IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

Crl. M.P. NO. _____ OF 2019

IN

CONTEMPT PETITION (CRL.) NO. 1 OF 2019

IN THE MATTER OF:

ATTORNEY GENERAL OF INDIA .....PETITIONER

VERSUS

SHRI PRASHANT BHUSHAN .....RESPONDENT

AND IN THE MATTER OF

ARUN SHOURIE & ORS.

PAPER BOOK

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(APPLICATION FOR (INTERVENTION)

COUNSEL FOR THE APPLICANT: **PRANAV SACHDEVA**

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AND IN THE MATTER OF:

1. ARUN SHOURIE
R/O HOUSE NO. A-31, WEST END COLONY
NEW DELHI - 110021

2. MRINAL PANDE
R/O E 148
EAST OF KAILASH
NEW DELHI – 110065

3. PARANJOY GUHA THAKURTA
R/O K-33 SOUTH CITY -1
GURGAON
HARYANA - 122001

4. MANOJ MITTA
R/O D 168, SECTOR 55
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5. N. RAM
R/O 43-B
KASTURI RANGA ROAD
CHENNAI - 600018 ...APPLICANTS/RESPONDENTS

AN APPLICATION FOR INTERVENTION WITH

SUPPORTING AFFIDAVIT

To,
THE HON'BLE CHIEF JUSTICE OF INDIA
AND HIS COMPANION JUSTICES OF
THE SUPREME COURT OF INDIA

The humble application of the applicant's abovementioned

MOST RESPECTFULLY SHOWETH:

1. Contempt proceedings against the Respondent have been initiated for exercising his 'freedom of speech' by making statements on social media via his twitter account regarding a petition challenging the appointment of CBI interim Director, in which the respondent was appearing as the advocate for the petitioners. Vide its order dated 6.02.2019, this Hon'ble Court issued notice to the respondent on the Contempt Petition (Crl.) 1/2019 and Contempt Petition (Crl.) 2/2019. However, while issuing notice to the respondent, the court expanded the scope of the contempt petition to include an examination of whether in matters which are sub-judice, advocates and litigants briefing the media would amount to an interference in the course of administration of justice. The court order states as follows:

"As the issues raised are of vital importance, whether in a matter which is sub-judice, it is open to criticise the court proceedings to affect the public opinion by litigants and lawyers and protection of various other rights of the litigants and what may amount to interference in the course of administration of justice. In view of the aforesaid decision and facts and circumstances, we deem it appropriate to hear the matter. As such, we issue notice to the respondent."

(A copy of the order of this Hon'ble Court dated 6.02.2019 is annexed as **AnnexureA1**_____at page 25 to 29)

2. The applicants are senior and renowned journalists in the country. A brief description of the applicants is given below:

i)Arun Shourie is a renowned economist, journalist, author and politician. He is the pioneer of investigative journalism in India. He served as the Editor in Chief of The Indian Express, Executive Editor of the Times of India and a Cabinet Minister in Prime Minister Mr. Atal Bihari Vajpayee's Government. He has received numerous national and international awards, including the Magsaysay Award and the Padma Bhushan. He has also won International Editor of the Year Award and has been acclaimed as one of 'World Press Freedom Heroes' by the International Press Institute. He is also the author of multiple widely-acclaimed books on subjects including constitutional law,

modern Indian history, religious fundamentalism and governance in India.

iii) Paranjoy Guha Thakurta's work experience, spanning over 40 years, cuts across different media: print, radio, television and documentary cinema. He is a writer, speaker, anchor, interviewer, teacher and commentator in three languages: English, Bangla and Hindi. His main areas of interest are the working of the political economy and the media in India and the world, on which he has authored/co-authored books and directed/produced documentary films. He teaches and speaks on these subjects to students, general audiences and also trains aspiring – and working -- media professionals. He participates frequently in, and organises, seminars/conferences. He is a regular contributor to newspapers, magazines and websites. He is featured regularly on television channels and radio programmes as an anchor as well as an analyst and commentator.

iv) Manoj Mitta is a New Delhi-based journalist who works in the domain of law, human rights, and public policy. He has served as a senior editor at the Times of India and the Indian Express. He is also founding director of the Foundation for Media Professionals, which promotes media freedom and works to uphold standards of journalism in India. He has published two critically acclaimed books on sectarian strife in India after the Gujarat riots and the 1984 carnage (co-authored). He has spoken at universities around the world, as well as at the British and Canadian Parliaments and the U.S. Congress.

v) N. Ram is a well-known political and investigative journalist and is former Editor-in-Chief of The Hindu, Frontline, BusinessLine, and Sportstar of The Hindu group of publications. N. Ram led The Hindu's investigation into the Bofors arms deal corruption scandal. Numerous awards received by him include the Padma Bhushan, Sri Lanka Ratna by the Govt of Sri Lanka, the Asian Investigative Journalist of the Year Award from the Press Foundation of Asia and the B.D. Goenka Award for Excellence in Journalism. He is an acclaimed author of several books including Why Scams are Here to Stay. He is closely associated, as a founding trustee of the Media Development Foundation (MDF), with the Asian College of Journalism (ACJ), Chennai, which is India's,

and South Asia's, premier post-graduate journalism education institution. He is currently the Chairman of the Hindu Group.

3. Vide order dated 6.02.2019, this Hon'ble court has effectively indicated that it wants to examine whether lawyers and litigants can comment on court cases, in matters pending in the court, in a public space or through the media and whether this will amount to contempt of court, which therefore needs to be restrained.

4. The applicants humbly submit that since any restraint on lawyers and litigants from commenting on matters pending in the court would also amount to restraints on the media from carrying those comments, any such order by the court would have serious consequences on the freedom of the press, its rights under Article 19(1) (a) of the Constitution and its ability to inform the people about important public interest issues pending in the courts. It is in these circumstances that the applicants who are journalists with considerable standing and experience are intervening in this case in order to help the court arrive at a correct decision which will not hurt public interest, the freedom of speech of the media and the ability of the media and journalists to write about and report pending court proceedings.

5. The issue of whether the media can in general write and comment on pending court proceedings involving matters of public interest has been examined by this Hon'ble Court in many cases. In a catena of cases this Hon'ble court has upheld this right to freedom of expression of the media even in matters that are sub judice and the duty of the courts to uphold the freedom of the Press and invalidate laws and orders that interfere with or are contrary to the Constitutional mandate. Courts are seized of several cases that are of intense public importance as well as of public concern and interest. Many such cases remain pending in courts for long years. Consider the disproportionate assets case against Jayalalitha which took 20 years to be decided or the Rama Janma Bhoomi case which has been going on for decades and that is before the Supreme Court today. Can it be maintained that for 20 years no one could talk about the facts and issues involved in the Jayalalitha case or for decades in the case of the Rama Janma

Bhoomi dispute? In an early early judgement of the Delhi High Court, Chief Justice H.R Khanna, held:

"A matter of great national importance may on occasions agitate vast sections of the population. Such a matter is bound to be discussed on the platform and in the press; the right to discuss being inalienable and the very essence of free and democratic society. The public discussion of that matter, in our opinion cannot necessarily be stiffled because of the filing of a suit by an individual in a court of law about that matter of national importance. To hold otherwise would result in the startling situation wherein any individual may place a blanket ban and embargo on public discussion of matters of national importance by just filing a suit in a Court of law, about those matters."

6. In the **Naresh Shridhar Mirajkar & Ors. Vs. State of Maharashtra & Anr.** case (**AIR 1967 SC 1**), a 9-judge bench of this Hon'ble Court held *"save in exceptional circumstances, the proceedings of a Court of Justice should be open to the public."* It was held that in a rare case for compelling reasons a court may order the trial to be held 'in-camera', but in all other cases, all proceedings are open to the public. This Hon'ble Court held:

"It is well-settled that in general, all cases brought before the Courts, whether civil, criminal, or others, must be heard in open Court. Public trial in open court is undoubtedly essential for the healthy, objective and fair administration of justice. Trial held subject to the public scrutiny and gaze naturally acts as a check against judicial caprice or vagaries, and serves as a powerful instrument for creating confidence of the public in the fairness, objectivity, and impartiality of the administration of justice. Public confidence in the administration of justice is of such great significance that there can be no two opinions on the broad proposition that in discharging their functions as judicial Tribunals, courts must generally hear causes in open and must permit the public admission to the court-room."

"It is through publicity that the citizens are convinced that the Court renders even handed justice, and it is, therefore, necessary that the trial should be open to the public and there should be no restraint on the publication of the report of the Court proceedings. The publicity generates public confidence in the administration of justice. In rare and

exceptional cases only, the Court may hold the trial behind closed doors, or may forbid the publication of the report of its proceedings during the pendency of the litigation."

7. That is why fair and accurate reporting of court proceedings has been declared not to amount to contempt by Sec 3 of Contempt of Courts Act and not to amount to criminal defamation by 4th exception to Sec 499 of IPC. Any general fetters placed by this court on reporting of court proceedings will clearly violate Art 19 (1) (a), since restrictions on this right can only be imposed only on the grounds mentioned in Art 19 (2) though contempt and defamation are permissible grounds on which restrictions can be imposed by law under Art 19 (2), fair and accurate court reporting has been exempted from such restrictions. This would apply even to reporting of petitions and pleadings filed in court that have not been heard, considered or decided by the court.

8. This Hon'ble Court in the case of ***Indian Express Newspapers (Bombay) Private Limited & Ors. Vs. Union of India & Ors.*** **(1985 1 SCC 641)**, observed that:

"31. In today's free world freedom of press is the heart of social and political intercourse. The press has now assumed the role of the public educator making formal and non-formal education possible in a large scale particularly in a developing world, where television and other kinds of modern communication are not still 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. .....It is the primary duty of all the National Courts to uphold the Freedom of Press and invalidate all laws or administrative actions which interfere with it contrary to the constitutional mandate."

9. This Hon'ble Court in **Indian Express case** had given a heartening assurance that *"as long as this Court sits, newspapermen need not have the fear of their freedom being curtailed by unconstitutional means"*. It would, therefore, be unfortunate if this Hon'ble Court itself starts making unnecessary restrictions on media. Such a situation would also leave no recourse to those affected by the ruling.

10. A Constitution Bench of this Hon'ble Court, in **Sahara India Real Estate v. SEBI, (2012) 10 SCC 603** while issuing guidelines for regulating media on matters sub-judice held:

"43. From the above propositions, the following principles emerge:

43.1. In any democratic society, the open justice rule must always be the norm and 'covertness' the exception. The right to open justice flows from the right to a fair trial. It also flows from the right of the public to information under Article 19(1)(a). The media, apart from exercising its own right to freedom of expression under Article 19(1)(a) is serving a larger public purpose by facilitating the carriage of information otherwise not available or easily accessible to the public. Thus, by reporting court proceedings, the media is enabng the fulfilment of the public's right to information about the working of the courts under Article 19(1)(a).

43.2. It is significant to note that under the open justice rule, reporting must be "contemporaneous" as recognised by the House of Lords in S (A child), In re11. That reporting may take place at any stage (which would include contemporaneous reporting) is reflected in Section 4 of the Contempt of Courts Act, 1971.

43.3.Fair comment must be permitted even during the pendency of the case. So long as a comment is temperate and balanced, there can be no objection to such comment. In PILs, for instance, interim orders are passed from time to time, which may have an impact on several parties who are not before the Court. These interim orders, may hold the field for several years. Thus the case remains sub judice. The situation may be beyond the control of an affected party who is not before the Court and it may be unfair to altogether deny him the right to fair comment on an interim order which may impact his rights.

43.4. Likewise, even in criminal cases reporting and fair comment ought to be permitted even during the pendency of the trial. It is important to note that in the BMW case53, the media played a vital and positive role in exposing the rot in the criminal justice system by resorting to a sting operation showing the nexus between the prosecution and the defence. It was absolutely essential that such an expose took place during the

pendency of the trial. If the right to report were to be postponed to the end of the trial, the entire purpose of the expose would have been lost.

43.5. There are exceptions to the open justice rule in the form of statutory exceptions carved out below, in the interests of privacy and the right to a fair trial. The Legislature has contemplated various situations in which a public trial may compromise the interests of a litigant and therefore express provision has been made for excluding access in those specific cases. As the House of Lords held in S (A child), In re11 referred to extensively hereinabove, the Court has no power to create further exceptions to the general principle of open justice except in the most compelling of circumstances. Section 7(b) of the Contempt of Courts Act, 1971 also recognises that the court may "on grounds of public policy or in exercise of any power vested in it, expressly prohibit the publication of all information relating to the proceeding or of information of the description which is published." This indicates that there can be an embargo on publication in certain exceptional situations and a breach thereof would amount to contempt. However, even this power to prohibit publications must be exercised with great caution and sparingly as Mirajkar case16 recognises.

43.6. While exercising the inherent power of the court to prohibit publication, the Court must bear in mind,

(i) while balancing the competing interests in favour of and against reporting, that:

"... The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings." (Duff, J. in Gazette Printing Co. v. Shallow54) and

(ii) that the restriction must not fall foul of the proportionality principle inasmuch as if a restriction is necessary, it must be the least restrictive measure. Edmonton Journal v. Alberta (Attorney General)9

43.7. It is significant to note that this Hon'ble Court had held in A.K. Gopalan v. Noordeen55, that proceedings can be said to be imminent from the time of arrest and prejudicial reports from the time of the arrest would be contemptuous. However, the Contempt of Courts Act of 1952 which was in force at the time that the matter was decided did not define contempt. On the other hand, barely two years after this case

was decided, the Contempt of Courts Act, 1971 came into force and this new Act not only defined "contempt of court" but also specifically excluded from the purview of contempt reports which "interfere or tend to interfere" with or obstructs or tends to obstruct the course of justice in connection with any civil or criminal proceeding pending at the time of publication if at that time the publisher had no reasonable grounds for believing that the proceeding was pending. The expression pending has been explained in Section 3 itself in the case of a criminal proceedings relating to the commission of an offence it is said to be pending from the time the charge-sheet of challan is filed or the court issues a summons or warrant against the accused. When the Legislature has chosen to expressly exclude such publications when the case is not "pending" then to hold otherwise may amount to rewriting the law. The Law Commission in its 200th Report has rightly pointed out the problems arising from this position and has recommended that a proceeding must be treated as pending from the time of arrest. However, this recommendation must be accepted by the Legislature and the statute amended accordingly before the same is followed.

43.8. While it must be recognised that misreporting and indiscretions do occasionally take place, the solution for the same would be to generate better awareness and education, not only amongst media people but all other participants from the public who wittingly or otherwise contribute to such misreporting or indiscretions. It is necessary to recognise that the media does not function in a vacuum. It is assisted actively by people from all walks of life: for instance, the police who sometimes leak information to the media, doctors who may reveal the results of medical examinations during the pendency of the trial, lawyers who may comment on sub judice matters and so on. The private television media is only about two decades old in India and self regulation is gradually taking shape in the last few years. Given the enormous revolution in information technology over the last few years, it will take sometime before we can reach the right balance on media reporting. The solution would not be to expand the scope of restrictions beyond what already exists under statute, but rather to first create awareness both the media and the public and all those who are part of the criminal justice system so that the interests of justice are met. The example of the Canadian Judicial Council and the UK may be referred to.

43.9. Finally, it must be recognised that the global trend leans towards more and more transparency taking into account the rapid strides in technology. For instance, in several jurisdictions, even live televisation of court proceedings is being permitted. Further, rules are in place even for live blogging and tweeting from the courtroom. While it may be debatable as to whether we in India are ready to introduce such changes, what these international developments show is that the global trends support live reporting and greater transparency, rather than more restrictions.

43.10. This Hon'ble Court may consider whether a beginning ought to be made with transcriptions of proceedings being carried out. These may be accessed by the media for a small fee so that media persons can ensure accuracy in reporting"

11. In ***Indirect Tax Practitioners' Assn. v. R.K. Jain, (2010) 8 SCC 281***, the court held:

"14. We have given serious thought to the entire matter. One of the two minor issues which needs our consideration is whether by writing the editorial in question, the respondent has committed breach of the undertaking filed in Contempt Petition (Crl.) No. 15 of 1997. The other issue is whether the editorial is intended to scandalise the functioning of CESTAT or the same amounts to interference in the administration of justice and whether the voice of a citizen who genuinely believes that a public body or institution entrusted with the task of deciding lis between the parties or their rights is not functioning well or is passing orders contrary to public interest can be muffled by using the weapon of contempt.

18. Before adverting to the second and more important issue, we deem it necessary to remind ourselves that freedom of speech and expression has always been considered as the most cherished right of every human being. Brennan, J. of the US Supreme Court, while dealing with a case of libel—New York Times Co. v. L.B. Sullivan[3] observed that "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, and this opportunity

should be afforded for 'vigorous advocacy' no less than 'abstract discussion'." (US p. 269)

19. In all civilised societies, the courts have exhibited high degree of tolerance and accepted adverse comments and criticism of their orders/judgments even though, at times, such criticism is totally off the mark and the language used is inappropriate. The right of a member of the public to criticise the functioning of a judicial institution has been beautifully described by the Privy Council in Ambard v. Attorney General for Trinidad and Tobago[4] in the following words: (AIR pp. 145-46)

"... no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith in private or public the public act done in the seat of justice. The path of criticism is a public way: the wrongheaded are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men."

20. In Debi Prasad Sharma v. King Emperor[5] Lord Atkin speaking on behalf of the Judicial Committee observed: (IA pp. 223-24)

"... In 1899 this Board pronounced proceedings for this species of contempt [scandalisation] to be obsolete in this country, though surviving in other parts of the empire, but they added that it is a weapon to be used sparingly and always with reference to the administration of justice: McLeod v. St. Aubyn[6]. In a Special Reference from the Bahama Islands, In re[7] the test applied by the very strong Board which heard the reference was whether the words complained of were in the circumstances calculated to obstruct or interfere with the course of justice and the due administration of the law. In R. v. Gray[8] it was shown that the offence of scandalising the court itself was not obsolete in this country. A very scandalous attack had been made on a Judge for his judicial utterances while sitting in a criminal case on circuit, and it was with the foregoing opinions on

record that Lord Russell of Killowen, C.J., adopting the expression of Wilmot, C.J., in his opinion in R. v. Almon[9], which is the source of much of the present law on the subject, spoke of the article complained of as calculated to lower the authority of the Judge."

21. In R. v. Commr. of Police of the Metropolis, ex p Blackburn (No. 2)[10] Lord Denning observed: (QB p. 155 A-D)

"Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.

It is the right of every man, in Parliament or out of it, in the press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication.

Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done."

22. In the land of Gautam Buddha, Mahavir and Mahatma Gandhi, the freedom of speech and expression and freedom to speak one's mind have always been respected. After Independence, the courts have zealously guarded this most precious freedom of every human being. Fair criticism of the system of administration of justice or functioning of institutions or authorities entrusted with the task of deciding rights of

the parties gives an opportunity to the operators of the system/institution to remedy the wrong and also bring about improvements. Such criticism cannot be castigated as an attempt to scandalise or lower the authority of the court or other judicial institutions or as an attempt to interfere with the administration of justice except when such criticism is ill-motivated or is construed as a deliberate [298] *attempt to run down the institution or an individual Judge is targeted for extraneous reasons.*

23. Ordinarily, the court would not use the power to punish for contempt for curbing the right of freedom of speech and expression, which is guaranteed under Article 19(1)(a) of the Constitution. Only when the criticism of judicial institutions transgresses all limits of decency and fairness or there is total lack of objectivity or there is deliberate attempt to denigrate the institution then the court would use this power. The judgments of this Court in S. Mulgaokar, In re[11] *and P.N. Duda v. P. Shiv Shanker*[12] *are outstanding examples of this attitude and approach.*

24. In the first case, a three-Judge Bench considered the question of contempt by a newspaper article published in The Indian Express dated 13-12-1977 criticising the Judges of this Court. The article noted that the High Courts had strongly reacted to the proposal of introducing a code of judicial ethics and propriety. In its issue dated 21-12-1977 an article entitled "Behaving like a Judge" was published which inter alia stated that the Supreme Court of India was "packed" by Mrs Indira Gandhi "with pliant and submissive judges except for a few". It was further stated that the suggestion that a code of ethics should be formulated by judges themselves was "so utterly inimical to the independence of the judiciary, violative of the constitutional safeguards in that respect and offensive to the self-respect of the judges as to make one wonder how it was conceived in the first place".

25. A notice had been issued to the Editor-in-Chief of the newspaper to show cause why proceedings for contempt under Article 129 of the Constitution should not be initiated against him in respect of the above two news items. After examining the submissions made at the Bar, the

Court dropped the contempt proceedings. Beg, C.J. expressed his views in the following words: (S. Mulgaokar, In re case[11], SCC pp. 342-43, para 1)

"1. ... Some people perhaps believe that attempts to hold trials of everything and everybody by publications in newspapers must include those directed against the highest court of justice in this country and its pronouncements. If this is done in a reasonable manner, which pre-supposes accuracy of information about a matter on which any criticism is offered, and arguments are directed fairly against any reasoning adopted, I would, speaking for myself, be the last person to consider it objectionable even if some criticism offered is erroneous. In Bennett Coleman & Co. v. Union of India[13], I had said: (SCC pp. 827-28, paras 96-98)

'96. John Stuart Mill, in his essay on "Liberty", pointed out the need for allowing even erroneous opinions to be expressed on the ground that the correct ones become more firmly established by what [illegible]299 may be called the "dialectical" process of a struggle with wrong ones which exposes errors. Milton, in his Areopagitica (1644) said:

"Though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; whoever knew Truth put to the worse, in a free and open encounter? ... Who knows not that Truth is strong, next to the Almighty; she needs no policies, no stratagems, no licensings to make her victorious; those are the shifts and defences that error makes against her power...."

97. Political philosophers and historians have taught us that intellectual advances made by our civilisation would have been impossible without freedom of speech and expression. At any rate, political democracy is based on the assumption that such freedom must be jealously guarded. Voltaire expressed a democrat's faith when he told an adversary in argument: 'I do not agree with a word you say, but I will defend to the death your right to say it.' Champions of human freedom of thought and expression, throughout the ages, have realised that intellectual paralysis

creeps over a society which denies, in however subtle a form, due freedom of thought and expression to its members.

98. Although, our Constitution does not contain a separate guarantee of freedom of the press, apart from the freedom of expression and opinion contained in Article 19(1)(a) of the Constitution, yet, it is well recognised that the press provides the principal vehicle of expression of their views to citizens. It has been said: -

"Freedom of the press is the Ark of the Covenant of Democracy because public criticism is essential to the working of its institutions. Never has criticism been more necessary than today, when the weapons of propaganda are so strong and so subtle. But, like other liberties, this also must be limited." ' "

26. Krishna Iyer, J. agreed with Beg, C.J. and observed: (S. Mulgaokar, In re case[11], SCC p. 350, para 24)

"24. Poise and peace and inner harmony are so quintessential to the judicial temper that huff, 'haywire' or even humiliation shall not besiege; nor, unveracious provocation, frivolous persiflage nor terminological inexactitude throw into palpitating tantrums the balanced cerebration of the judicial mind. The integral yoga of shanti and neeti is so much the cornerstone of the judicial process that criticism, wild or valid, authentic or anathematic, shall have little purchase over the mentation of the court. I quite realise how hard it is to resist, with sage silence, the shafts of acid speech; and, how alluring it is to succumb to the temptation of argumentation where the thorn, not the rose, triumphs. Truth's taciturn [illegible]300 strategy, the testimony of history says, has a higher power than a hundred thousand tongues or pens. In contempt jurisdiction, silence is a sign of strength since our power is wide and we are prosecutor and judge."

28. In Baradakanta Mishra v. Orissa High Court[14] Krishna Iyer, J. speaking for himself and P.N. Bhagwati, J., as he then was, emphasised the necessity of maintaining constitutional balance between two great but occasionally conflicting principles i.e. freedom of

expression which is guaranteed under Article 19(1)(a) and fair and fearless justice, referred to "republican justification" suggested in the American system and observed: (SCC pp. 401-03, paras 62-64)

"62. Maybe, we are nearer the republican justification suggested in the American system:

'In this country, all courts derive their authority from the people, and hold it in trust for their security and benefit. In this state, all judges are elected by the people, and hold their authority, in a double 302 *sense, directly from them; the power they exercise is but the authority of the people themselves, exercised through courts as their agents. It is the authority and laws emanating from the people, which the judges sit to exercise and enforce. Contempt against these courts, the administration of their laws, are insults offered to the authority of the people themselves, and not to the humble agents of the law, whom they employ in the conduct of their government.'*

63. This shift in legal philosophy will broaden the base of the citizen's right to criticise and render the judicial power more socially valid. We are not subjects of a king but citizens of a republic and a blanket ban through the contempt power, stifling criticism of a strategic institution, namely, administration of justice, thus forbidding the right to argue for reform of the judicial process and to comment on the performance of the judicial personnel through outspoken or marginally excessive criticism of the instrumentalities of law and justice, may be a tall order. For, change through free speech is basic to our democracy, and to prevent change through criticism is to petrify the organs of democratic Government. The judicial instrument is no exception. To cite vintage rulings of English courts and to bow to decisions of British Indian days as absolutes is to ignore the law of all laws that the rule of law must keep pace with the rule of life. To make our point, we cannot resist quoting McWhinney, who wrote:

'The dominant theme in American philosophy of law today must be the concept of change—or revolution—in law. In Mr Justice Oliver Wendell Holmes' own aphorism, it is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. The prestige argument, from age alone, that because a claimed legal rule has lasted a certain length of time it

must automatically be valid and binding at the present day, regardless of changes in basic societal conditions and expectations, is no longer very persuasive. According to the basic teachings of the Legal Realist and policy schools of law, society itself is in continuing state of flux at the present day; and the positive law, therefore, if it is to continue to be useful in the resolution of contemporary major social conflicts and social problems, must change in measure with the society. What we have, therefore, concomitantly with our conception of society in revolution is a conception of law itself, as being in a condition of flux, of movement. On this view, law is not a frozen, static body of rules but rules in a continuous process of change and adaptation; and the judge, at the final appellate level anyway, is a part—a determinant part—of this dynamic process of legal evolution.'

This approach must inform Indian law, including contempt law.

64. It is very necessary to remember the legal transformation in our value system on the inauguration of the Constitution, and the dogmas of the quiet past must change with the challenges of the stormy present. The [303] *great words of Justice Holmes uttered in a different context bear repetition in this context:*

'But when men have realised that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.' "

42. In our view, a person like the respondent can appropriately be described as a whistleblower for the system who has tried to highlight the malfunctioning of an important institution established for dealing with cases involving revenue of the State and there is no reason to silence such a person by invoking Articles 129 or 215 of the Constitution or the provisions of the Act."

12. In **Adarsh Cooperative Housing Society Ltd. v. Union of India, (2018) SCC OnLine 227,** while rejecting the prayer of the petitioner for banning of the film Aiyaary as it reflected badly on the Petitioner-Society's reputation and would adversely affect the litigations pending against it, held:

"17. At this juncture, we may also state that the doctrine of sub-judice may not be elevated to such an extent that some kind of reference or allusion to a member of a society would warrant the negation of the right to freedom of speech and expression which is an extremely cherished right enshrined under the Constitution. The moment the right to freedom of speech and expression is atrophied, not only the right but also the person having the right gets into a semi coma. We may hasten to add that the said right is not absolute but any restriction imposed thereon has to be extremely narrow and within reasonable parameters."

13. **Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers, Bombay, (1988) 4 SCC 592,** the issue before the court was the issuance of an interim injunction against a newspaper restraining publication of comments, etc on matters of public interest that are pending.

"21. In 1976, in Nebraska Press Association v. Hugh Stuart [49 L Ed 2d 683 : 427 US 539] , where the facts of the case were entirely different to the present ones, Chief Justice Burger delivered the opinion of the court saying that to the extent that the order prohibited the reporting of evidence adduced at the open preliminary hearing in a murder trial it was bad. Chief Justice Burger reiterated that a responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. The observations of Learned Hand [In United States v. Dennis, 183 F 2d

201, 212] referred to at p. 699 indicate "the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger", as the test. Hence, we must examine the gravity of the evil. In other words, *a balance of convenience* in the conventional phrase of Anglo-Saxon Common Law Jurisprudence would, perhaps, be the proper test to follow.

38. In the aforesaid view of the matter, we direct that there is no further need for the continuance of the injunction. Publications, if any, however, would be subject to the decision of the court on the question of contempt of court, namely, pre-judging the issue and thereby interfering with the due administration of justice. Preventive remedy in the form of an injunction is no longer necessary. Whether punitive remedy will be available or not, will depend upon the facts and the decision on the matter after ascertaining the consent or refusal of the Attorney General."

14. In **A.G. v. Times Newspapers 1972 H.NO.8335 Court of Appeal,** Lord Denning held:

"In so stating the law1, I would emphasize that it applies only 'when litigation is pending and is actively in suit before the Court', To which add that there must appear to be 'a real and substantial danger of prejudice', the trial if the case or to the settlement of it. And when considering the question, it must always be remembered that besides the interest of the parties in a fair trial or a fair settlement of the case there is another important interest to be considered. It is interest of the public in matters of national concern, and the freedom of the press to make fair comment on such matters. The one interest must be balanced against the other. There may be cases where the subject matter is such that the public interest counterbalances the private interest of the parties. In such cases the public interest prevails. Fair comments to be allowed."

15. The European Court of Human Rights in **The Sunday Times V. The United Kingdom 2 E.H.R.R. 245, held:**

"65. As the Court remarked in its HANDYSIDE judgment, freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. 41 These principles are of particular importance as far as the press is concerned. ***They are equally applicable to the field of the administration of justice, which serves the interests of the community at large and requires the co-operation of an enlightened public. There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large.*** *Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest.* ***Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.***

66. "It is true that, if The Sunday Times article had appeared at the intended time, Distillers might have felt obliged to develop in public, and in advance of any trial, their arguments on the facts of the case (see para. 63 above); however, ***those facts did not cease to be a matter of public interest merely because they formed the background to pending litigation****. By bringing to light certain facts, the article might have served as a brake on speculative and unenlightened discussion."*

67. Having regard to all the circumstances of the case and on the basis of the approach described in paragraph 65 above, the Court concludes that the interference complained of did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the Convention. The Court therefore finds the reasons for the restraint imposed on the applicants not to be sufficient under Article 10 (2) (art. 10-2). That restraint proves not to be proportionate to the legitimate aim pursued; it was not necessary in a democratic society for maintaining the authority of the judiciary.

68. There has accordingly been a violation of Article 10"

16. The court in the present case seems to want to examine whether an exception to the above general rule about writing and commenting about pending cases involving public interest can be made in the case of lawyers and litigants involved in those cases. It is submitted, that the best information about the facts and issues involved in any particular case can be obtained only from the lawyers and the litigants involved in those cases. They are the persons likely to be best informed and hence in the best position to speak about those cases. This is why, the media normally asks the persons directly involved in those cases, to inform it about the facts and issues involved in those cases and through this to be able to inform the public. Going to any other source or bystander for information about the proceedings in a particular case or the issues involved in that case is likely to result in less accurate information and sometimes incorrect information being disseminated. Of course lawyers and litigants involved in a particular case are likely to have a particular point of view as well and that bias is taken care of by informing the people, which the media normally does, about the status/involvement of the lawyer or the litigant, regarding that particular litigation.

17. Any reporting of and comment on pending court proceedings by any body in the media, can potentially have some impact on the minds of judges dealing with the case and therefore fears have been raised about "media trials", etc. However, barring the media or anybody through the media, from writing about or commenting about pending court proceedings, would have the effect of depriving the people of information which they are entitled to know about court proceedings involving matters of public interest. This is why after considering all the pros and cons of the issue, this court as well as courts in other similar judicial systems in the world have taken a consistent view that despite a possible effect on pending court proceedings, the media or any other commentators cannot be barred from commenting or reporting on pending court proceedings involving matters of public interest. The courts have taken the view that the public interest involved in disseminating information about pending cases involving public interest, outweighs any possible harm or effect on pending

cases. This impact on pending cases would not be any greater if the persons reporting on or commenting on the proceedings were the lawyers and litigants themselves. Infact, so far as the lawyers and litigants are concerned, they have already been heard by the judge or would be heard by the judge in court and therefore, their views/ information being aired through the media, would have the least effect on the mind of the judge as opposed to other people who not being involved in the case at hand, may not have the appropriate information on the cases and all its nuances.

18. Therefore, the applicants are approaching this Hon'ble Court to intervene and make appropriate submissions to assist the court.

PRAYER

In light of the afore-mentioned facts and circumstances, it is humbly prayed that this Hon'ble Court may be pleased to:

a. Pass an order allowing the Applicants herein to intervene in the captioned matter being Contempt Petition (Crl.) 1 of 2019 and make oral and written arguments before this Hon'ble Court; and
b. Pass any such further order(s)/direction(s) as this Hon'ble Court may deem fit in the facts and circumstances of the case;

AND FOR THIS ACT OF KINDNESS, THE APPLICANTS AS ARE DUTY BOUND SHALL EVER PRAY.

Filed By:

Place: New Delhi

PRANAV SACHDEVA

Filed On: 02.03.2019

ADVOCATE FOR THE APPLICANTS

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

Crl.M.P. NO. _____ OF 2019

IN

CONTEMPT PETITION (CRL.) NO. 1 OF 2019

23

IN THE MATTER OF :

THE ATTORNEY GENERAL FOR INDIA — PETITIONER

VERSUS

SHRI PRASHANT BHUSHAN — RESPONDENT

AND IN THE MATTER OF:

Arun Shourie & ORS. — APPLICANTS

AFFIDAVIT

I, Manoj Mitta, S/o Late Jagan Mohan Mitta R/o D 168, Sector 55, Noida-201307, do hereby solemnly affirm and as under:

1. That I am the Intervenor/ Applicant No. 24 in the present Intervention Application and as such I am conversant with the facts and circumstances of the present application. I have been duly authorized to swear this affidavit on behalf of all the other intervenors in this application.
2. That the Contents of accompanying Intervention Application are true and correct to the best of my knowledge and belief as per information derived from the record of the case, and the legal submissions made on my understanding of the law and are believed to be true and correct.
3. That the Annexuresare true copies of the respective Originals.

4. That the averments of facts stated herein above are true to my knowledge and belief and no part of it is false and nothing material has been concealed therefrom.

DEPONENT

VERIFICATION

I, the above named Deponent, do hereby verify that the contents of the above Affidavit are true and correct to my knowledge and belief, no part of it is false and nothing materials has been concealed there from.

Verified at New Delhi on this March, 2019

DEPONENT

ANNEXURE-A1

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ITEM NO.8 + 11 COURT NO.5 SECTION PIL-W

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Writ Petition(s)(Civil) No(s). 54/2019

COMMON CAUSE & ANR. Petitioner(s)

VERSUS

UNION OF INDIA & ANR. Respondent(s)

(FOR ADMISSION and IA No.8979/2019-APPROPRIATE ORDERS/DIRECTIONS)

with

Contempt Petition (Crl.) No. 1/2019
Contempt Petition (Crl.) No. 2/2019

Date : 06-02-2019 These petitions were called on for hearing today.

CORAM : HON'BLE MR. JUSTICE ARUN MISHRA
HON'BLE MR. JUSTICE NAVIN SINHA

Counsel for the parties

Mr. K. K. Venugopal, Attorney General
Mr. Tushar Mehta, ASG
Mr. Rajat Nair, Adv.
Mr. R. Balasubramaniam, Adv.
Ms. Shraddha Deshmukh, Adv.
Mr. Kanu Agrawal, Adv.
Mr. Rajeev Ranjan, Adv.
Mr. A. K. Sharma, Adv.
Mr. Ankur Talwar, Adv.
Ms. Uttara Babbar, Adv.
Ms. Bhavana Duhoon, Adv.

Mr. Prashant Bhushan, Adv.
Mr. Rohit Kumar Singh, Adv.
Ms. Cheryl D'Souza, Adv.

UPON hearing the counsel the Court made the following

O R D E R

Writ Petition(s)(Civil) No(s). 54/2019

Heard the learned counsel for the parties.

Arguments concluded.

Order reserved.

Contempt Petition (Crl.) No. 1/2019 and Contempt Petition (Crl.) No. 2/2019

Heard Sh. K.K.Venugopal, learned Attorney General for India, and Sh. Tushar Mehta, learned Solicitor General of India.

To contend that by act in question, contempt of court has been committed, reliance has been placed on the decision of this Court in RE : P.C.SEN (Criminal Appeal No. 119 of 1966), reported in (1969) 2 SCR 649, wherein the following observations have been made by this Court :-

> *"8. The law relating to contempt of Court is well settled. Any act done or writing published which is calculated to bring a Court or a Judge into contempt, or to lower his authority, or to interfere with the due course of justice or the lawful process of the Court, is a contempt of Court : R. v. Gray, [1900] 2 Q.B.D. 36 at p. 40. Contempt by speech or writing may be by scandalising the Court itself, or by abusing parties to actions, or by prejudicing mankind in favour of or against a party before the cause is heard. It is incumbent upon Courts of justice to preserve their proceedings from being misrepresented, for prejudicing the minds of the public against persons concerned as parties in causes before the cause is finally heard has pernicious consequences. Speeches or writings misrepresenting the proceedings of the Court or prejudicing the public for or against a party or involving reflections on parties to a proceeding amount to contempt. To make a speech tending to influence the result of a pending trial, whether civil or criminal is a grave contempt. Comments on pending proceedings, if emanating from*

the parties or their lawyers, are generally a more serious contempt than those coming from independent sources. The question in all cases of comment on pending proceedings is not whether the publication does interfere, but whether it tends to interfere, with the due course of justice. The question is not so much of the intention of the contemner as whether it is calculated to interfere with the administration of justice. As observed by the Judicial Committee in Debi Prasad Sharma and Ors. v. The King-Emperor , L.R. 70 I. A. 216 at p. 224: ".... the test applied by the .... Board which heard the reference was whether the words complained of were in the circumstances calculated to obstruct or interfere with the course of justice and the due administration of the law."

If, therefore, the speech which was broadcast by the Chief Minister was calculated to interfere with the course of justice, it was liable to be declared a contempt of the Court even assuming that he had not intended thereby to interfere with the due course of justice. There is nothing in Saibal Kumar Gupta and Ors. v. B. K. Sen and Anr., on which counsel for the appellant relied, which supports his contention that intention of the contemner is the decisive test. The observations of Imam, J., speaking for the majority of the Court that the appellants should be acquitted, because they "had at no time intended to interfere with the course of justice and their conduct did not tend to interfere with the course of justice", does not imply that conduct which tends to or is calculated to interfere with the administration of justice is not liable to be punished as contempt because the contemner had no intention to interfere with the

course of justice. Nor does the judgment of the Judicial Committee in Arthur Reginald Perera v. The King, [1951] A.C. 482 support the contention that in determining whether conduct which is otherwise calculated to interfere with the due administration of justice will not be contempt of Court because on the part of the contemner there was no intention to interfere with the administration of justice. In that case, a member of the House of Representatives in Ceylon, on receiving a complaint from some of the prisoners about the practice of producing followed by the Jail Authorities in the Court when an appeal filed by the prisoners was being heard, made an entry in the prison visitors' book that "The present practice of appeals of remand prisoners being heard in their absence is not healthy. When represented by counsel or otherwise the prisoner should be present at proceedings". Information conveyed to Perera was inaccurate. It was held by the Judicial Committee that Perera acted in good faith and in discharge of what be believed to be his public duty as a member of the legislature, and that he had not committed any contempt of Court because the words made no direct reference to the Court or to any of its Judges, or to the course of justice or to the process of the Courts. His criticism was honest criticism on a matter of public importance and there was nothing in his conduct which came within the definition of contempt of Court."

As the issues raised are of vital importance, whether in a matter which is sub-judice, it is open to criticise the court proceedings to affect the public opinion by litigants and lawyers

and protection of various other rights of the litigants are also involved; what are the rights of the litigants and what may amount to interference in the course of administration of justice. In view of the aforesaid decision and facts and circumstances, we deem it appropriate to hear the matter. As such, we issue notice to the respondent.

Mr. Prashant Bhushan, who is present in Court, accepts notice. He has prayed for three weeks' time to reply to the petitions.

Rejoinder affidavit, if any, be filed within one week thereafter.

List the matter on 07.03.2019.

(JAYANT KUMAR ARORA)
COURT MASTER

(JAGDISH CHANDER)
BRANCH OFFICER

(TRUE COPY)