobiography while confined in jail in the year 1991 is false and prisoner had himself denied the writing of any such literature. The letter concluded, "from the above facts, it is clearly established that the serial in your magazine under the caption "Shadowed Truth" or "Auto Shankar's Dying Declaration" is not really written by Gauri Shankar but it is written by someone else in his name. Writing an article in a magazine in the name of a condemned prisoner is against prison rules and your claim that the power of attorney is given by the prisoner is unlawful. In view of all those it is alleged that your serial supposed to have written by Auto Shankar is (false?) since with an ulterior motive for this above act there will arise a situation that we may take legal action against you for blackmailing. Hence, I request you to stop publishing the said serial forthwith."

The petitioners submitted that the contents of the impugned letter were untrue. The argument of jeopardy to prisoners interest was a hollow one. The petitioners have a right to publish the said book in their magazine as desired by the prisoner himself. Indeed, the petitioners have published parts of the saidautobiography in three issues of their magazine dated June 11, 1994, June 18, 1994 and June 22, 1994 but stopped further publication in view of the threatening tone of the letter dated June 15, 1994. The petitioners have reasons to believe that the police authorities may swoop down upon their printing press, seize the issues of the magazine besides damaging the press and their properties, with a view to terrorise them. On a previous occasion when the petitioners' magazine published, on August 16, 1991, an investigative report of tapping of telephones of opposition leaders by the State Government, the then editor and publisher were arrested, paraded, jailed and subjected to the third degree methods. There were several instances when the petitioners' press was raided and substantial damage done to their press and properties. The petitioners were apprehensive that the police officials may again do the same since they were afraid of their links with the condemned prisoner being exposed by the publication of the said autobiography. The petitioner asserted the freedom of press guaranteed by Art. 19(1)(a), which, according to them, entitled them to publish the said autobiography. It was submitted that the condemned prisoner had the undoubted right to have his life story published and that he cannot be prevented from doing so.

The respondentssubmitted that the writ petition filed by the petitioners in the High Court was dismissed by the learned single Judge on June 28, 1994 holding inter alia that the question whether the said prisoner had indeed written his autobiography and authorised the petitioner to publish the same is a disputed question of fact. This was so held in view of the failure of the learned counsel for the petitioners, to produce the alleged letters written by the prisoner to his counsel, or to the petitioners, authorising them to publish his autobiography. It was submitted that the letter dated June 15, 1994 was addressed to the first petitioner in as much as "there was a genuine doubt regarding the authorship of the autobiography alleged to have been written by the condemned prisoner while he was in prison and which purportedly reached his wife. Besides, it was also not clear whether the said prisoner had as a matter of fact authorised the petitioner to publish the said autobiography. In the context of such a disputed claim both as to authenticity as well as the authority to publish the said autobiography, the said communication was addressed to the petitioners herein, since the petitioners have threatened to publish derogatory and scurrilous statements purporting to be based on material which are to be found in the disputed autobiography". It was submitted that the allegation that a number of IAS, IPS and other officers patronized the condemned prisoner in his nefarious activities was baseless. "It is only in the context of such a situation coupled with the fact that the petitioner might under the guise of such an autobiography tarnish the image of the persons holding responsible positions in public institution that the communication dated 15-6-94 was sent to him", say the respondents. They also denied that they subjected the said prisoner to third degree methods to pressurise him into writing letters denying the authorisation to the petitioners to publish his life-story.

Following issues were framed after considering the petition:

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

infringement of his right to privacy and further in case such writing amounts to defamation?

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

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

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

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

It was held that the petitioners have a right to publish the autobiography of Auto Shanker in so far as it appears from public records even without his consent or authorization. But if they go beyond that and publish his life story they may be invading his right to privacy and will be liable for the consequences in accordance with law. Similarly the State and its officials who apprehend that they may be defamed cannot impose prior restraint upon publication of alleged autobiography. The remedy of the affected officials, if any, is after the publication.

Following observations were also made:

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

(2) The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public

records including Court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others.

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

Conclusively, it was also held that the principles above mentioned are only the broad principles. They are neither exhaustive nor all-comprehending; indeed no such enunciation is possible or advisable. The said right has to go through a case-by-case development asthe concepts dealt with herein are still in the process of evolution.

Applying the above principles, it was held that the petitioners have a right to publish, what they allege to be the lifestory / autobiography of Auto Shankar in so far as it appears from the public records, even without his consent or authorisation. But if they go beyond that and publish his lifestory, they may be invading his right to privacy and will be liable for the consequences in accordance with law. Similarly, the State or its officials cannot prevent or restrain the said publication. The remedy of the affected public officials/ public figures, if any, is after the publication, as explained hereinabove. Thus Supreme Court took a balanced view between public life and private life of those in power in the nation. It held that though freedom of press extends to engaging in uninhabited debate about the involvement of public figures in public issues, it does not extend to interfering in their private lives and at such level, a balance between freedom of press and right to privacy is a must. To surmise it can be said that Supreme Court has recognized and respected the right of privacy of individuals and the same cannot be sacrificed at the cost of media's right of free speech.

In case of ***Re. Harijai Singh***[323] it was also held that the expression "freedom of the press" has not been used in Article 19 but it is comprehended within Article 19(1)(a). The expression means freedom from interference from authority which would have the effect of interference with the content and circulation of newspapers. There cannot be any interference with that freedom in the name of public interest. The purpose of press is to

[323] AIR 1997 SC 73

advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments. Freedom of the press is heard of social and political intercourse. It is the primary duty of courts to uphold the freedom of press and invalidate all laws or administrative actions which interfere with it contrary to the constitutional mandate.The fundamental principle behind the freedom of press is people's right to know. The primary function of press is to provide comprehensive and objective information of all aspects of country's political, social, economic and cultural life. It has an educative and mobilizing role to play. It plays an important role in moulding public opinion. But freedom of press is not absolute, unlimited and unfettered at all times and in all circumstances as giving an unrestricted freedom of speech and expression would amount to an uncontrolled licence. If it were wholly free even froom reasonable restraints, it would lead to disorder and anarchy. The freedom is not to be misunderstood as to be a press free to disregard its duty to be responsible. In an organized society the rights of press free have to be recognized with its duties and responsibilities towards the society. Public order, decency, morality and such other things must be safeguarded. The editor of a newspaper or a journal has a greater responsibility to guard against untruthful news and publications for the simple reason that his utterance has a far greater circulation and impact than utterance of an individual and by reason of their appearing in print, they are likely to be believed by the ignorant. It is the duty of a true and responsible journalist to strive to inform he people with accurate and impartial presentation of news and their views."

Thus, the Court in this case heavily tried to balance the scales between a free press on one hand and the restrictions on the other. The power of information to the right human mind is extremely invaluable. The same follows for putting wrong information in wrong hands which can be just as dangerous. Press being a powerful medium with its capabilities to do such harm needs to be careful in news reporting. Of course, free press has to be maintained at all costs as that's how the real picture can be presented to the society but likewise, abuse or misuse of this free press will only lead to damages, sometimes irreversible.

In case of ***Ajay Goswami vs. Union of India***[324], the petition was filed against Union of India, Press Council of India and leading newspapers namely The Times of India and Hindustan Times to seek protection from this Court to ensure that minors are not exposed to sexually exploitative materials, whether or not the same is obscene or is within the law. The objective was that the nature and extent of the material having sexual contents should not be exposed to the minors indiscriminately and without regard to the age of minor and the discretion in this regard should vest with parents, guardians, teachers or experts on sex education. The petitioner prayed to direct the authorities to strike a reasonable balance between the fundamental right of freedom of speech and expression enjoyed by the press and the duty of the Government, being signatory of United Nations Convention on the Rights of the Child, 1989 and Universal Declaration of Human Rights, to protect the vulnerable minors from abuse, exploitation and harmful effects of such expression. A classification or introduction of a regulatory system was sought from the Court for facilitating climate of reciprocal tolerance which may include :-

(a) an acceptance of other people's rights to express and receive certain ideas and actions; and

(b) accepting that other people have the right not to be exposed against their will to one's expression of ideas and actions.

The reciprocal tolerance was further necessary considering the growing tendency among youngsters and minors in indulging in X-rated jokes, SMS and MMS.

The petitioner specified that he was in no way seeking restrain on the freedom of press or any censorship prior to the publication of article or other material but only at the receiving end, i.e. when the literature in any form with obscene content is received easily by children. The petitioner stated that The Press Council of India which was constituted for preserving the freedom of press and maintaining and improving the standards of newspapers and news agency is a powerless body and no guidelines have been framed for

[324] AIR 2007 SC 493

the minors and adolescents in particular, which can be enforced in Court of law. Petitioner-in-person made the following proposals at the end of his arguments:

i) Guidelines in detail may be issued to all the newspapers regarding the matter which may not be suitable for the reading of minors or which may require parents or teachers discretion.

ii) Newspapers should have self-regulatory system to access the publication in view of those guidelines.

iii) In case the newspapers publish any material which is categorized in the guidelines the newspaper be packed in some different form and should convey in bold infrontof newspapers of the existence of such material.

iv) This would give discretion to the parents to instruct the news vendor whether to deliver such newspaper or not.

In the alternative, he suggested a Committee be appointed to suggest ways and means for regulating the access of minors to adult oriented sexual, titillating or prurient material.

In response to petitioner's arguments, it was submitted on behalf of Union of India that publishing as well as circulating of obscene and nude/semi-nude photographs of women already constitutes a penal offence under the provisions of the Indecent Representation of Women (Prohibition) Act, 1986, administered by the Department of Women and Child Development, Ministry of Human Resources Development. It was further submitted that sale, letting, hiring, distributing, exhibiting, circulating of obscene books and objects of young persons under the age of twenty years also constituted a penal offence u/s. 292 and 293 of the Indian Penal Code.

On behalf of Press Council of India it was submitted that the Press Council enjoys only limited authority, with its power limited to giving directions, censure etc. to the parties arraigned before it, to publish particulars relating to its enquiry and adjudication etc. The powers of the Council in so far its authority over the press is concerned are enumerated u/s. 14 of the Press Council Act, 1978. However, it has no further authority to ensure that its directions are complied with and its observations implemented by the

erring parties. Lack of punitive powers with Press Council has tied its hands in exercising control over the erring publications. On behalf ofTheTimes of India it was submitted that legislations, rules and regulations already existed within the Indian legal framework to check publication of obscene materials and articles as also that Press Council is empowered under the Press Council of India Act to impose serious checks on the Newspaper, News Agency, an editor or a journalist who flouts the norms as formulated by the Press Council and is against societal norms of decency. It was also submitted that the Indian Constitution under Article 19 (1) (a) guarantees every citizen the right to freedom of speech and expression and respondent being a leading newspaper has the right to express its views and various news of national and international relevance in its edition and any kind of unreasonable restriction on this right will amount to the violation of the right guaranteed by the Indian Constitution.

Likewise referring American cases it was stated that even nudity per se is not obscenity. In 50 Am Jur 2 d, para 22 at page 23, it was observed that "Articles and pictures in a newspaper must meet the Miller's test's Constitutional standard of obscenity in order for the publisher or distributor to be prosecuted for obscenity. Nudity alone is not enough to make a material legally obscene."In Alfred E Butler v. State of Michigan[325] the U.S. Supreme Court held that: "The state insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig."

Relying on the fame and circulation of the newspaper, the Times of India and Hindustan Times, it was submitted that they are leading newspapers of nation and their popularity only stands to show that the pictures published are not objectionable and also that respondent while publishing any news article has any intention to cater to the prurient interest of anybody. Also there was an internal regulatory system to ensure that no objectionable photograph or matter gets published.

In conclusion, it was urged that any step to ban publishing of certain news-pieces or pictures would fetter the independence of free-press.

[325]1 Led 2d 412

In its judgment, the Court held that theglobalisation and liberalization does not give licence to the media to misuse freedom of the Press and to lower the values of the society. The media performs a distinct role and public purpose which require it to rise above commercial consideration guiding other industries and businesses. So far as that role is concerned, one of the duties of the media is to preserve and promote our cultural heritage and social values. The Court relied upon American case Reno vs. the American Civil Liberties Union[326] wherein the U.S. Supreme Court struck down two provisions of the Communications Decency Act, 1996 which criminalized online transmission of "obscene or indecent" messages to any recipient under 18 years of age. The Court partly tried to respond by saying that protecting children from harmful materials does not justify an unnecessarily broad suppression of speech addressed to adults. The Court also held that where art and obscenity are mixed, what must be seen is whether the artistic, literary or social merit of work in question outweighs its "obscene" content. It is necessary that publication must be judged as a whole and the impugned should also separately be examined so as to judge whether the impugned passages are so grossly obscene and are likely to deprave and corrupt. The test for judging a work should be that of an ordinary man of common sense and prudence and not that of a hypersensitive man. It was observed that a culture of 'responsible reading' should be inculcated among the readers of any news article. No news item should be viewed or read in isolation. It is necessary that publication must be judged as a whole and news items, advertisements or passages should not be read without the accompanying message that is purported to be conveyed to the public. Also the members of the public and readers should not look for meanings in a picture or written article, which is not conceived to be conveyed through the picture or the news item.

The court opined that a blanket ban on publication of obscene materials or article in order to shield juvenile innocence cannot be imposed as it will lead to situation of newspapers publishing only that content which is in requirement of children despite being a source of information for all ages. It also held that no news item should be viewed in isolationandpublication must be judged as a whole and fictitious imagination of anybody

[326] 521 US 844 (1997)

especially of minors should not be agitated in court of law. The Court also suggested Press Council to amend the provisions of its Act.

In case of **Aveek Sarkar and another v. State of W.B. and others**[327]a widely circulated German magazine titled "STERN" published an article alongwith a picture of Boris Becker, a world renowned tennis player, posing nude with his dark-skinned fiancée by name Barbara Feltus, a film actress, which was photographed by none other than her father. The article stated that, in an interview, both Boris Becker and Barbara Feltus spoke freely about their engagement, their lives and future plans and the message they wanted to convey to the people at large, for posing to such a photograph. The said article portrayed Boris Becker as a staunch protester of the evil practice of "apartheid".[328] They had also mentioned in the article that the purpose of photograph was also to signify that love triumphs over hatred. The same article was later published by "Sports World" magazine as also Ananda Bazar Patrika - a newspaper with wide circulation in Kolkata.

The present case arose after a lawyer practicing at Alipore Judge's Court, Kolkata, filed a complaint under Section 292 of the Indian Penal Code against the Editor, the Publisher and Printer of the newspaper as well as against the Editor of the Sports World, former Captain of Indian Cricket Team, late Mansoor Ali Khan of Pataudi, before the Sub-Divisional Magistrate at Alipore. According to the complaint, the complainant Advocate being an experienced Advocate and an elderly person had a strong apprehension that the nude photograph appearing in the AnandabazarPatrika, as well as in the Sports World, would corrupt young minds, both children and youth of this country, and that it was against the cultural and moral values of Indian society which had a vast difference from the western culture.

The complainant stated that unless such types of obscene photographs are censured and banned and accused persons are punished, the dignity and honour of our

[327] AIR 2014 SC 1495

[328]The term ‘apartheid’ refers to racial segregation. After the National Party gained power in South Africa in 1948, its all-white government immediately began enforcing existing policies of racial segregation under a system of legislation that it called apartheid. Under apartheid, nonwhite South Africans (a majority of the population were forced to live in separate public facilities, and contact between the two groups was limited. Despite strong and consistent opposition to apartheid within and outside South Africa, its laws remained in effect for nearly 50 years. (www.history.com/topics/apartheid) (Visited on 22.5.2017)

womanhood would be in jeopardy. Complainant also urged that the accused persons should not only be prosecuted under Section 292, IPC, but also be prosecuted under Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986, since the photograph prima facie gives a sexual titillation and its impact is moral degradation and would also encourage the people to commit sexual offences.

In response thereto, the accused persons filed an application before the Court for dropping the proceedings stating that there was no illegality in reproducing in the Sports World as well as in the AnandabazarPatrika of the news item and photographhappeared in a magazine 'STERN'' published in Germany.Further, it was pointed out that the said magazine was never banned entry into India and was never considered as 'obscene', especially when Section 79 of Indian Penal Code states that nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not reason of a mistake of law in good faith, believes himself to be justified by law, in doing it.

The Court after seeing the photographs and hearing the arguments of either side, held that until evidence was brought on record, responsibility of accused persons could not be determined. However, the Court observed that though Sec. 292 does not define word 'obscene', but considering the precedents, it does have a harmful effect of depraving and debauching the mind of the persons into whose hands it may come and also for other sufficient reasons process was issued against the accused persons u/s. 292, I.P.C. The Magistrate after holding so, held the accused persons to be examined under Section 251, Cr.P.C. and ordered that they would be put to face the trial for the offence punishable u/s. 292, IPC alternatively under Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986. The accused appealed against the said order.

In appeal proceedings before the High Court, it was pointed out that the Magistrate had not properly appreciated the fact that there was no ban in importing the German sports magazine 'STERN'' into India. Consequently, reproduction of any picture would fall within the general exception contained in Section 79, IPC. Referring to the picture, it was pointed out that the picture only demonstrates the protest lodged by Boris Becker as well as his fiancée against 'apartheid'' and those facts were not properly

appreciated by the learned Magistrate. Further, it was also pointed out that the offending picture could not be termed as obscene inasmuch as nudity per se was not obscene and the picture was neither suggestive nor provocative in any manner and would have no effect on the minds of the youth or the public in general. Further, it was also pointed out that the learned Magistrate should not have issued summons without application of mind. The High Court, however, did not appreciate all those contentions and declined to quash the proceedings under Section 483, Cr.P.C., against which this appeal has been preferred. It was also pointed out:

- That obscenity has to be judged in the context of contemporary social norms, current socio-moral attitude of the community and the prevalent normsof acceptability/susceptibility of the community, in relation to matters in issue.
- That the learned Magistrate as well as the High Court have completely overlooked the context in which the photograph was published and the message it had given to the public at large.
- That the photograph is in no way vulgar or lascivious.
- That the Courts below have not properly appreciated the scope of Section 79, IPC and that the appellants are justified in law in publishing the photograph and the article which was borrowed from the German magazine.

On behalf of the respondentsit was submitted as under:

- That the Courts below were justified in holding that it would not be proper to give an opinion as to the culpability of the accused persons unless they are put to trial and the evidence is adduced.
- That the question whether the publication of the photograph is justified or not and was made in good faith requires to be proved by the appellants since good faith and public good are questions of fact and matters for evidence.
- That the learned Magistrate as well as the High Court was justified in not quashing the complaint and ordering the appellants to face the trial.

The Court after hearing both the sides observed as under:

That looking at the circumstances of present case, the landmarkHicklin test is not the correct test to be applied to determine "what is obscenity". Therefore, "community standard test" should be applied rather than "Hicklin test" to determine what is "obscenity". A bare reading of sub-section (1) of Section 292, makes clear that a picture or article shall be deemed to be obscene (i) if it is lascivious; (ii) it appeals to the prurient interest, and (iii) it tends to deprave and corrupt persons who are likely to read, see or hear the matter, alleged to be obscene. Once the matter is found to be obscene, the question may arise as to whether the impugned matter falls within any of the exceptions contained in Section. A picture of a nude/semi-nude woman, as such, cannot per se be called obscene unless it has the tendency to arouse feeling or revealing an overt sexual desire. The picture should be suggestive of deprave mind and designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in which the nude/semi-nude woman is depicted. Only those sex-related materials which have a tendency of "exciting lustful thoughts" can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards.

The Court in present case, had to examine whether the photograph of Boris Becker with his fiancée Barbara Fultus, a dark-skinned lady standing close to each other bare bodied but covering the breast of his fiancée with his hands can be stated to be objectionable in the sense it violates Section 292, IPC. If the community tolerance test was applied, it did not appear to be a photograph suggestive of depraving minds and designed to excite sexual passion in persons who are likely to look at them and see them, which would depend upon the particular posture and background in which the woman is depicted or shown. Further, the photograph, had no tendency to deprave or corrupt the minds of people in whose hands the magazine Sports World or AnandabazarPatrika would fall. The Court further held that the said picture has to be viewed in the background in which it was shown, and the message it has to convey to the public and the world at large. The cover story of the magazine carries the title, posing nude, dropping of harassment, battling racism in Germany. Boris Becker himself in the article published in the German magazine, speaks of the racial discrimination prevalent in Germany and the article highlights Boris Becker's protests against racism in Germany.

The controversial photograph was taken in such a manner to convey that people may belong to different regions and religions, their skin colors maybe different or in stark contrast, but the element of love wins over such petty matters. The picture promoted love affair, leading to a marriage, between a white-skinned man and a black skinned woman. Therefore, photograph and the article should be appreciated in the light of message it wants to convey, that is to eradicate the evil of racism and apartheid in the society and to promote love and marriage between white skinned man and a black skinned woman. When viewed in that angle, the Court held that the picture or the article which was reproduced by Sports World and the AnandabazarPatrika did not appear to be objectionable so as to initiate proceedings under Section 292, IPC or under Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986.

The Queen's Bench gave the Hicklin Test while deciding the case of Regina vs. Hicklin. As per the Test, in order to find out if any matter, i.e. literature, film, play, etc. is obscene or not, it shall be required to pass the Hicklin Test which stated that whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. If it was decided that the matter has such tendency, it shall be considered obscene irrespective of any other facts. Any publication could be considered as "obscene" solely based on isolated passages of a work considered out of context. Works could be considered as obscene by their possible influence on most susceptible readers such as children or weak-minded adults. The rule was considered severe as any piece of work could be entirely considered as obscene based on certain parts of it without considering its entirety. Later, in Roth vs. United States, it was held that sex and obscenity should not be considered as synonymous. The Court elaborated that only those sex-related materials which had the tendency of exciting lustful thoughts were found to be obscene and the same has to be judged from the viewpoint of an average person by applying contemporary community standards test. The Hicklin Test eventually gave away to the Community Standards Test which came to be accepted by several nations through their judgments of similar nature. What could be obscene to some persons might not be so for the society at large. Again, that may have been obscene at one point of time might not be so after some decades. Considering the various segments of society and how different

individuals carry different tastes, the community standards came to be considered as the final test for deciding obscenity.

In case of ***S. Khushboo v. Kanniammal***[329]**,** the famous and widely circulated national magazine "India Today"had gathered and published the views expressed by several individuals from different segments of society, including those of the appellant on subject of sexual habits as also premarital sex of people residing in bigger cities of India. The appellant expressed her personal opinion wherein she had noted the increasing incidence of pre-marital sex, especially in the context of live-in relationships and called for the societal acceptance of the same. However, appellant had also qualified her remarks by observing that girls should take adequate precautions to prevent unwanted pregnancies and the transmission of venereal diseases. The said remarks of appellant were published in Tamil newspaper "DhinaThanthi" on 24.9.2005 which first quoted the appellant's statement published in 'India Today' and then opined that it had created a sensation all over the State of Tamil Nadu. This news item also reported a conversation between the appellant and a correspondent from 'DhinaThanthi', wherein the appellant had purportedly defended her earlier views.Soon after publication of the said news item, the appellant sent a legal notice to the Editor of 'DhinaThanthi', categorically denying that she had made the statement quoted above. In fact, the appellant had asked the publisher to withdraw the entire news-item published earlier and to publish her objections prominently within three days of receipt of the notice, failing which the appellant would be constrained to take appropriate legal action against the newspaper.

In the meantime, the publication of these statements in 'India Today' and 'DhinaThanthi' drew criticism from people and organizations across the nation and some of them also filed criminal complaints against the appellant.

- In one complaint, the complainant stated that she is a married woman who is the Treasurer of a District-level unit of the PattaliMakalKatchi [hereinafter referred as 'PMK'], a political party, and is also involved in social service. She had quoted some parts of the statements published in 'India Today' and 'DhinaThanthi' to allege that the appellant's interview had brought great shame on her since it had suggested that

[329] AIR 2010 SC 3196

women of her profile had engaged in premarital sex. The complainant further alleged that the appellant's remarks had caused mental harassment to a large section of women, and in particular women from Tamil Nadu were being looked down upon with disrespect and contempt.

- In another complaint, the complainant stated that he found second-hand accounts of the same to be quite shocking since the appellant had questioned the need for women to maintain their virginity or chastity. It was alleged that these remarks were an abuse against the dignity of the Tamil women and that they had grossly affected and ruined the culture and morality of the people of the State. It was further submitted that these statements could persuade people to involve themselves in unnatural crimes and that the appellant's acts amounted to commission of offences punishable under Sections 499, 500, 504, 505(1)(b) and 509 IPC read with Sections 3 and 4 of Act 1986.

- Yet another complaint was filed by a lady advocate who was practicing in the Trichy District Courts for more than 10 years. She quoted some portions from the statements published in 'India Today' and 'DhinaThanthi' to submit that the appellant's acts were punishable under Sections 292, 500, 504, 505(1)(b) and (c), 505(2) and 509 IPC read with Section 6 of Act 1986.

On behalf of appellant, the actress who gave the interview,it was submitted that the complainants (respondents in these appeals) were not 'persons aggrieved' within the meaning of Section 199(1)(b) Cr.P.C. and hence they were not competent to institute private complaints for the alleged offences. It was stated that the appellant had made a fair and reasonable comment as a prudent person, and therefore, the opinion expressed by the appellant is fully protected under Article 19(1)(a) of the Constitution of India which guarantees freedom of speech and expression to all citizens. Furthermore, it was contended that even if the allegations in the various complaints are taken on their face value and accepted in their entirety, the same do not disclose any offence whatsoever and the opinion of the appellant does not, by any means, fall within the ambit of Sections 499, 500 and 505 IPC or Sections 3 and 4 of Act 1986. It was also canvassed that the criminal proceedings had been instituted in a

mala fide manner by the workers of a particular political party, with the intention of vilifying the appellant and gaining undue political mileage.

In response, advocates appearing for the respondents, submitted that since the High Court has refused to quash the complaints, this Court should not interfere either since the complaints require determination of factual controversies that are best left to be decided by a court of first instance. They asserted that the complainants in these cases are mostly women belonging to Tamil Nadu, who were personally aggrieved by the appellant's remarks. It was argued that the endorsement of pre-marital sex by a prominent person such as the appellant would have a morally corruptive effect on the minds of young people. Her statement would definitely obscure some basic moral values and expose young people to bizarre ideas about pre-marital sex, thereby leading to deviant behaviour which would adversely affect public notions of morality. It was contended that the constitutional protection for speech and expression is not absolute and that it is subject to reasonable restrictions based on considerations of 'public order', 'defamation', 'decency and morality' among other grounds.

After perusal of the complaints, it was revealed that most of the allegations pertained to offences such as defamation (Sections 499, 501 and 502 IPC), obscenity (Section 292 IPC), indecent representation of women and incitement among others. At the outset, Court was of the view that there is absolutely no basis for proceeding against the appellant in respect of some of the alleged offences. For example, the Act, 1986 was enacted to punish publishers and advertisers who knowingly disseminate materials that portray women in an indecent manner. However, this statute cannot be used in the present case where the appellant has merely referred to the incidence of pre-marital sex in her statement which was published by a news magazine and subsequently reported in another periodical. It would defy logic to invoke the offences mentioned in this statute to proceed against the appellant, who cannot be described as an 'advertiser' or 'publisher' by any means.

Similarly, Section 509 IPC criminalised a 'word, gesture or act intended to insult the modesty of a woman' and in order to establish this offence it was necessary to show that the modesty of a particular woman or a readily identifiable group of women has been

insulted by a spoken word, gesture or physical act. Clearly this offence cannot be made out when the complainants' grievance is with the publication of what the appellant had stated in a written form. Likewise, some of the complaints have mentioned offences such as those contemplated by Section 153A IPC ('Promoting enmity between different groups etc.,') which have no application to the present case since the appellant was not speaking on behalf of one group and the content of her statement was not directed against any particular group either.

The Court observed that in respect of substance of the complaints, it could not see how the appellant's remarks amounted to 'obscenity' in the context of Section 292 IPC. Clause (1) to Section 292 stated that the publication of a book, pamphlet, paper, writing, drawing, painting, representation, figure, etc., will be deemed obscene, if -

- It is lascivious (i.e. expressing or causing sexual desire) or

- Appeals to the prurient interest (i.e. excessive interest in sexual matters), or

- If its effect, or the effect of any one of the items, tends to deprave and corrupt persons, who are likely to read, see, or hear the matter contained in such materials.

In the past, authors as well as publishers of artistic and literary works have been put to trial and punished under this section. In the present case, the appellant takes full responsibility for her statement which was published in 'India Today', a leading news magazine. The Court also referred to the case of Ranjit D. Udeshi v. State of Maharashtra[330], wherein it was held that if a mere reference to sex by itself is considered obscene, no books can be sold except those which are purely religious. It was observed that in the field of art and cinema, the adolescent is shown situations which even a quarter of a century ago would be considered derogatory to public morality, but having regard to changed conditions, the same are taken for granted without in any way tending to debase or debauch the mind. What is to be considered is whether a class of persons, not an isolated case, into whose hands the book, article or story falls will suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thoughts aroused in their minds. Even though the decision in that case had upheld a conviction for

[330]AIR 1965 SC 881

the sale of a literary work, it became clear that references to sex cannot be considered obscene in the legal sense without examining the context of the reference.

In the present case, the appellant has merely referred to the increasing incidence of premarital sex and called for its societal acceptance. She has at no point of time described the sexual act or said anything that could arouse sexual desires in the mind of a reasonable and prudent reader. Furthermore, the statement has been made in the context of a survey which has touched on numerous aspects relating to the sexual habits of people in big cities. Even though this survey was not part of a literary or artistic work, it was published in a news magazine thereby serving the purpose of communicating certain ideas and opinions on the above-mentioned subject. In the long run, such communication prompts a dialogue within society wherein people can choose to either defend or question the existing social mores. It is difficult to appreciate the claim that the statements published as part of the survey were in the nature of obscene communications.

The Court also observed that all that the appellant did was to urge the societal acceptance of the increasing instances of pre-marital sex when both partners are committed to each other. This cannot be construed as an open endorsement of sexual activities of all kinds. If it were to be considered so, the criminal law machinery would have to take on the unenforceable task of punishing all writers, journalists or other such persons for merely referring to any matter connected with sex in published materials. For the sake of argument, even if it were to be assumed that the appellant's statements could encourage some people to engage in pre-marital sex, no legal injury has been shown since the latter is not an offence.

The Court found it difficult to fathom how the appellant's views can be construed as an attack on the reputation of anyone in particular. Even if the remarks published in 'DhinaThanthi' (dated 24.9.2005) were referred, which were categorically denied by the appellant, there was no direct attack on the reputation of anyone in particular. Instead, the purported remarks were in the nature of rhetorical questions wherein it was asked if people in Tamil Nadu were not aware of the incidence of sex. The Court concluded that even if Court thesaid remarks were considered in their entirety, nowhere was it

suggested that all women in Tamil Nadu have engaged in premarital sex. It clearly was a case of complainants over-assuming hypothetical facts which were yet to occur.

The Court observed that the threshold for placing reasonable restrictions on the 'freedom of speech and expression' is indeed a very high one and there should be a presumption in favour of the accused in such cases. It is only when the complainants produce materials that support a prima facie case for a statutory offence that Magistrates can proceed to take cognizance of the same. The initiation of a criminal trial is a process which carries an implicit degree of coercion and it should not be triggered by false and frivolous complaints, amounting to harassment and humiliation to the accused.

It was further observed that even though the constitutional freedom of speech and expression is not absolute and can be subjected to reasonable restrictions on grounds such as 'decency and morality' among others, the Court laid stress on the need to tolerate unpopular views in the socio-cultural space. The framers of Constitution recognised the importance of safeguarding this right since the free flow of opinions and ideas was essential to sustain the collective life of citizenry. While an informed citizenry is a pre-condition for meaningful governance in the political sense, Courts must also promote a culture of open dialogue when it comes to societal attitudes. Admittedly, the appellant's remarks did provoke a controversy since the acceptance of pre-marital sex and live-in relationships is viewed by some as an attack on the centrality of marriage. While there can be no doubt that in India, marriage is an important social institution, it should also be remembered that there are certain individuals or groups who do not hold the same view. To be sure, there are some indigenous groups within our country wherein sexual relations outside the marital setting are accepted as a normal occurrence. Even in the societal mainstream, there are a significant number of people who see nothing wrong in engaging in pre-marital sex. Notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and Criminality are not co-extensive. In the present case, the substance of the controversy does not really touch on whether pre-marital sex is socially acceptable. Instead, the real issue of concern is the disproportionate response to the appellant's remarks. If the complainants vehemently disagreed with the appellant's views, then they

should have contested her views through the news media or any other public platform. The law should not be used in a manner that has chilling effects on the 'freedom of speech and expression'.

Thus, dissemination of news and views for popular consumption was held as permissible under our constitutional scheme. Proponents to an idea can propose their views while those against it have just as much a right to oppose it. A culture of responsible reading is to be inculcated amongst the prudent readers. Morality and criminality are far from being coextensive. An expression of opinion in favour of non-dogmatic and non-conventional morality has to be tolerated as the same cannot be a ground to penalise the author.It is, therefore, not only desirable but imperative that electronic and news media should also play positive role in presenting to general public as to what actually transpires during the course of the hearing and it should not be published in such a manner so as to get unnecessary publicity for its own paper or news channel. Such a tendency, which is indeed growing fast, should be stopped.

In conclusion, the Court found that the various complaints filed against the appellant do not support or even draw a prima facie case for any of the statutory offences as alleged. Therefore, the appeals were allowed and the impugned judgment and order of the High Court dated 30.4.2008 was set aside.

In case of ***S. Narayan, Editor-in-Chief, Hindustan vs. Hon'ble High Court of Allahabad through Registrar General***[331], the appellants filed an affidavit tendering unqualified apology for publishing a controversial article in Hindustan Times on 20.9.2010 out of which contempt proceedings had arose. In this case, an article was published in Hindustan Times against the Chief Justice of Allahabad without verifying the authenticity of facts which tarnished his image. The Lower Court allowed the petition seeking contempt of court against which appeal was filed by appellants. In appeal, the Appellate Court specifically provided as under:

1. The media, be it electronic or print media, is generally called the fourth pillar of democracy. The media, in all its forms, whether electronic or print, discharges a very

[331] (2011) AIR SCW 5761

onerous duty of keeping the people knowledgeable and informed.The impact of media is far-reaching as it reaches not only the people physically but also influences them mentally. It creates opinions, broadcasts different points of view, brings to the fore wrongs and lapses of the Government and all other governing bodies and is an important tool in restraining corruption and other ill-effects of society. The media ensures that the individual actively participates in the decision-making process. The right to information is fundamental in encouraging the individual to be a part of the governing process. The enactment of the Right to Information Act is the most empowering step in this direction. The role of people in a democracy and that of active debate is essential for the functioning of a vibrant democracy.

2. With this immense power, comes the burden of responsibility. Media collects exorbitant amounts of information everyday from all parts of the world and hence it is the responsibility of the media to ensure that the information is thoroughly verified and processed and that they are not providing the public with information that is factually wrong, biased or simply unverified information. The right to freedom of speech is enshrined in Article 19(1)(a) of the Constitution. However, this right is restricted by Article 19(2) in the interest of the sovereignty and integrity of India, security of the State, public order, decency and morality and also Contempt of Courts Act and defamation.The unbridled power of the media can become dangerous if check and balance is not inherent in it. The role of the media is to provide to the readers and the public in general with information and views tested and found as true and correct. This power must be carefully regulated and must reconcile with a person's fundamental right to privacy. Any wrong or biased information that is put forth can potentially damage the otherwise clean and good reputation of the person or institution against whom something adverse is reported. Instances like anticipating the case, pre-judging the issues and rushing to conclusions must be avoided as has happened in the present case. The then Chief Justice of the Allahabad High Court who had otherwise proved himself to be a competent and good Judge wherever he was posted during his career was brought under a cloud by the reporting which is the subject-matter of this petition. His image was sought to be tarnished by a newspaper report which was apparently based on surmises and conjectures and not based on facts and figures. The dignity of the courts and the people's faith in

administration must not be tarnished because of biased and unverified reporting. In order to avoid such biased reporting, one must be careful to verify the facts and do some research on the subject being reported before a publication is brought out.

The Appellate Court also showed its gladness that the persons against whom contempt proceedings were initiated for a wrong and incorrect reporting about the then Chief Justice had realized their mistake and also had expressed their repentance through their advocate and also themselves by filing an unqualified apology before the court for the wrong done by them, which was not done by them before the Lower Court. The Court further held that the judiciary also must be magnanimous in accepting an apology when filed through an affidavit duly sworn, conveying remorse for such publication. This indicates that they have accepted their mistake and fault. This Court has also time and again reiterated that this Court is not hypersensitive in matter relating to Contempt of Courts Act and has always shown magnanimity in accepting the apology. Thus, the aforesaid unqualified apology submitted by appellants was accepted and proceedings were dropped. Simultaneously, the Court also ordered for appellants to publish the apology as stated in the affidavit on first page of Lucknow edition of Hindustan Times and also at such other place wherever there was any such publication, in a daily issue of the newspaper at some prominent place of newspaper.

In case of ***Ratan N Tata vs Union of India***[332], the income tax authorities during the years 2008-09 intercepted telephonic talks between one Ms. NiraRadia and several other people after seeking approval from Ministry of Home Affairs because the authorities had a strong suspicion that the said Ms. Nadia as well as other individuals namely politicians, corporates, lobbyists, bureaucrats and journalists with whom she had conversations were indulging in tax evasion, money laundering and restricted financial practices. Shri Tata who was one of the many individuals whose conversation with Ms. Radia was intercepted and after the conversations were leaked to the media by an unknown source, he filed petition before Hon'ble Supreme Court of India to protect his right of privacy and declare the act of tax authorities as invasion of his right to privacy. According to Ratan Tata, his conversations with Ms. Radia were of private nature and the

[332] AIR 2014(Supp) 827

tapes which were in custody of media should be withdrawn from public. The leak of conversations had also exposed a scam pertaining to the 2G spectrum auction. Considering the petition, Supreme Court issued notice to restrain the unauthorized publication of intercepted tapes.

The Court after hearing both sides ordered CBI to conduct thorough investigation into various issues highlighted in the report of the Central Vigilance Commission, as also report of the CAG who had prima facie found serious irregularities in the grant of licences to 122 applicants, majority of whom are said to be ineligible, the blatant violation of the terms and conditions of licences and huge loss to the public exchequer running into several thousand crores. Court also directed CBI to probe how licences were granted to large number of ineligible applicants and who was responsible for the same and why TRAI and DoT did not take action against those licensees who sold their stakes/equities for many thousand crores and also against those who failed to fulfil rollout obligations and comply with other conditions of licence.

In November, 2010 some news magazines published portions of the conversation which Ms. Radia had with politicians, corporates, lobbyists, bureaucrats and journalists. Shri Ratan Tata, whose name figured in some of these publications filed Writ Petition under Article 32 of the Constitution seeking immediate retrieval and recovery of all recordings removed from their custody as also thorough inquiry in the manner in which the secret recordings were made available to the unauthorized personnel. Reliefs were also sought to ensure that no further publication of these recordings either as audio files through the internet or any print as transcripts appeared in any media - print or electronic.

Eventually, Centre for Public Interest Litigation filed Writ Petition praying to direct the Government to release all the 5800 conversations of Ms. NiraRadia tapped by the Government agencies into the public domain as also to frame guidelines that protected 'public whistle-blowers' who make public disclosures that effectuate the citizens' 'right to know',

The Court considered the respective submissions and made the following observations:

"That analysis of the calls of Ms. NiraRadia revealed that during the period of interception i.e. year 2008-2009, she had been talking over her phone to her employees, clients, media persons and other important persons in the field of politics, business, bureaucracy and journalism, etc. During investigation of 2G Spectrum Case and the scrutiny of the transcripts, it emerged that Ms. NiraRadia, through her companies, provided consultancy to Tata Group of companies, M/s. Unitech Ltd., and M/s. Reliance Industries Ltd. (MukeshDhirubhaiAmbani Group). During her conversations, she discussed several important issues including judicial judgments, policy matters of Government of India, insider information of important issues related to Department of Telecommunications (DOT), condition of civil aviation in India, allocation of coal and iron ore mines and issues related to gas and petroleum sector etc."

The conversations between Ms. NiraRadia and her associates with various persons suggested that unscrupulous elements have used corrupt means to secure favours from the Government Officers, who appear to have acted for extraneous considerations. The court was convinced that instead of asking the State Police or other agencies to make inquiries in several aspects of the case, it would be appropriate to direct an inquiry by CBI in respect of these issues as well. Accordingly, CBI was directed to make inquiry in the case and positively submit a report promptly. As regards allocation of iron ore mine without having a steel plant, the matter was directed to be referred to the Chief Vigilance Officer, Ministry of Mines, Government of India for taking appropriate action.A report based on detailed conversations which were relating to corruption in judiciary and malpractices of judges was directed to be referred to the Chief Justice of India for consideration and appropriate action.

16. In the second report, the team had categorised suspected calls under the following 6 issues:

"Issue No. 1 - Alleged criminal misconduct by public servant in respect of survey/raid conductedby Income Tax Department.

Issue No. 2 - Payment of illegal gratification to Income Tax Officials to get work done.

Issue No. 3 - Chartered Accountantworking as tout of Income Tax Officer.

Issue No. 4 - Payment of illegal gratification/favours extended to Public Servants.

Issue No. 5 - Conversations regarding allocation of spectrum.

Issue No. 6 - Miscellaneous issues."

After considering the second report, the Court directed CBI to make inquiries in terms of Chapter 9 of CBI Manual on the subjects mentioned in all the 6 issues and submit its report. During the course of argument, it was suggested that the remaining tapes should be scrutinized by the same team and a comprehensive report be submitted to the Court. Both the learned Additional Solicitor Generals submitted that a bigger team may be constituted because a very large number of tapes are required to be scrutinized.

Thus, right of privacy was given a major platform while considering freedom of speech and expression of any individual. No man can freely speak and express himself unless he's given a certain amount of privacy through which he may communicate only to those he desires and keep it private from those he doesn't want to communicate it. If the element of privacy were removed and all communications were made publicly open, it would in fact be against the very essence of freedom of speech and expression because the said freedom though not specified, is ingrained with the right to privacy. Expression of thoughts maybe to an audience or to a person and if interchanged without the knowledge of communicator, can lead to unpleasant circumstances.

In case of ***Rajat Prasad vs. CBI***[333], a news story was published in the Indian Express on Nov. 16, 2003 stating that Union Minister of State for the Environment and Forests namely Dalip Singh Judeo had accepted a bribe of Rs. 9 lacs. During CBI investigation, it came on record that Amit Jogi, son of AjitJogi, former chief minister of Chattisgarh had conspired to conduct this sting operation and also release the footage to media. The accused argued that the said sting was carried out so as to expose the criminal acts of people who were misusing their vital position and giving the face of criminal intention to sting operations would nullify the entire effect of sting itself. Rajat Prasad named above was one of the co-conspirators who booked the hotel room wherein the said sting operation took place.

[333] AIR 2014 SC (Supp) 1236

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

Learned counsels elaborately laid before the Court the ingredients of the offence of criminal conspiracy defined in Section 120-A of the IPC to contend that there must be (1) commonality of object to be accomplished; (2) a plan or scheme embodying means to accomplish; and (3) an agreement or understanding between two or more persons whereby they become committed to co-operate for accomplishment of the object by the means embodied in the agreement. It was pointed out that going by the result of the investigation mentioned in the charge-sheet, as elicited earlier, namely that the operation was aimed to disgrace the accused as also to derive political mileage in favour of the father Amit Jogi, the conspiracy, if any, was to defame AjitJogi and not to commit any of the offences alleged in the charge-sheet. It was also argued that there was no criminal intent behind the giving of bribe and the absence of mensrea to commit the offences alleged is ex facie apparent. Learned counsels for the accused-appellants have, by referring to the specific allegations mentioned in the charge-sheet, submitted that even if the said allegations are accepted to be correct no criminal offence was made out against

either of the accused-appellants. It was argued that in respect of several accused, the complaint was unsustainable

On behalf of respondents it was submitted that the sting operation involved giving of bribe to AjitJogi who was a Union Minister at the relevant point of time and in return certain favours were sought. While the motive behind the act of videographing the incident may have been to derive political mileage by discrediting the accused, the giving of bribe amounts to abetment within the meaning of Section 107 of the IPC. The said criminal act would not stand obliterated by what is claimed to be the pious desire of the accused to expose corruption in public life. Several facts would come to light only after recording of evidence.

Held:

Hon'ble Court after hearing both the sides observed as under:

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

The Court in its judgment also discussed the position and validity of stings in other countries like U.S. and U.K. and observed that:

Unlike the U.S. and certain other countries where a sting operation is recognized as a legal method of law enforcement, though in a limited manner, the same is not the position in India which makes the issues arising in the present case somewhat unique. Even in countries like the United States of America where sting operations are used by law enforcement agencies to apprehend suspected offenders involved in different

offences like drug trafficking, political and judicial corruption, prostitution, property theft, traffic violations etc., the criminal jurisprudence differentiates between "the trap for the unwary innocent and the trap for the unwary criminal" (per Chief Justice Warren in Sherman v. United States[334]) approving situations where government agents "merely afford opportunities or facilities for the commission of the offence" and censuring situations where the crime is the "product of the creative activity" of law-enforcement officials (Sorrell v. United States[335]). In the latter type of cases the defence of entrapment is recognized as a valid defence in the USA. If properly founded such a defence could defeat the prosecution.

9. In United Kingdom the defence of entrapment is not a substantive defence as observed in R v. Sang[336]by the House of Lords:-

"The conduct of the police where it has involved the use of an agent provocateur may well be a matter to be taken into consideration in mitigation of sentence; but under the English system of criminal justice, it does not give rise to any discretion on the part of the judge himself to acquit the accused or to direct the jury to do so, notwithstanding that he is guilty of the offence."

In stark contrast to the above judgment, in another case of R v. Loosely[337]the House of Lords found that:-

"A prosecution founded on entrapment would be an abuse of the court's process. The court will not permit the prosecutorial arm of the State to behave in this way."

"Entrapment is not a matter going only to the blameworthiness or culpability of the defendant and, hence, to sentence as distinct from conviction. Entrapment goes to the propriety of there being a prosecution at all for the relevant offence, havingregard to the State's involvement in the circumstance in which it was committed." (para 17)

Thus, sting operations conducted by the law enforcement agencies themselves in the above jurisdictions have not been recognized as absolute principles of crime detection

[334] 356 US 359 (1958)
[335] 287 US 435 (1932)
[336] (1980) AC 402
[337] (2001) UKHL 53

and proof of criminal acts. Such operations by the enforcement agencies are yet to be experimented and tested in India and legal acceptance thereof in Indian legal system is yet to be answered. Nonetheless, the question that arises in the present case is what would be the position of such operations if conducted not by a State agency but by a private individual and the liability, not of the principal offender trapped into committing the crime, but that of the sting operator who had stained his own hands while entrapping what he considers to be the main crime and the main offender. Several questions posed serious threat in the final outcome namely:

- Should such an individual i.e. the sting operator be held to be criminally liable for commission of the offence that is inherent and inseparable from the process by which commission of another offence is sought to be established?

- Should the commission of the first offence be understood to be obliterated and extinguished in the face of claims of larger public interest that the sting operator seeks to make, namely, to expose the main offender of a serious crime injurious to public interest?

- Can the commission of the initial offence by the sting operator be understood to be without any criminal intent and only to facilitate the commission of the other offence by the "main culprit" and its exposure before the public?

It was observed that a crime does not stand obliterated or extinguished merely because its commission is claimed to be in public interest. Any such principle would be abhorrent to criminal jurisprudence. At the same time the criminal intent behind the commission of the act which is alleged to have occasioned the crime will have to be established before the liability of the person charged with the commission of crime can be adjudged. The doctrine of mensrea, though a salient feature of the Indian criminal justice system, finds expression in different statutory provisions requiring proof of either intention or knowledge on the part of the accused. Such proof is to be gathered from the surrounding facts established by the evidence and materials before the Court and not by a process of probe of the mental state of the accused which the law does not contemplate. The offence of abetment defined by Section 107 of the IPC or the offence of criminal conspiracy under Section 120A of IPC would, thus, require criminal intent on the part of the offender like any other offence. Both the offences would require existence of a

culpable mental state which is a matter of proof from the surrounding facts established by the materials on record. Therefore, whether the commission of offence under Section 12 of the PC Act read with Section 120B, IPC had been occasioned by the acts attributed to the accused appellants or not, ideally, is a matter that can be determined only after the evidence in the case is recorded. What the accused appellants assert is that in view of the fact that the sting operation was a journalistic exercise, no criminal intent can be imputed to the participants therein. Whether the operation was really such an exercise and the giving of bribe was a mere sham or pretence or whether the giving of the bribe was with expectation of favours in connection with mining projects, are questions that can only be answered by the evidence of the parties which is yet to come. Such facts cannot be a matter of an assumption. The inherent possibilities of abuse of the operation as videographed, namely, retention and use thereof to ensure delivery of the favours assured by the receiver of the bribe has to be excluded before liability can be attributed or excluded and this was possible only after the evidence of witnesses is recorded.

Also, merely because in the charge-sheet it was stated that the accused had undertaken the operation to gain political mileage could not undermine the importance of proof of aforesaid facts to draw permissible conclusions on basis thereof as regards the criminal intent of accused in the present case.

Appellants also stated that any finding with regard to the culpability of the accused, even prima facie, would be detrimental to the public interest inasmuch as any such opinion of the Court would act as an inhibition for enterprising and conscious journalists and citizens from carrying out sting operations to expose corruption and other illegal acts in high places. The Court however viewed the matter differently. A journalist or any other citizen who has no connection, even remotely, with the favour that is allegedly sought in exchange for the bribe offered, cannot be imputed with the necessary intent to commit the offence of abetment under Section 12 or that of conspiracy under Section 120B, IPC. Non applicability of the aforesaid provisions of law in such situations, therefore, may be ex facie apparent. The cause of journalism and its role and responsibility in spreading information and awareness will stand subserved. Considering the above aspects, the High Court order dated 30.5.2008 refusing to interfere with the

charges framed against accused-appellants was fully justified. Accordingly, the appeals were dismissed and the order dated 30.5.2008 passed by the High Court was affirmed.

This judgment has thus reiterated that the public interest continues to be the lone factor that justifies a sting operation by a journalist or citizen or entrapment by the police. In a sting operation where a person lures another to accept a bribe while secretly video recording the act, it is entrapment, which could be legal or criminal depending on intention and motive of the bribe giver and all those who supported the operation.[338]

In case of ***M/s. Omega Printers & Publishers P. Ltd. vs. Union of India***[339]the North East Frontier Railway stopped release of instructions and guidelines in form of advertisement to two newspapers despite having wide circulation on ground of irregularities committed by newspapers without issuing any notice or opportunity of being heard in respect of alleged irregularities. The said newspapers namely "The Sentinel"(English) and "The Sentinel" (Hindi) were not suspended till date from empanelment with Directorate of Advertising and Visual Publicity (DAVP) whose guidelines had to be followed by Railway Authority while publishing its advertisements. The Supreme Court held action of railway authority in stopping to release advertisement only to two newspapers as arbitrary and violative of Article 19(1)(a) and directed the N.F. Railway authorities to release their advertisements in future to both the newspapers. It observed in the judgment that:

- A newspaper not only sustains itself from its sale proceeds but also from the revenue generated through advertisements. Therefore, advertisements play a very crucial role in the overall viability of a newspaper.
- Government advertisements including advertisements by Government agencies form a major portion of a newspaper's advertisements. If these are reduced or stopped altogether, it will increase the financial burden on newspaper. This will lead to newspaper increasing the price thus reducing the circulation and leading to eventual closing down of

[338]Madabhushi Sridhar, Law and Policy *"A sting without public interest is a crime"* (Available at http://asu.thehoot.org/media-watch/law-and-policy/a-sting-without-public-interest-is-a-crime-7672) (Visited on 12.11.2018)
[339] AIR 2012 Gauhati 53

newspaper or compel it to seek government assistance to survive leading to pressure of government.

In case of ***N. Radhakrishnan vs. Union of India***[340], ban was sought on novel "Meesha" on ground that some parts of novel were describing women going to temple in bad light and having disturbing effect on community. Supreme Court held that banning of books should not be allowed simply at somebody's view or perception and such banning will even directly impact free flow of ideas and is an affront to freedom of speech, thought and expression. Supreme Court gave a wide view of how important is freedom of speech and expression to writers and artists and other people working in fields requiring creativity. It held as under:

- Literature can act as medium to connect to readers only when creativity is not choked or smothered. Writer or an artist or any person in creative sphere has to think in unfettered way free from shackles that may hinder his musings and ruminations. Writers possess freedom to express their views and imagination and readers too enjoy freedom to perceive and imagine from their own viewpoint.

- It is perilous to obstruct free speech, expression, creativity and imagination for it leads to state of intellectual repression of literary freedom.

- Any direct or veiled censorship or ban of book unless defamatory or derogatory to any community for abject obscenity, would create unrest and disquiet among intelligentsia by going beyond bounds of intellectual tolerance and further creating danger to intellectual freedom thereby gradually resulting in "intellectual cowardice" which is said to be greatest enemy of writer, for it destroys free spirit of writer.

- It is called from readers and admirers of literature and art to exhibit certain degree of adherence to unwritten codes of maturity, humanity and tolerance so that freedom of expression reigns supreme and is not inhibited in any manner.

- Creative work has to be read with matured spirit, catholicity of approach, objective tolerance and sense of acceptability founded on reality that is differently projected but not with obsessed idea of perversity that immediately connects on with passion of

[340] AIR 2018 SC 4154

didacticism or perception of puritanical attitude. Reader should have sensibility to understand situation and appreciate character and not draw conclusion that everything that is written is in bad taste and deliberately so done to pollute young minds.

- It has to kept uppermost in mind that imagination of writer has to enjoy freedom. It cannot be asked to succumb to specifics. That will tantamount to imposition. Writer should have free play with words, like painter has it with colors.

- Final publication must not run counter to law but application of rigours of law has to also remain alive to various aspects that have been accepted by authorities of Court. Craftsmanship of writer deserves respect by acceptation of concept of objective perceptibility.

(4.2) Article 19(1)(a) and electronic media

In case of ***Secretary, Ministry of Information & Broadcasting, Government of India vs. Cricket Association of Bengal***[341] it was held that right to freedom of speech and expression was not restricted to a few persons but available to all citizens equally. The State is under an obligation to ensure conditions in which the right can be meaningfully and effectively enjoyed by all citizens. Declaring a right of access to broadcasting, the Court enumerated its attributes to include:

(a) Freedom from State control and censorship;
(b) Freedom of listeners/viewers to a variety of views and plurality of opinions based on their retaining an interest in free speech;
(c) Right of citizens to have access to the broadcasting media.

The judgment was landmark in the sense that it marked the end of era of monopoly of Doordarshan in the matters of telecast and broadcast of programmes and events. The court had unequivocally pronounced that the constitution of India forbids monopoly either in print or electronic media and a citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose. It was held that "broadcasting is a means of communication and therefore a medium of speech and expression. Hence in a

[341] (1995) 2 SCC 161

democratic policy, neither any private individual, institution or organization nor any government or government organization can claim exclusive right over it."[342]

In case of ***Mohammad Ajmal Mohammad Amir Kasab vs. State of Maharashtra***[343] Pakistan planned a terror attack on the business hub of India and in furtherance of that conspiracy a savage attack was unleashed on Mumbai by a team of ten terrorists, including Mohd. Kasab, who landed on the city's shores via the Arabian Sea. The attack began on November 26, 2008 at about 9.15 p.m. and it ended when the last of the attackers, who was holed up in Hotel TajMahal Palace, was killed by Indian security forces at about 9.00 a.m.on November 29. The brutal assault left Mumbai scarred and traumatized and the entire country shocked. The terrorists killed 166 people and several hundreds were seriously injured. The loss to property resulting from the terrorist attack was assessed at over Rs. 150 crores. Of those dead, at least seven 7 were killed by the appellant personally, 72 were killed by him in furtherance of the common intention he shared with one Abu Ismail (deceased accused No.1) and the rest were victims of the conspiracy to which he was a party along with 9 dead accused and 35 other accused.

During the entire terrorist attack, even while the rescue operation was in process, the Indian media namely the anchors of news channels had jumped into the picture eager to send the "breaking news" and the first pictures and videos of the live coverage of the rescue operation. Such was a frenzy to telecast the same on TV channels that nobody cared to realize that while the TV channels were broadcasting the rescue operations to their citizens in order to earn a few TRP ratings, the same broadcasts were also helping the terrorists who had planned the entire attack to take their next step and keep an eye over how their terror attack was being accomplished.

Held:

The Courts observed heavily on the role of media during live coverage of such terror attacks in following words:

[342] N.V. Anjaria, "Updating Broadcasting Law in India: Supreme Court's Milestone Judgment (AIR 1995 SC 1236)
[343] AIR 2012 SC 3565

1. We feel compelled to say a few words about the way the terrorist attacks on Taj Hotel, Hotel Oberoi and Nariman House were covered by the mainstream, electronic media and shown live on the TV screen. From the transcripts, especially those from Taj Hotel and Nariman House, it is evident that the terrorists who were entrenched at those places and more than them, their collaborators across the border were watching the full show on TV. In the transcripts there are many references to the media reports and the visuals being shown on the TV screen. The collaborators sitting in their hideouts across the border came to know about the appellant being caught alive from Indian TV: they came to know about the killing of high ranking police officers also from Indian TV. At one place in the transcript, the collaborators and the terrorists appear to be making fun of the speculative report in the media that the person whose dead body was found in Kuber was the leader of the terrorist group whom his colleagues had killed for some reason before leaving the boat. At another place in the transcript the collaborators tell the terrorists in Taj Hotel that the dome at the top (of the building) had caught fire. The terrorists holed up in some room were not aware of this. The collaborators further advise the terrorists that the stronger they make the fire the better it would be for them. At yet another place the terrorists at Hotel Taj tell the collaborators that they had thrown a grenade. The Collaborators reply, "the sound of the grenade has come, they have shown the grenade, the explosion has taken place, people are wounded". At yet another place the collaborators tell the terrorists at Hotel Oberoi that the troops were making their position very strong on the roof of the building. At yet another place the collaborators tell the terrorists at Taj Hotel the exact position taken by the policemen (close to abuilding that belonged to the navy but was given to the civilians) and from where they were taking aim and firing at them (the terrorists) and advised them the best position for them to hit back at those policemen.There are countless such instances to show that the collaborators were watching practically every movement of the security forces that were trying to tackle the terrorists under relentless gun fire and throwing of grenades from their end.

2. Apart from the transcripts, we can take judicial notice of the fact that the terrorists attacks at all the places, in the goriest details, were shown live on the Indian TV from beginning to end almost non-stop. All the channels were competing with each other in showing the latest developments on a minute to minute basis, including the positions and the

movements of the security forces engaged in flushing out the terrorists. The reckless coverage of the terrorist attack by the channels thus gave rise to a situation where on one hand the terrorists were completely hidden from the security forces and they had no means to know their exact position or even the kind of firearms and explosives they possessed and on the other hand the positions of security forces, their weapons and all their operational movements were being watched by the collaborators across the border on TV screens and being communicated to the terrorists.

3. In these appeals, it is not possible to find out whether the security forces actually suffered any casualty or injuries on account of the way their operations were being displayed on the TV screen. But it is beyond doubt that the way their operations were freely shown made the task of the security forces not only exceedingly difficult but also dangerous and risky.

4. Any attempt to justify the conduct of the TV channels by citing the right to freedom of speech and expression would be totally wrong and unacceptable in such a situation. The freedom of expression, like all other freedoms under Article 19, is subject to reasonable restrictions. An action tending to violate another person's right to life guaranteed under Article 21 or putting the national security in jeopardy can never be justified by taking the plea of freedom of speech and expression.

5. The shots and visuals that were shown live by the TV channels could have also been shown after all the terrorists were neutralized and the security operations were over. But, in that case the TV programmes would not have had the same thrill, scintillating and chilling effect and would not have shot up the TRP ratings of the channels. It must, therefore, be held that by covering live the terrorists attack on Mumbai in the way it was done, the Indian TV channels were not serving any national interest or social cause. On the contrary they were acting in their own commercial interests putting the national security in jeopardy.

6. It is in such extreme cases that the credibility of an institution is tested. The coverage of the Mumbai terror attack by the mainstream electronic media has done much harm to the argument that any regulatory mechanism for the media must only come from within.

In a recent case, Gujarat High Court rejected website's petition seeking in its prayers that defamation case filed by Jay Shah for its report accusing him of corruption be cancelled. The court said based on initial impression that there was a case against Wire's reporter, publisher and editors and held that the most disturbing part of the article which could be prima facie termed as defamatory is linking the rise in Jay's firm's turnover with the election of NarendraModi as Prime Minister. The Wire had in its article "The Golden Touch of Jay Amit Shah" alleged that Jay Shah's company's turnover grew exponentially after BJP came to power in 2014. The Wire had said its report is based on documentary evidence and so they cannot be tried for criminal defamation.[344] The court had originally granted an all encompassing ex parte injunction to Jay Shah barring The Wire from using and publishing or printing in any electronic, print, digital or any other media or broadcast, telecast, print and publish in any manner including by way of interview, holding TV talks, debate, news items, programs in any language on the basis of the article published in The Wire dated 8.10.2010 either directly or indirectly the subject matter with respect to the plaintiff in any manner whatsoever. However, the injunction was later restricted only to the line "NarendraModi becoming Prime Minister/elected as Prime Minister" as per the court ruling on 23.12.17. The media house had earlier challenged injunction saying that it was a violation of freedom of the press and had also claimed that the original article "The Golden Touch of Jay Amit Shah" did not contain any content that was derogatory in nature and was based completely on public records and information provided by Jay Shah himself.[345] The Supreme Court in its judgment strictly stated that a section of the press, mainly in electronic media had crossed the line by "writing what they think." It held that media, especially the electronic media should be more responsible in its reporting rather than churning baseless publications containing insinuations and also added that it should not feel like the "Pope sitting in the Pulpit". It should refrain from writing anything which is several times just sheer contempt of court as also defamatory. Such acts cannot be considered as journalists' right to freedom of speech and expression. Everyone should assume their duty to assist the law and feel some kind of responsibility. The court cannot be seen as gagging the press but at the same time

[344] Available at https://www.ndtv.com/india-news/electronic-media-cant-think-they-become-popes-overnight-chief-justice (Visited on 15.11.2018)
[345] Available at https://www.thequint.com/news/india/injunction-the-wire-lifted-by-jay-shah (Visited on 15.11.2018)

media cannot just baselessly nurture, construct, construe, create anything as seems fit to their heart and mind.[346]

In case of ***R.K. Anand vs. Registrar, Delhi High Court,***[347]the petitioner was filmed by the media while attempting to bribe a key witness for gaining a deposition in favor of his client Sanjeev Nanda. This sting was aired on NDTV alongwith story encouraging the fact that rich could bribe their way out of any charge in criminal prosecution. The Delhi High Court issued suomotu criminal contempt of court proceedings against R.K. Anand and Supreme Court upheld the judgment of High Court holding him guilty. The defence of media trial as contended by Anand was refuted and efforts of press were conformed in the case as sting operation here had served an important public cause.

Likewise, in the recent Muzaffarpur shelter home case, the Supreme Court held that there cannot be a blanket ban as was imposed by Patna High Court on reporting of sexual abuse and rape cases but at the same time, the media should treat cautiously while writing on such incidents. In the instant case, 30 girls were allegedly raped and sexually abused over a period of time in the Muzaffarpur shelter home. The Supreme Court in its judgment requested both print and electronic media not to sensationalise incidents of sexual assault.[348] The electronic media was restrained from showing imaged of alleged rape victims even in blurred or morphed form observing they cannot be compelled to "relive the trauma" again and again. It was also held that such act on part of media was a cause of serious concern that alleged victims of sexual violence were being interviewed a number of times and were made to repeat the incident. It said that victims of child sex abuse can only be interviewed by members of National Commission for Protection of Child Rights and State Commissions for Protection of Child Rights in presence of counsellors.[349]

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[346] Available at https://m.timesofindia.com/india/section-of-electronic-media-has-crossed-the-line-says-supreme-court (Visited on 15.11.2018)
[347] (2009) 8 SCC 106
[348] Available at https://www.hindustantimes.com/india-news/treat-cautiously-in-reporting-rape-supreme-court-to-media (Visited on 15.11.2018)
[349] Available at https://www.newindianexpress.com/supreme-court-restrains-media-from-showing-images-of-bihar-shelter-home-rape-victims (Visited on 15.11.2018)

(4.3) Article 19(1)(a) and media trials

It would not be an exaggeration to call media omnipotent and omnipresent just like the God who is prayed everywhere. Not only are its powers supreme and universal, it also creates a lasting impression on the minds of those who use it, which in today's world includes almost everyone. Media operates by covering news stories and events across the world and presenting them before the public, readers or viewers through print, electronic or social media. The news stories and events maybe either political, sports oriented, from science or technology, high profile crime cases and so on. Media having been bestowed with the freedom of speech and expression as every other citizen can express its views on the topic of the news story being covered by it and give it a picture of its own. Whether this picture creates a positive impact or a negative one on the minds of the viewers is what has these days become the term "media trial". Trial by media refers to sensational reporting done by news media aimed at determining the blameworthiness of suspects in high-profile criminal cases. In other words, media investigates (tries) high-profile matters by reporting them in a 'whodunit' manner.[350]People think and comprehend a crime and those involved in the direction in which media has covered its story. As a matter of fact, media should only report the actual events as and when they have occurred or at the most, those the occurrence of which is most likely. However, in today's highly competitive world, even media has to keep up in the race with its peers. This comes sometimes at the price of vices likes media trials wherein media itself takes up the role of judiciary and presents the news story in its own way, be it biased, prejudiced or unbased on complete facts. This act has far-reaching implications not only on the viewers, but also on those involved in crime as well as on those who are actually responsible for judging the matter.

Media trial means the pre-trial and in-trial reporting of case, whether civil or criminal which is likely to prejudice fair trial of every accused.[351] When those who are obliged by law to speak, but choose not to speak, those who are obliged by law to investigate but choose no to investigate, those who are to take action, choose not to do so,

[350] Available at https://www.firstpost.com/india/shashi-tharoors-right-to-silence-balancing-free-speech-and-trial-by-media-3922079.html (Visited on 10.9.2018)
[351]Shyam Singh vs. State 1973 CrLJ 441

in those circumstances when the course of justice is thwarted or blocked, the public have right to know the facts. When that is done by media, it is perceived as media trial.[352]

The subject of "trial by media" has posed a imminent danger since the increase in number of news channels. Each news channel claims right to free speech as also free media and while exercising the same often iindulges in cases of media trials by putting forward its own views and even judging the case itself before the same can be done by the judiciary.vIf excessive publicity in the media about a suspect or an accused before trial prejudices a fair trial or results in characterizing him as a person who had indeed committed the crime, it amounts to undue interference with the "administration of justice" calling for proceedings for contempt of court against the media. Other issues about the privacy rights of individuals or defendants may also arise. There appears to be very little restraint in the media in so far as the administration of criminal justice is concerned.[353]

Thus, it can be said that media trials have an impact on the fair trial itself. As public has a deep interest in both, viz. free trial as well as free press, the media trials are a resultant vice of conflict between the two. On one hand, freedom of press rises from citizens' right and interest to know the everyday national events of political, social, economic nature. On the other hand, free trial which is uninfluenced by extraneous pressures is the crux of justice in India. A journalist publishing anything which prejudices fair trial or impairs the impartiality of Court while deciding the case on merits is liable for contempt of Court under the Contempt of Courts Act 1971 and under Articles 129 (Contempt jurisdiction power of Supreme Court) and Article 215 (power of High Court to punish for contempt of itself).

In case of ***Shri Surya Prakash and another vs. Smt. MadhuTrehan and others***[354], it was observed that "the whole gamut of public affairs is the domain for fearless and critical comment and not least the administration of justice. But the public function which belongs to the press makes it an obligation of honour to exercise the function only with fullest sense of responsibility. Without such a lively sense of responsibility, a free press

[352] Outlook, New Delhi Edition 22.3.2010
[353] Pg. 11, 200th Report of Law Commission of India on Trial By Media – Free Speech and Fair Trial under Criminal Procedure Code 1973, August 2006
[354] 2001 CrLJ 3476

may readily become a powerful instrument of injustice. It should not and may not attempt to influence Judges before they have made up their minds on pending controversies."

In case of ***ZahiraHabibullah Sheikh vs. State of Gujarat***[355], Supreme Court held that a fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses or the cause which is being tried is eliminated.

In case of ***KartongenKemiOchForvaltning AB and others vs State through CBI***[356], the Court observed that through media publicity those who know about the incident may come forward with information and it prevents perjury by placing witnesses under public gaze and also reduces crime through the public expression of disapproval for crime and also promotes public discussion of important issues. All this is done in interest of freedom of communication and right of information little realizing that right to a fair trial is equally valuable.

In ***Sanjeev Nanda vs. State***[357] the appellant belonging to an affluent family caused the death of 6 persons while rashly driving his BMW car leading to a "hit and run" case. He was later also accused of fleeing the scene of crime and attempting to destroy the evidence. The media, highlighted the plight of innocent victims and raised considerable public outrage against the accused. The trial court succumbed to the public pressure created by press and erroneously convicted him for culpable homicide not amounting to murder instead of death by negligence. The error was later corrected by Delhi High Court but the negative effect of media's hullabaloo on a pending matter also came to surface.

Media trials prove most harmful in the sense that even before the court has taken cognizance of a crime, media is already in action with its news stories, probable loose ends and possible reasons and outcomes of the crime. Media declares those arrested as guilty at the time of arrest itself. Again, as media is not bound by any laws of evidence, it keeps churning endless outcomes out of whatever material or information it comes across often thus leading to irreparable harm to the entire case. In case of ***Manu Sharma vs.***

[355] (2004) 4 SCC 158
[356] 2004 (72) DRJ 693
[357] 160(2009) DLT 775

State (NCT of Delhi)[358] the Court also used precautionary words against the spread of media trials and said that "Presumption of innocence of an accused is a legal presumption and it should not be destroyed at the very threshold through the process of media trial and that too when 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. Every effort should be made by the print and electronic media to ensure that the distinction between trial by media and informative media is always maintained." The Court also held that "Despite the significance of print and electronic media in 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 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.

However, it must be also kept in mind that if public becomes used to witnessing pseudo trials held by news media time and again, it will have severe consequences in long run because courts might no longer be accepted as the proper forums for settlement of legal disputes. Besides, their long and tedious process backed by frequent adjournments will kill the interest of public in courts and increase it in media trials which are given a sensational coverage as compared to the original courtroom trials.

In case of ***State of Maharashtra vs. Rajendra Gandhi***[359] Supreme Court observed that "there is a procedure established by law governing the conduct of trial of a person accused of an offence. A trial by press, electronic media or public agitation is very antithesis of rule of law. It can well lead to miscarriage of justice. A judge has to guard himself against any such pressure and is to be guided strictly by rules of law. If he finds the person guilty of an offence he is then to address himself to the question of sentence to be awarded to him in accordance with the provisions of law."

In case of ***M.P. Lohiavs State of West Bengal***[360], despite an ongoing criminal trial connected to death of a female, the press reported in favor of the deceased and gave it the color of a dowry death merely on basis of interviewing family of the deceased. The Court

[358] CDJ 2010 SC 361
[359] (1997) 8 SCC 386
[360] AIR 2005 SC 790

in its judgment held that "the facts narrated therein are all materials that may be used in the forthcoming trial in this case and we have no hesitation that this type of articles appearing in the media would certainly interfere with the administration of justice. We deprecate this practice and caution the publisher, editor and the journalist who were responsible for the said article against in such trial by media when the issue is subjudiced."

In case of ***Rajendra Sail vs. Madhya Pradesh High Court Bar Association and others***[361], the editor, printer and publisher as also a reporter of newspaper along with petitioner who was a labour union activist were given a six month imprisonment by High Court for publishing disparaging remarks against High Court judges which were made by union activist at a rally of workers. The remarks said that the decision given by High Court was rubbish and fit to be thrown in dustbin. The Supreme Court upheld the contempt in appeal but modified and reduced the sentence.It was observed that "for rule of law and orderly society, a free responsible press and an independent judiciary are both indispensable and both have to be therefore protected. The aim and duty of both is to bring out the truth. And it is well known that the truth is often found in shades of grey. Therefore the role of both cannot be but emphasized enough especially in a "new India" where the public is becoming more aware and sensitive to its surroundings than ever before. The only way of orderly functioning is to maintain the delicate balance between the two. The country cannot function without two of the pillars its people trust the most."

In case of ***Y.V. Hanumantha Rao vs K.R. Pattabhiram and another***[362], it was observed that "when litigation is pending before a Court, no one shall comment on it in such a way that there is a real and substantial danger of prejudice to the trial of action as for instance by influence on the Judge, the witnesses or by prejudicing mankind in general against a party to the cause. Even if the person making a comment honestly believes it to be true, it is still contempt of Court if he prejudices the truth before it is ascertained in the proceedings. To this general rule of fair trial one may add a further rule and that is that none shall by misrepresentation or otherwise bring unfair pressure to bear on one of the parties to a cause so as to force him to drop his complaint or defense. It is

[361] 2005(2) LRC 156(SC)
[362] AIR 1975 AP 30

always regarded as of the first importance that the law which we have just stated should be maintained in its full integrity. But in so stating the law we must bear in mind that there must appear to be a real and substantial danger of prejudice."

In case of ***Sushil Sharma vs. The State (Delhi Administration)***[363] and others, the petitioner Sushil Sharma was booked on charge of murder of NainaSahni as also for destroying evidence. According to petitioner, news items were being printed in press as also frequently telecast on electronic media in such a manner that it coloured public opinion as also aroused public passions against him. So much so the senior police officials by their utterances published in the press had prejudged the case thereby holding him guilty even before the Court could consider all aspects of the case and pronounce its judgment. To cut short, the press had initiated a parallel public trial holding him guilty of the charge of murder of NainaSahni. On account of such circumstances, the petitioner prayed for postponement of trial or his discharge from the case as he could not expect fair trial due to media's over-interference in the matter. It was held by Delhi High Court that "conviction, if any, would be based not on media's report but what facts are placed on record. Judge dealing with the case is supposed to be neutral. Now if what petitioner contends regarding denial of fair trial because of these news items is accepted it would cause aspiration on the Judge being not neutral. Press reports or no reports, the charge to be framed has to be based on the basis of material available on record. The charge cannot be framed on extraneous circumstances or facts dehors the material available on record." The Court also held that "the awareness of what is happening around in the society to a great extent is the work force of journalists. Mature investigative journalism helps in unearthing many skeletons. Democratic institutions are surviving thanks to the eternal vigilance of the journalists. But for journalists also there is code of conduct and ethical norms. The task to keep restraint in pending matters is expected more from the investigating and prosecuting agencies. Similarly the judge dealing with sensitive and important matters have to exercise due restraint in their utterances."

Media trials tend to leave a mark on the minds of judges deciding the case and are bound to create a parallel path of probabilities as against evidence on record of court. It

[363] 1996 CrLJ 3944

may not only confuse the judge in deciding the matter but may also create a severe delay in giving justice.

In case of ***Saibal Kumar Gupta and others vs. B.K. Sen***[364] and another, it was held that "No doubt it would be mischievous for a newspaper to systematically conduct an independent investigation into a crime for which a man has been arrested and to publish the results of that investigation. This is because trial by newspapers, when a trial by one of the regular tribunals of the country is going on, must be prevented. The basis for this view is that such action on part of a newspaper tends to interfere with the course of justice whether the investigation tends to prejudice the accused or the prosecution. There is no comparison between a trial by a newspaper and what has happened in the case."

However, it is also equally true that media cannot be completely bound by government regulations while performing its functions as it will lead to revealing only stories favoring government and not those which bring out its drawbacks.

In case of ***S.P. Gupta vs. President of India***[365], while dealing with the case relating to appointment and transfer of judges, where there had been inappropriate reporting by the press regarding the case, it was held that "such behavior of a section of the press has been most distressing and has unnecessarily affected the image of judiciary and the high constitutional functionaries involved."

In case of ***Indian Express Newspapers (Bombay) Ltd. Vs. Union of India***[366], it was held that "freedom of press is the heart of social and political intercourse. The press has now assumed the role of public educator making formal and non-formal education possible in a large scale particularly in the developing world where television and other kinds of modern communication are still not available for all sections of society. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments. Newspapers being purveyors of news and views having a bearing on public administration very often carry material which would not be palatable to governments and other authorities." India being a democratic country it becomes imperative that every citizen must have his say in

[364] 1961 AIR 633
[365] AIR 1982 SC 149
[366] (1985) 1 SCC 641

the democratic process for which he must have a clear picture of the public matters. This picture in earlier times could be presented only through print media which was the sole form of media. Hence, freedom of press is essential for proper functioning of democratic process.

In case of ***Printers (Mysore) Ltd. vs. CTO***[367], it was reiterated that even though freedom of press is nowhere expressly guaranteed as fundamental right in the Constitution, it is implicit in the freedom of speech and expression. Freedom of press has always been a cherished right in all democratic countries and the press has been rightly described as the fourth pillar of democracy.

In case of ***Anukul Chandra Pradhan vs. Union of India***[368], it was observed that "No occasion should arise for an impression that publicity attached to the hawala transactions has tended to dilute the emphasis on essentials of a fair trial and the basic principles of jurisprudence including the presumption of innocence of accused unless found guilty at the end of trial.

In case of ***Mother Dairy Foods & Processing Ltd. vs. Zee Telefilms***[369], Delhi High Court in para 33 of judgment quoted from an article "Journalism and Ethics, Can they co-exist?" written by Andrew Belsey that "Journalism and ethics stand apart. While journalists are distinctive facilitators for democratic process to function without hindrance, media has to follow the virtues of accuracy, honesty, truth, objectivity, fairness, balanced reporting, respect or autonomy of ordinary people. These are all part of democratic process. But practical considerations namely pursuit of successful career, promotion to be obtained, compulsion of meeting deadlines and satisfying media managers by meeting growth targets are recognized as factors for temptation to print trivial stories salaciously presented. In the temptation to sell stories, what is presented is what public is interested in rather than what is in public interest."The Court also pointed towards good journalism stating that it aims at discovering and promoting the understanding of an event via truth promoting events. A failure of impartiality in journalism is a failure to respect one of the methods required in order to fulfill the goal of journalism; getting at the truth of the matter. Where reporting turns away from the goal of

[367] 1994 SCC(2) 434
[368] Laws(SC)-1997-7-1
[369] AIR 2005 Delhi 195

truth and journalists treat events as open to many interpretations, according to their prejudices, assumption, news agenda or the commercial drive towards entertainment, the justification and self-confessed rationale of journalism threatens to disappear. In concluding remarks, the Court also held that "media has the onerous responsibility to ensure that facts are verified and the matter is thoroughly investigated and researched and salient and critical information is collection. As part of its responsibility and accountability, media should eschew sensationalism, exaggeration and sweeping comments especially in matters of food and public health."

Despite all its negativities, there have been specific but limited number of cases when the interference by media has led to a positive outcome in the case as compared to judicial outcome. The infamous Jessica Lal murder case is the best example of media trial which resulted in getting justice done in a criminal case. When the victim Jessica Lal was murdered in a Delhi bar by Manu Sharma at late night for not selling him a drink, he shot her dead. During legal proceedings, the witnesses turned hostile and in absence of any circumstantial evidence, the case was almost reaching its dead end without any visible justice. During the same period, media had highly publicized the case by repeating the news story and probable culprits behind the murder mainly through news channels as well as in print media. This had caused a high level of awareness as well as outrage in public across the nation. During police investigation of the culprit Manu Sharma, he had admitted to have shot Jessica Lal but the tape never saw light of the day during the trial and Manu Sharma eventually started denying his hand in her murder. The said tape was eventually acquired by NDTV and broadcasted on nationwide news. As the already anxious and angry public saw the tape, it resulted in a hue and cry for not giving justice in the murder and the culprit running scot-free. Meanwhile, news magazine Tehelka also organized a sting operation in the case on its witnesses wherefrom it was discovered that Vinod Sharma had bribed all the witnesses for going hostile. The said sting operation was broadcast by Star News and it came into public light that the case had been manipulated in order to save the culprit. Also Hindustan Times, a newspaper conducted a poll seeking opinion of people's faith in Indian judiciary, result of which was only 2.7 on a scale from 1 to 10. All this led to reopening of the case and the Court convicted Manu Sharma who was given life sentence in December 2006.

Likewise, in PriyadarshiniMattoo's case, the said girl living in Delhi was found raped and murdered at her residence on 23.1.1996 and the prime accused was Santosh Kumar Singh who was her senior in the same college. He had been harassing and stalking Mattoo since several months in person as well as through phone calls. Despite the victim filing police complaint against Singh and being provided with private security, there was no change in Singh's behavior as he belonged to influential family. On the day of incident, he entered the victim's house under the pretext of getting compromise in the complaint filed by the victim. Once inside, he raped PriyadarshiniMattoo and left the place after brutally murdering her. Later, he was arrested but given benefit of doubt and acquitted due to lack of sufficient evidence though sufficient testimonials and samples from crime site were available. This led to nationwide protests against the culprit and media gave a huge coverage to this issue by showing frequent interviews of victim's father demanding justice. Through use of investigative journalism, media detected the lapses in murder case and brought the same before nationwide public. The case was reopened after massive uproar from public created more pressure on CBI as well as judiciary. Ultimately, in February 2000, CBI submitted appeal against the verdict in Delhi High Court and in October 2006, Delhi High Court held Santosh Kumar Singh guilty and charged him with death sentence for committing rape with murder. The role of media's interference in this case was a positive one as it continuously covered the issue through its investigative journalism bringing to light what had been till then kept back from the public in order to save the culprit.

In the NitishKatara murder case, the said person was murdered by VikasYadav, son of influential politician D.P. Yadav for having a love affair with VikasYadav's sister. After the murder, witnesses turned hostile through the political influence of culprit's father. Initially trial court held the murder as a case of honour killing but eventually media came into picture and through its investigative journalism, brought the real picture before the society as also the nation.

In case of ***Sahara India Real Estate Corp. Ltd. vs. Securities and Exchange Board of India,***[370] the vitality of freedom of expression was declared in following words:

- 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 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 it is not restricted to expression of thoughts and ideas which are accepted and acceptable but also to those which offend or shock any section of the population. It also includes the right to receive information and ideas of all kinds from different sources. In essence, the freedom of expression embodies the right to know.
- 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).
- To see that the administration of justice is not prejudiced or perverted clearly includes power of the Supreme Court to prohibit temporarily statements being made in 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. 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.
- The order to postpone publicity of judicial proceedings can be passed only when other alternative measures for wardingoff ill effect of media publicity such as change of venue or postponement of trial are not available. In passing such orders of postponement, Courts have to keep in mind the principle of proportionality and the test of necessity.
- There is no general law for Courts to postpone publicity either prior to adjudication or during adjudication as it would depend on facts of each case. The necessity for any such order would depend on extent of prejudice, the effect on individuals involved in the case, the overriding necessity to curb the right to report judicial proceedings conferred on the

[370] AIR 2012 SC 3829

media under Article 19(1)(a) and the right of media to challenge the order of postponement.

- Open justice permits fair and accurate reports of Court proceedings to be published but sometimes fair and accurate reporting of trial would nonetheless give rise to substantial risk of prejudice not in the pending trial but in 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.
- Orders of postponement of publications/publicity can be made considering factors such as the timing(the stage at which it should be ordered), its duration and the right of appeal to challenge such orders is just a neutralizing device when no other alternative such as change of venue or postponement of trial is available, evolved by courts as a preventive measure to protect the press from getting prosecuted for contempt and also to prevent administration of justice from getting perverted or prejudiced.

Thus, as postponement orders once granted have the effect of curtailing the freedom of expression of third parties, they must be passed only in cases of actual risk of prejudice to fairness of trial or even to proper administration of justice. Care must be taken that these orders are implemented for a limited period only and also without disturbing the content of publication.

In case of ***High Court Bar Association, Odisha vs. State of Odisha,***[371]there was an exaggerated and incorrect reporting of incident of misbehaving with lady inspector by some advocates in High Court at Odisha.The Court in this matter found itself duty bound to interfere as matter would affect administration of justice and save from tarnishing image of institution of class of people, viz. the legal fraternity. Accordingly directions were issued to print and electronic media to restrict highlighting matter against advocates and from publishing names and photographs of accused persons or informants.

To surmise it may well be said that media trials have done somewhat good in specific cases and brought the culprit to the book. However, this should not be its

[371] AIR 2017 Orissa 62

certificate to conduct media trials carelessly in each and every case. In 2014, after SunandaPushkar, wife of ShashiTharoor was found dead in a hotel room, the medical board declared that her death was due to poisoning and was not a natural death. Ever since then, media went into frenzy trying to find, create, even concoct stories as to the persons and reasons behind her death. ShashiTharoor who's a former Union Minister became media's favorite culprit in the case with all probable stories ending up as Tharoor being the person behind Sunanda's murder. Tharoor blamed media for delivering concocted stories to police stories without any basis. Case was also filed by Tharoor against ArnabGoswami and Republic TV on the ground that they had implicated Tharoor in the case wrongly and were also prejudicing the investigation and subsequent trial. The Delhi High Court while hearing the defamation suit observed that ArnabGoswami and his TV channel must respect Tharoor's right to silence pending investigation in the murder case.[372] It further held that public opinion as shaped by media can influence the police and judges in criminal cases and can even pressurize the police to formally charge certain individuals in criminal cases based on media reports and judges to decide a case one way or the other. Trial by media also threatens the cardinal principle in criminal law that an accused is to be presumed innocent until proved guilty under the law.

The following categories of publications in the media are generally recognizes as prejudicial to a suspect or fraud:[373]

(i) Publications concerning the character of accused or previous conclusions which tend to excite "feelings of hostility" against the accused amount to contempt because they tend to induce the Court to be biased. Such hostile feelings can be most easily inducted by commenting unfavourably upon the character of accused.[374]

(ii) Publications of confessions before trial are treated as highly prejudicial and affecting the Court's impartiality and amount to serious contempt.[375]

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[372] Available at https://www.firstpost.com/india/shashi-tharoors-right-to-silence-balancing-free-speech-and-trial-by-media-3922079.html (Visited on 10.9.2018)
[373] Chapter IX, What categories of media publications are recognizes as prejudicial to a suspect or fraud? Pg. 195 200th Report on Trial by Media Free Speech and Fair Trial under CrPC 1973, August 2006
[374]R. vs.O'Dogherty (1848) 5 Cox C C 348 (354) (Ireland)
[375] R. vs. Clarke ex p Crippen (1910) 103 LT 636

(iii) Publications wherein newspapers usurp the functions of Court without the safeguards of procedure, right to cross examine, etc. amount to contempt. In R v Bolam ex p Haigh, Haigh was described as a vampire and that he had committed other murders and publication printed names of victims as well. The editor was sent to jail and proprietors of newspaper were fined heavily. Lord Goddard called it a disgrace to English journalism.[376]

(iv) Publishing photographs interfering with the procedure of identification of accused also prove harmful to the trial of the case. In AG vs News Group Newspapers Ltd.[377], Sun Newspaper published photograph of a man on the second day of trial. He was charged with causing serious injuries to his baby and the baby's mother also was accused of offences. Though the caption being "Baby was blinded by Dad", in actuality, the said allegation was not part of Crown's allegations. It was held that the juxtaposition of photograph undoubtedly carried with it the risk that the accused who had pleaded not guilty might be regarded in a very unpleasant light by those who saw this particular photograph and headline. Fine was imposed for the said contempt.

(v) A disclosure by police of an alleged confession after arrest is held to be contempt.[378] Publishing references to police activity surrounding a crime such as various searches, questioning of suspects and connected arrests that may be made but it is not immune from arrest.

(vi) Direct imputations of accused's innocence can be considered as contempt.[379]

(vii) Creating an atmosphere of prejudice by showing news reports captions with charges more sensationalized than the actual ones amounts to contempt.[380]

(viii) Criticism of witnesses by publishing that a witness was being paid by a national newspaper, the amount being contingent upon final outcome of the case shall amount to contempt.[381]

(ix) A newspaper conducting its own private investigation and publishing the results before or during trial is also an example of trial by newspaper.[382]

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[376] (1949) 93 Sol Jo 220
[377] (1984) 6 Crl App (S) 418
[378] AG(NSW) v Dean (1990) NSWLR 650
[379] R v Castro Onslow and Whelley (1873) LR 9 QB 219
[380] R v Hutchison ex p McMahon 1936(2) All ER 1514
[381] AG v New Statesman and Nation Publishing Co Ltd. 1980(1) All ER 644

Also, whenever there is trial by media, there is always a conflict between two constitutional rights, namely right to fair trial and freedom of the press. While media argues that they have a duty to report the news as it happens to the public, it sometimes interferes with an accused person's right to a fair trial. The terms of fair trial comprise all processes of criminal justice commencing from investigation to ultimate stage of trial, i.e. sentencing or acquittal of accused. However, Article 19(1)(a) does not confer any right on the press to have an unrestricted access to means of information.[383]

(4.4) Article 19(1)(a) and Paid news

The evil of paid news can be said to have evolved from the sole object of maximization of profits. As several media channels are owned by corporate conglomerates and multinational media houses, they see a media news channel as a mere source of profit rather than recognizing its duties towards the nation as a responsible media channel. Commercial benefits outweigh the interest of nation's citizens and information is put out on news channels as if it has been independently and objectively produced while in actuality, it has been paid for. Maximum cases of paid news are found connected to politicians and political parties during election campaigns and such cases challenge the very purity of vote which has now been colored with the media stories favoring particular parties who have already converted media house into a business hub for commercial benefits.

Of the 22 states in which Assembly elections were held between 2010 and 2013, Madhya Pradesh was in top three for the highest number of cases of alleged paid news. Election Commission of India found 42 cases of "paid news" that contributed to Narottam Mishra's victory in 2008 Assembly elections in Madhya Pradesh. However, as no specific is available to deal with paid news, Election Commission finally decided that Mishra had misrepresented his campaign expenses and was disqualified on those grounds. 279 notices in this regard were issued in Madhya Pradesh in 2013 of which 165 were confirmed. Likewise, after 2012 elections in Punjab and Gujarat, 339 notices were

[382]Borrie& Lowe (1996, 3rd Ed P 151)
[383] Dr. N. S. Santhosh Kumar, Trial By Media – Transgressing the Lakshmanrekha, Pg. 14, (2010) 5MLJ

issued in Punjab and 523 cases were confirmed while in Gujarat, 495 notices were issued and 414 cases were confirmed.[384]

In December 2013, Chief Electoral Officer at Election Commission, N. Delhi said that the Commission would be recommending action against atleast six candidates for not disclosing the amounts they paid for planting "news" reports in publications in the run-up to the elections in their expenditure statements. The Commission had calculated the amounts spent by these candidates on "paid news" and if their total expenditure on campaigning was found to be exceeding the statutory ceiling of Rs. 14 lacs per candidate, they could be disqualified even if they are elected as members of legislative assembly.[385]

In October 2011, UmeshYadav was disqualified by Election Commission for her failure to record expenditure incurred on advertising during her election campaign. The Commission opined that "by suppressing expenditure on 'paid news' and filing an incorrect or false account, the candidate is guilty of not merely circumventing the law relating to election expenses but also of resorting to false propaganda by projecting wrong picture and defrauding the electorate." The said findings were challenged wherein Allahabad High Court upheld the same as consistent with law and also cited Supreme Court's decision in L.R. Shivaramagowda vs. T.M. Chandrasekhar wherein it was held that in addition to checking whether accounts had been duly lodged, it was fully within the Election Commission's powers to check to see if "true and correct" accounts of expenditure incurred or authorized were provided by candidates.

(4.5) Article 19(1)(a) and Social Media

In the landmark case of ***Shreya Singhal vs. Union of India***[386], the petitioner alongwith her friend was arrested for posting allegedly offensive and objectionable comments on social networking website Facebook about the correctness of government's decision to keep the entire Mumbai city shut down due to death of a famous political leader. The

[384] Available at https://www.indianexpress.com/article/explained/what-is-the-menace-of-paid-news-election-commission-narottam-mishra-madhya-pradesh-minister-2008-assembly-elections-4755328.html (Visited on 10.9.2018)
[385] Available at https://www.indianexpress.com/article/explained/what-is-the-menacce-of-paid-news-election-commission-narottam-mishra-madhya-pradesh-minister-2008-assembly-elections-4755328.html (Visited on 10.9.2018)
[386] AIR 2015 SC 1523

petitioner had made the actual post while her friend agreed with such decision on the original post which was open for public viewing. The police arrested both the women u/s. 66A of Information Technology Act which punishes any person who sends through a computer resource or communication device any information that is grossly offensive or with the knowledge of its falsity, the information is transmitted for purpose of causing annoyance, inconvenience, danger, insult, injury, hatred or ill will. They were later released and prosecution was dismissed but the entire incident invoked substantial media attention and criticism. The women filed a petition through their lawyer challenging the constitutional validity of Section 66A on the ground that it violated their right to freedom of expression.[387]

On behalf of petitioners, it was submitted that Section 66A was violative of the right to free speech and expression and it could not be protected under any of the reasonable restrictions. Nor could sending of information for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, through any electronic form be protected under any of the reasonable restrictions. They further contended that the Section 66A was immensely vague because none of the terms for which it held someone liable were anywhere defined due to which even those who were not guilty were held so under the said Section. Intelligible differentia between those exercising free speech on internet and those using freedom of speech by spoken words was also missing.

Contentions by the respondents

Against petitioners contentions, the respondents contended on several vague grounds stating that the Court interferes in a legislative process only if a statute has violated rights of citizen. Respondents also argued that mere possibility of abuse of a provision cannot be a ground to decide the validity of any provision. They also argued that if a provision was vague, it cannot be a ground to declare any statute unconstitutional.

[387] Globalafreedomofexpression.columbia.edu/cases/singhal-v-union-of-india/ (Visited on 18.5.2017)

HELD:

1. The Court tried to discuss what was the content of expression "freedom of speech and expression". It observed that the discussion and advocacy of any particular subject are the essence of Article 19(1)(a). However, if such discussion and advocacy reached to the extent of incitement, reasonable restrictions could be used to curtail such discussion/advocacy.

2. It further observed that an individual's act if leading to disturbing the entire community's everydays living should be punishable rather than an act which affected merely the individual and left the society undisturbed. Going by this test, it is clear that Section 66A is intended to punish any person who uses the internet to disseminate any information that falls within the sub-clauses of Section 66A. It was also observed that for something to be defamatory, injury to reputation is a basic ingredient and Section 66A did not cover such instances.

4. The Court also stated that Section 66A was in no way connected to incitement for commiting an offence. It only restricts information that may be sent on the internet based on whether it is grossly offensive, annoying, inconvenient, etc. and being unrelated to any of the eight subject matters under Article 19(2) is declared as unconstitutional.

5. It was also stated that any person likely to be an offender u/s. Section 66A as also the authorities in charge of handling cases under the said Section had no specific laid down standards under which they could hold a person liable. It was held that clearly, Section 66A arbitrarily, excessively and disproportionately invaded the right of free speech.

6. The Court considering the stand of petitioners also observed that Section 66A had several vague and undefined terms and they were capable of hindering free speech at several levels. One person expressing his views over the internet may cause annoyance to someone with a different thinking pattern and if Section 66A is used to shut down every such case, freedom of speech will hardly be exercisable at all.

7. Considering these reasons, it was held that the Section is unconstitutional also on the ground that it takes within its sweep protected speech and speech that is innocent in

nature and is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down on the ground of overbreadth.

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

10. Thus, the Court held that:

- Section 66A creates an offence which is vague and overbroad, and, therefore, unconstitutional under Article 19(1)(a) and not saved by Article 19(2).
- No part of Section 66A is severable and the provision as a whole must be declared unconstitutional.
- Wider range of circulation over the internet cannot restrict the content of the right under Article 19(1)(a) nor can it justify its denial.

The said judgment was a major one since the rise of social media as it gave a platform to millions of everyday social media users to express their views and opinions freely. After the rise of internet and social media, many people had started using the same to exchange their ideas of political views, current affairs, etc. The Information Technology Act, 2000 under Section 66A had laid down rigid criteria due to which law enforcing agencies often interpreted it in a narrow and limited manner. Again, the Section had used several terms like “offensive”, “causing annoyance”, “grossly menacing”, etc. but nowhere were they defined which made them open to an unlimited number of interpretations as maybe desired by the law enforcers. Likewise, the Section also indirectly restricted political satire, caricatures and cartoons which were based on current affairs. Due to this, even a healthy expression of ideas by artists and cartoonists became getting restricted. The Court in its judgment held that Section 66A was vague, open-minded and undefined. It was unconstitutional, void and hindered free speech on social media. Also, it nowhere specifically provided as to what acts if performed on internet would amount to defamation. The Section had lacunae both for internet users as well as law enforcement agencies as neither the terms used were well-defined nor the extent of speech within the scope of the Section was mentioned. Thus, the Section had a intimidating effect on free speech.

To conclude, judiciary has played a vital role in giving a face and voice to the media when freedom of speech and expression is concerned. As such media was devoid of any specific rights under the Constitution wherein despite several freedoms for all segments of society, none were provided for media. For this reason, media could not stand on its own when rights and freedom of media were disputed. However, after several landmark cases as discussed above, media now holds a firm ground of its own and has freedom of speech and expression like any other citizen albeit subject to reasonable restrictions. From being the Fourth Estate, it won't be wrong to say that media has come to being the first estate itself as it has become a mirror of the activities of legislature, executive and judiciary to the society. However, in the process, media has also misused and tried to step beyond the powers conferred over it by the said judicial decisions. While exercising freedom of speech and expression, media has often not taken care of exercising it by simultaneously considering reasonable restrictions but has considered the same as its birthright and often indulged in cases of media trials, paid news and sting operations.