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EDITORIAL PAGE

The South Asian Journal of Law and Policy Review is an independent bi-annually published peer-reviewed journal published by the Editorial board comprising of students from National Law University Odisha and West Bengal National University of Juridical Sciences.

At SAJLPR we welcome and encourage scholarly unpublished papers on various fields of Law and Policy developments in South Asia from students, teachers, scholars and professionals. The Journal invites the submission of papers that meet the general criteria of significance and academic brilliance. Authors are requested to emphasize on novel theoretical standard and downtrodden concerns of the mentioned areas against the backdrop of proper objectification of suitable primary materials and documents.

In the first edition of the journal, we bring to you insights into various leading constitutional law cases in India. The focus here has been the understanding of various fundamental rights as envisaged in Part III, Constitution of India, 1950. The articles give a judicial understanding of the rights of freedom of speech, privacy, religion and profession.

- Editorial Board

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INTRODUCTION AND FACTS OF THE CASE

This case deals with the power of the head of religious group to excommunicate members of the religious community he heads, and whether this right can be abridged by and Act enacted by a State legislature. The facts of the case are as follows:

The Dawoodi Bohra Community consists of Muslims of the Shia sect. The head of this community is called the Dai-ul-Mutlaq. The Dai, as a citizen of India and also the Head Priest of the Community of the Dawoodi Bohras has not only civil powers as head of the sect and as trustee of the property, but also ecclesiastical powers as a religious leader of the community. It is the right and privilege of the petitioner as the Dai to regulate the exercise of religious rights in places where such rites and ceremonies are carried out and in which religious exercises are performed. One of his duties as the Dai-ul-Mutlaq (apart from being the religious leader and trustee of the property of the community) is to manage the properties which are all under his directions and control. He also has the right to excommunication (which is the right in question). This power of excommunication is not absolute, arbitrary and untrammeled, and it has to be exercised in accordance with the usage and tents of the community. Apart from exceptional circumstances, expulsion from the community can be effected only (1) at a meeting of the Jamat, (2) after the person concerned is given due warning of the fault

complained of, (3) an opportunity of mending and (4) after a public statement of the grounds of expulsion. The result of excommunication properly and legally effected involves exclusion form the exercise of religious rights in places under the trusteeship of the Dai-ul-Mutlaq. The legislature of the State of Bombay enacted an Act called the "Bombay Prevention of Excommunication Act, 1949[1], which came into force on November 1, 1949. The Dai-ul-Mutlaq, who is the petitioner, claims that as the head of the Dawoodi Bohra community and as the Dai, he has the right and power, in a proper case, and subject to the conditions of the legal exercise of that power, to excommunicate a member of the Dawoodi Bohra community, and this power and right is an integral part of the religious faith and belief of the community. The petitioner also affirms that the exercise of the right to excommunicate is a matter of religion, and that the right is an incident of the management of the affairs of the community in matters of religion. He asserts that the community constitutes a religious denomination within the meaning of Article 26 of the Constitution, and the said right of excommunication is a guaranteed right under Articles 25 and 26 of the Constitution of India. The petitioner approached the Supreme Court under Article 32 challenging the constitutionality of this Act on the ground that the provisions of the Act infringe his rights as the head of the community under Article 25 and 26 of the Constitution.

During the pendency of the proceedings in the Supreme Court, one member of the Dawoodi Bohra community made an application either to be party to the writ petition or be granted leave to intervene in the proceedings, to argue about the invalidity of the practice of excommunication.

ARGUMENTS OF THE PARTIES

(A) ARGUMENTS ON BEHALF OF THE PETITIONER

The First contention of the petitioner was that the Act violates his right and power, as Dai-ul-Mutlaq and the religious leader of the Dawoodi Bohra community, to excommunicate such members of the community as he may think fit and proper to do so, and that the said right of excommunication and the exercise of that right by the petitioner in the aforesaid manner (mentioned in the facts) are matters of religion within the meaning of Article 26(b) of the Constitution. The provisions of this Act infringe both Articles 25 and 26 of the Constitution, and also, after the coming into force of the Constitution, the Act has become void under Article 13 of the Constitution.

Counsel also contended that insofar as the Act interferes with the said right of the petitioner, it is ultra vires the legislature. He also challenged the Act on the grounds of legislative incompetence of the legislature of Bombay since such a power was not contained in any of the entries in the Seventh Schedule of the Government of India Act, 1935[2].

[1] Bombay Prevention of Excommunication Act, 1949
[2] Government of India Act, 1935

The application of the intervener was disposed by the Court, but the intervener had asserted that the *Holy Koran* does not permit excommunication, since it is against the spirit of Islam, and the Dai-ul-Mutlaq had no right or power to excommunicate any member of the community; and assuming the fact that the Holy Koran did permit so, it was totally out of date in modern times and deserves to be abrogated, which was rightly done by the impugned Act. It was also asserted by the intervener that the right of excommunication was opposed to the universally accepted fundamentals of human rights as embodied in the "Universal Declaration of Human Rights". Lastly, the intervener raised the point that the rights to belief, faith and worship and the right to a decent burial were basic human rights and were wholly inconsistent with the right to excommunicate as claimed by the petitioner. In response to this, the petitioner challenged the right of the intervener to intervene or to be added as a party-respondent, and said that the practice of excommunication was essential to the purity of religious denominations because it could be secured only by removing persons who were unsuitable for membership in the community. Therefore, the petitioner asserted that those who did not accept the headship of the Dai-ul-Mutlaq must go out of the community and anybody defying the authority of the Dai-ul-Mutlaq would be liable to be excommunicated. The intervener's application was rejected despite the arguments raised and responded.

The Counsel for the petitioner further argued that the Dawoodi Bohra community is a religious denomination within the meaning of Article 26 of the Constitution[3], and that such a religious denomination is entitled to ensure its continuity by maintaining the bond of religious unity and discipline, which would secure the continued acceptance by its adherents of the essential tents, doctrines and practices.; and in order to ensure all this, the petitioner as the religious head is invested with such powers, especially the right to excommunication, and this power is a matter of religion within the meaning of Article 26(b) of the Constitution. It was also contended that the person who has been excommunicated as a result of his non-conformity to religious practices is not entitled to use the communal mosque or the communal ground or other property, thus showing that he was no more to be treated as a member of the community and that he is an outcast. The other consequence of excommunication is that no other member of the community can have any contacts, social or religious, with the person excommunicated.

Counsel had relied on the case of *Commissioner, H.R.E., Madras V. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*[4], which laid down that the guarantee under the Constitution not only protects the freedom of opinion, but also protects acts done in pursuance of such religious opinion, and it is the denomination itself which has the right to determine what are essential parts of its religion, as protected by Articles 25 and 26 of the Constitution. Moreover, it was contended that the right to worship in the mosque belonging to the community and of burial dedicated to the community

[3] Article 26, Constitution of India 1949
[4] *H.R.E., Madras V. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt,* AIR 1954 SC 282

were religious rights and could not be enjoyed by a person who had been rightly excommunicated; and the impugned Act had deprived the petitioner of his rights. What was emphasized on in this argument was that if the intention of the impugned Act was to bring about religious reform, and it could not do so as it was outside the ambit of Article 25(2) (b) of the Constitution.

Counsel for the Petitioner had presented three case laws to prove their stand. The first two cases were those of *Advocate-General ex relatione Dave Muhammad v. Muhammad Husen Huseni*[5] and *Advocate-General of Bombay v. Yusufali Ebrahim*[6]. However, these two cases only discussed the history of the Dawoodi Bohra community and had no points to prove their case on validity of excommunication. However, Counsel presented one case which dealt directly with the point in this litigation and this was the case of *Hasanali v. Mansoorali*[7]. This case dealt directly with the powers of the Dai-ul-Mutlaq to excommunicate. In this case, certain orders of excommunication were being challenged, and as a result of those excommunication orders, the plaintiffs had been obstructed form entering the property in suit for the purposes of worship, burial and resting in the rest house. It was held in this case that the power of the Dai-ul-Mutlaq was not unrestricted, absolute, arbitrary and untrammeled, and has to be done in a manner which was indicated in the case. But however, it had decided that the power to excommunicate was a religious power exercisable by the Dai.

Counsel for the petitioner, in the present case, had contended that the Right guaranteed under Article 25 is available not only to an individual, but to the community at large, acting through its religious head, the petitioner as the religious head has the right to excommunicate any person who goes against the beliefs and practices connected with those beliefs. In support of this, Counsel had presented the case of *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Shirur Mutt*, where it was quoted that

> "A religion may not only lay down a code of ethical rules for its followers to accept, it might also prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might even extend to matters of food and dress. The guarantee under our Constitution not only protects freedom of religious opinion but it protects acts also done in pursuance of a religion and this is made clear by the use of the expression 'practice of religion' in Article 25."

On the basis of this judgement, Counsel argued that this practice of excommunication is a part of the religion of the community, and that matters of religion are outside State interference. It was also stated in the above case that under Article 26(b), a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according

[5] *Advocate-General ex relatione Dave Muhammad v. Muhammad Husen Huseni,* AIR 1962 SC 853
[6] *Advocate-General of Bombay v. Yusufali Ebrahim,* 84 Ind Cas 759
[7] *Hasanali v. Mansoorali,* (1948) 50 BOMLR 389

to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters.

In response to Justice Sinha's opinion that the petitioner must not withhold the civil rights of the excommunicated member, Counsel argued that the Petitioner's right to excommunicate is bound up with religion and is not a civil right. This right is protected by Art. 26(b) and is thus completely out of regulation of law.

Further, Counsel argued that the guaranteed right of a religious denomination to manage its own affairs in matters of religion (Art. 26(b)) is subject only to public order, morality and health and is not subject to legislation contemplated by Article 25(2) (b).

(B) ARGUMENTS ON BEHALF OF THE RESPONDENT

The first contention of the Respondent was that the power of the Dai-ul-Mutlaq, as the head of the community, to excommunicate any member of that community was not in conformity with the policy of the State. The petitioner may have the right to regulate religious rights at appropriate places and occasions, but those rights do not include the right to excommunicate any person and to deprive him of his civil rights and privileges. Moreover, what defeats the purpose of the aforesaid right was that it was denied that the right to excommunicate springs from or has its foundation in religion and religious doctrines, tenets or faith of the Dawoodi Bohra community. Even if it was the case that the right to excommunicate was a part of their religious practice, it ran counter to public order, morality and health.

Counsel for the Respondent added to his opening argument that the impugned Act was a valid piece of legislation enacted by a competent legislature and it was within the limits of Articles 25 and 26 of the Constitution. The right to manage its own affairs vested in a religious community is not an absolute or untrammeled right but is subject to a regulation in the interest of public order, morality and health.

Counsel for the Respondent had submitted that the right to excommunicate, which was rendered invalid by the impugned Act, was not a matter of religion within the meaning of Article 26(b) The Article's intention was to stop the practice indulged by a caste or a denomination to deprive its members of their civil rights as members, and this is different from matters of religion which were protected under Articles 25[8] and 26. Alternatively, Counsel submitted that even if the right were a matter of religion, the Act would not be void because it was a matter of reform in the interest of public welfare. What Counsel asserted further was that there was no evidence on record to show that excommunication was an essential matter of religion. The right to worship at a particular place and the right of burial in a particular burial ground were questions of civil nature which was within the

[8] Article 25, Constitution od India 1949

cognizance of civil courts. It was further contended that Article 26(b) was controlled by Article 25(2) (b). Therefore, even if excommunication had touched certain religious matters, the impugned Act, insofar as it had abolished it, was in consonance with modern notions of human dignity and individual liberty of action even in matters of religious opinion and faith and practice.

To summarize his position, the counsel for the Respondent, who was the learned Attorney- General had, in his submissions, submitted three points: (1) In the petition, there was no pleading that the deprivation of civil rights of a person excommunicated was a matter of religion or religious practice. (2) The word "excommunication" defined in the Act deals only with the rights of civil nature and not with those of religious or social nature, and with the civil consequences of excommunication does not violate the freedom protected under Article 25 and 26. (3) Even if the civil consequences of excommunication are a matter of religion, it still constitutes as a measure of social reform and the legislation would be protected under Article 25(2) (b).

In order to prove that the impugned Act could be sustained as a measure of social welfare and reform under Article 25(2) (b), Counsel had relied on the decision in *Venkataramana Devaru v. State of Mysore*[9], where it was stated that the right guaranteed under Article 26(b) is subject to the law protected by Article 25(2) (b). In this case, it was held that notwithstanding the exclusion of these communities from worship in such a temple was in essential a part of the "practice of religion" of the denomination. Counsel sought support from this ruling, but unfortunately it was rejected as there was a special saving as regards to laws providing for "throwing open of public Hindu Religion Institutions to all classes and sections of Hindus".

THE DECISION (VERDICT)

The case was decided by a 5 judge bench comprising of Chief Justice Bhuvaneshwar Prasad Sinha, Justice A.K. Sarkar, Justice K.C. Das Gupta, Justice N. Rajagopala Ayyangar and Justice J.R. Mudholkar. Only three judges had delivered their judgement. The case was decided in favour of the Petitioner with the decision being in a 2:1 ratio. Justice Sinha had a dissenting opinion, and Justice Das Gupta and Justice Ayyangar had decided in favor of the Petition. The reasons for the judgement given by the judges are in the following pages.

REASONS GIVEN FOR THE DECISION

REASONS GIVEN BY CHIEF JUSTICE SINHA

After hearing the initial arguments from both sides about the practice of excommunication being/ not being a religious one and its interference with a person's civil rights, Counsel for the intervener had reopened the question of whether or not the petitioner, as the Dai-ul-Mutlaq, had the power to excommunicate. But since Their Lordships had disposed of the application to intervene in the

[9] *Venkataramana Devaru v. State of Mysore,* AIR 1958 SC 255

proceedings, His Lordship had proceeded with the assumption that the petitioner had the power to do so.

His Lordship had referred to an Act called the Caste Disabilities Removal Act, which provided that a person shall not be deprived of his rights or property by reason of his or her renouncing or exclusion from the communion of any religion or being deprived of caste, and that any such forfeiture shall not be enforced as the law in the courts. This Act had aimed at ensuring higher human dignity, had given full effect to the modern notions of individual freedom to choose one's way of life and to do away with all the undue and outmoded interferences with liberty of conscience, faith and belief. The impugned Act was in the same lines as the Case Disabilities Removal Act.

His Lordship also assessed the argument with respect to the incompetency of the Bombay legislature to enact such a provision, and opinionated that the enactment would come within entries 1 and 2 of the List III of the Government of India Act 1935. No other argument was addressed by either of the parties to show that the above mentioned entries come/ don't come under the purview of the aforementioned entries in the List.

There were some cases which Counsel for the petitioner presented to prove their stand. But the only case relevant to the issue in question was that of *Hasanali v. Mansoorali*.

His Lordship stated that it was undisputed fact that the petitioner is the head of the Dawoodi Bohra community or that the Dawoodi Bohra community is a religious denomination within the meaning of Article 26 of the Constitution, and also that the petitioner as the head of the community has the right to excommunicate and in the manner indicated in *Hasanali*

His Lordship opined that the Bombay Legislature was competent to enact the Act. His Lordship expounded that law in Section 25, and further stated that the right guaranteed under Article 25 is not absolute and it is subject to public order, morality and health. Any existing law regulating an economic/financial/political or secular activity which may be associated with religious practice, laws providing social reform and any law made by the State to regulate or restrict the aforesaid activities or providing social reform would come under the scope of Article 25.

His Lordship also mentioned that nobody can be compelled, against his own judgement, to hold any particular creed or follow a set of religious practices. A person is free to worship God according to the dictates of his conscience, so long as it does not come in conflict with any restraints imposed by the State in the interest of public order. Moreover, a person cannot be questioned as to his religious beliefs by the State or any other person. The laws made by a competent legislature in the interest of public order would come within the regulating power of the State. His Lordship drew a parallel to religious practices of sacrifice of human beings or animals, and how the State can intervene to stop such delirious practices.

In response to the argument of the right of excommunication being a religious one, His Lordship opined that the judgement of the Judicial Committee of the Privy Council had clearly laid down that excommunication was not purely a religious right. A matter which was purely religious could not come within the purview of the courts. His Lordship also said that the effect of excommunication is that the expelled person is excluded from the exercise of rights not only in places of worship but also from burying the dead in the community burial ground and other property rights belonging to the community, which are all disputes of civil nature and not purely religious matters.

In the aspect as to whether the legislature was competent to enact such a law, His Lordship said that though the Act may have its repercussions on the religious aspect of excommunication, insofar as it protects the civil rights of the members of the community it has not gone beyond the provisions of Article 25(2) (b).

His Lordship had also opined that the main intention of the Act was to do away with all mischief of treating a human being as a pariah, and depriving him of his human dignity. Every human should be allowed to follow the dictates of his own conscience. His Lordship had compared the consequences of excommunication to that of untouchability, and that untouchability was abolished under Article 17 The Act had aimed at fulfillment of individual liberty of conscience guaranteed under Article 25(1) and insofar as the Act has any repercussions on the right of the Petitioner, the Act could come under the protection of Article 26(d) that he has to administer the property in accordance with law.

Since His Lordship felt that it had not been established that the Act was passed by a legislature which was no competent to do so, or that the impugned Act infringes any provision of the Constitution, the Act must be upheld and the petition must fail.

REASONS GIVEN BY JUSTICE DAS GUPTA

His Lordship had placed reliance on an article in the "Encyclopedia of the Social Sciences" written by Prof. Hazeltine. Prof. Hazeltine which had stated that excommunication is a principal means of maintaining discipline within religious organizations. This was not only followed in the Dawoodi Bohra community, but it was also followed in early Christian communities. Even among the Muslims, the right of excommunication appears to have been practiced from earlier times, and was exercised by the Dais on a number of occasions.

His Lordship had also mentioned that there was a *Mishak* which every Dawoodi Bohra takes at the time of his initiation, which includes an oath of unquestioning faith in and loyalty to the Dai.

His Lordship clarified that whenever there is a breach of some practice considered an essential part of the religion, excommunication can be held to maintain the strength of the religion. From this, His Lordship had opined that this Act clearly interferes with the right of the Dawoodi Bohra community under Art. 26(b) of the Constitution.

His Lordship had also opined that excommunication of a member from the community will affect many of his civil rights, and will lose his rights of enjoyment of such property. However, the right given under Article 26(b) has not been made subject to civil rights, but has been made only subject to public order, morality and health.

His Lordship also opined that the Act cannot be regarded as a law regulating or restricting any economic, financial, political or other secular activity. The mere fact that the civil rights which might be lost by members of the community as a result of excommunication, even though on religious grounds, does not offer sufficient basis for a conclusion that the law provides for social welfare and reform. Barring of excommunication on grounds other than religious grounds might be a measure of social reform, but barring of excommunication on religious grounds cannot be considered to promote social welfare and reform As the impugned Act invalidates excommunication on any ground whatsoever, it was held by His Lordship that it was a clear violation of the right of the Dawoodi Bohra community under Article 26(b) of the Constitution.

Therefore, His Lordship had allowed the petition and declared the Act to be void.

REASONS GIVEN BY JUSTICE AYYANGAR

His Lordship had concurred with the reasoning given by Justice Das Gupta, thereby allowing the Petition and declaring the Act void.

His Lordship opined that various doctrines, creeds and tenets of a religious denomination are intended to ensure the unity of the faith which its adherents profess and the identity of the religious views are what bind the community together. As stated by Lord Halsbury, in the case of *Free Church of Scotland v. Overtoun*,

> "In the absence of conformity to essentials, the denomination would not be an entity cemented into solidity by harmonious uniformity of opinion, it would be a mere incongruous heap of grains of sand, thrown together without being united, each of these intellectual and isolated grains differing from every other, and the whole forming a but nominally united while really unconnected mass; fraught with nothing but internal dissimilitude, and mutual reciprocal contradiction and dissension."

His Lordship interpreted the purpose of excommunication by saying that a denomination within Article 26 and persons who are members of that denomination are under Article 25, and they are entitles to ensure the continuity of the denomination and such continuity is possible only by maintaining the bond of religious discipline which would secure the continued adherence of its members to certain essentials like faith, doctrine, tenets and practices. Excommunication, his Lordship stated, is one of the suitable actions that could be taken against those who deny the fundamental bases of the religion.

His Lordship refused to accept any of the three contentions put forward by the Attorney –General who was Counsel for the State. In response to the first contention, His Lordship stated that the consequence of deprivation of the use of these properties by persons excommunicated would be a logical and would flow form the order of excommunication. If the property belongs to the community and if a person by excommunication ceased to be a member of that community, the divorce of his right to enjoyment of the denominational property is a sure and logical consequence.

His Lordship then addressed the second submission of the Attorney General. His Lordship said that although the intention of the impugned Act was to deal with the consequences of civil rights, it does interfere with consequences having religious significance, i.e., religious rights. He opined that the attorney General was not right in the submission that the Act is concerned only with the civil rights of the excommunicate person.

His Lordship also emphasized on the two rights under Article 26, which are relevant in the present context, and they are (1) "To manage its own affairs in matters of religion" and (2) "To administer such property in accordance with law". Since Religious denominations are possessed of property which is dedicated for definite uses and which it has the right to administer, it has the right to use that property for the purpose it has been dedicated to, subject to limitations such as public order, morality and health. His Lordship did not accept the argument of the Attorney General that a valid law could be enacted which would permit the diversion of those funds, as such an enactment wouldn't be a law contemplated by Article 26(d). Moreover, if the Dai permitted use of a property by an apostate, he would be committing a dereliction of his duty as the supreme head of the religion.

His Lordship opined that the fundamental point to be considered in the attack on the constitutionality of the Act is that the practice of excommunication is of ancient origin. Excommunication bore two aspects (1) That it is a punishment for crimes which the religious community justifies and (2) judicial exclusion from the right and privileges of the religious community to whom the offender belongs. The second aspect has more to do with maintenance of discipline and integrity in the community, than a punishment. If everyone were at liberty to deny the essentials of the community, then the community as a group would cease to exist. Thus, the impugned Act is a violation of the right to practice religion guaranteed by Article 25(1) and also Article 26 (in that it interferes with the rights of the Dai to exclude dissidents and excommunicated persons from beneficial use of the community property). So the Dai's power and right to excommunicate is valid as long as it is done subject to the procedural requirements indicated in the judgement of the Privy Council in *Hasanali v. Mansoorali*.

His Lordship then addressed the question as to whether the impugned Act could be sustained as a measure of social welfare and reform under Article 25(2) (b). His Lordship opined that the phrase "laws providing for social reform" was not intended to enable the legislature to "reform" a religion out of its existence or identity.

With these reasons, His Lordship opined that the petitioner is entitled to relief and the petitioner should be allowed

ANALYSIS AND COMMENTS ON THE CASE

This case poses a very interesting argument between the clash of civil rights of a man, and the religious rights of a community. The arguments from both sides are very strong and powerful, one arguing from a religious rights perspective, while the other arguing from a civil rights perspective.

The Bombay Prevention of Excommunication Act was brought into force to order to do away with the Act of excommunication, which was a religious practice within the Dawoodi Bohra Muslim community. This was done because the existing practice of excommunication had deprived the members of the community of their legitimate rights as members of the community.

In my opinion, I agree with the decision of the majority, not just for the reason of it being given by the majority, but rather for the reasoning and interpretation given by them. I believe that that although, Justice Sinha's reasoning had some interesting points about the overlapping of civil liberties and religious liberties, the points given by the majority had a better interpretation of Articles 25 and 26.

In my view, the legislature should not be allowed to regulate the religious activities and practices which have been carried on over a long period of time, and they should not be permitted to enact such Act. It has also been mentioned in Article 25(2) (a) that nothing shall prevent the State from making any law regulating the economic, financial, political or other secular activities of a religion and its religious practices, but however, this provision does not permit the State to pass an Act which can control and restrict the religious practices of a religious group, and what is more important here is that this is not only a long standing practice, but it is also an important component of the religion. As has been stated by Justice Das Gupta from the Encyclopedia of Social Sciences, which I find very convincing, excommunication is a principal means of maintaining discipline within religious organizations. From this meaning, we can ascertain that excommunication is primarily a religious practice done with an objective of maintaining discipline within the community.

It has also been pointed out that every member of the community takes an oath called a *mishak* on joining the community, and this oath includes giving his/her unquestioning loyalty to the Dai. A religious community isn't just a group of people having the same thoughts and mindset who come together to practice it, but when they come together, they must also ensure that their conduct is in going with the general rules and tenets of the religious community. If a person acts, behaves, or does something contrary to the laid down rules, he should be liable to receiving excommunication, and this is only a measure of maintaining discipline within the community and ensuring its continued strength and integrity.

One important point of observation which has to be made here is that although the Counsel for the Petitioner had argued largely on the grounds of deprivation of civil rights through such a practice, a

closer reading of Article 26 would explain that such rights of administration of the community are not subject to civil rights, but has been made only subject to public order, morality and health. Therefore, even if the practice of excommunication had overlapping effects with and deprives a person of his civil rights, the act cannot be done away with by the passing of legislation as from a legal standpoint, the rights are not subject to a person's civil rights. Although the Act was brought into force to protect the civil rights of the members of the community, it did touch certain religious aspects and significance of the practice of excommunication, which could not be done as per Article 26 of the Constitution of India.

Another look at the case and the judgement would show that the Respondent did not have many authorities cited and used to support his argument. Although that is not the basis for deciding who should win a case, but the authorities cited by the Petitioner had clarified, or rather suppressed most of the arguments raised by the Respondent. Nevertheless, the arguments out forward by the Petitioner were more convincing to me, than those of the Respondent.

There are certain measures which are a must to be taken in order to ensure solidarity and harmonious uniformity within the community. Excommunication is one of them. When there is an absence of conformity to the essential tenets of the religious practice, the religious denomination would be merely an incongruous heap of sand grains thrown together, although without being united. Each of these sand grains would not have a similar line of thinking, which leads to a nominally united but unconnected group, where there is internal dissimilitude and mutual contradiction. Therefore, in my opinion, in order to maintain the required levels of unity, integrity, harmony and conformity, it is necessary to have certain disciplinary measures such as excommunication.

The concept of social welfare and reform is another debatable provision in its applicability in the present context. The legislature can be allowed to bring about social welfare and reform, but I believe that it cannot do so when it interferes with the essential practices of a religion, which are not just essential to the religion, but are also long standing practices. Excommunication, as has been stated in the arguments of the Petitioner, is an essential practice in the religious denomination, and social reform cannot be applied to something, which if not present would defeat the unity, integrity, and uniformity of the denomination, for which they might as well, do away with the religious denomination altogether.

One example which could be compared to in this case is that of membership in a club. When a person wants to join and take membership in a club, he must agree to abide by all the terms and conditions laid down by them. Any disorderly conduct which is not in going with the prescribed rules and behavior laid down can call for immediate removal and disqualification from the club, following which he or she would not be entitled to the benefits which had been conferred while he/she was a member.

Therefore, in my opinion, I agree with the arguments put forward by the Petitioner, and agree with the judgement of Justice Das Gupta and Justice Ayyangar, and I believe that the court was correct in striking down the impugned Act.

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ARTICLES

DETAILED ANALYSIS OF VODAFONE CASE

- Archita Mohapatra, Pranav B.R.

FACTS

In September 2007, the tax department issued a show-cause notice to Vodafone to explain why tax was not withheld on payments made to HTIL in relation to the above transaction. The tax department contended that the transaction of transfer of shares in CGP had the effect of indirect transfer of assets situated in India.

Vodafone filed a writ petition in the Bombay High Court, inter alia, challenging the jurisdiction of the tax authorities in the matter. By its order dated 3 December 2008, the Bombay High Court held that the tax authorities had made out a prima facie case that the transaction was one of transfer of a capital asset situated in India, and accordingly, the Indian income-tax authorities had jurisdiction over the matter.

Vodafone challenged the order of the Bombay High Court before the Supreme Court. In its ruling, dated 23 January 2009, the Supreme Court directed the tax authorities to first determine the jurisdictional challenge raised by Vodafone. It also permitted Vodafone to challenge the decision of the tax authorities on the preliminary issue of jurisdiction before the High Court.

In May 2010, the tax authorities held that they had jurisdiction to proceed against Vodafone for their alleged failure to withhold tax from payments made under Section 201 of the Income-tax Act, 1961. This order of the tax authorities was challenged by Vodafone before the Bombay High Court.

By its order dated 8 September 2010, the Bombay High Court dismissed Vodafone‟s challenge to the order passed by the tax authorities. Vodafone filed a Special Leave Petition (SLP) against the High Court order before the Supreme Court. On 26 November 2010, SLP was admitted and the Supreme Court directed Vodafone to deposit a sum of INR 25000 million within three weeks and provide a bank guarantee of INR 85000 million within eight weeks from the date of its order.

After a detailed hearing before a three-judge bench headed by the Chief Justice of India, the Supreme Court delivered its verdict on the case on 20 January 2012.

JUDGMENT

The judgment of the court has been decided and studied issue wise, which are hereunder.

INTERPRETATION OF SECTION 9(1)(I) OF THE ACT

At the heart of the controversy was the interpretation of Section 9(1)(i) of the Act. As per the said section, inter alia, income accruing or arising directly or indirectly from the transfer of a capital asset situated in India is deemed to accrue/ arise in India in the hands of a non-resident.

In connection with the above, the Supreme Court observed that:

Charge to capital gains under Section 9(1)(i) of the Act arises on existence of three elements, viz, transfer, existence of a capital asset and situation of such asset in India. The legislature has not used the words „indirect transfer‟ in Section 9(1)(i) of the Act. If the word „indirect‟ is read into Section 9(1)(i) of the Act, then the phrase „capital asset situate in India‟ would be rendered nugatory.

Section 9(1)(i) of the Act does not have „look through‟ provisions, and it cannot be extended to cover indirect transfers of capital assets/ property situated in India. The proposals contained in the Direct Taxes Code Bill, 2010, on taxation of off-shore share transactions indicate that indirect transfers are not covered by Section 9(1)(i) of the Act.

A legal fiction has a limited scope and it cannot be expanded by giving purposive interpretation, particularly if the result of such interpretation is to transform the concept of chargeability which is also there in Section 9(1)(i) of the Act.

Accordingly, the Supreme Court concluded that the transfer of the share in CGP did not result in the transfer of a capital asset situated in India, and gains from such transfer could not be subject to Indian tax.

EXTINGUISHMENT OF HTIL'S INTERESTS

The tax authorities further argued that the rights of HTIL[1] over the control and management of HEL constituted "property" in the hands of HTIL. Accordingly, the extinguishment of such rights under the Share Purchase Agreement (SPA) resulted in a taxable transfer of a capital asset situated in India.

In this context, the Supreme Court reiterated the „look at" principle enunciated in Ramsay case, in which it was held that the Revenue or the Court must look at a document or a transaction in a context to which it properly belongs.

It is the task of the Revenue/ Court to ascertain the legal nature of the transaction and while doing so it has to look at the entire transaction as a whole, and not adopt a dissecting approach.By applying the „look at" test discussed above, the Supreme Court held that extinguishment took place because of the transfer of the CGP share and not by virtue of various clauses of SPA.

The Supreme Court went on to hold that where a structure has existed for a considerable length of time and where the Court is satisfied that the transaction satisfies all the parameters of „participation in investment", then in such a case, the Court need not go into questions such as de facto control vs. legal control, legal rights vs. practical rights, etc in the context of determining taxability.

ROLE OF CGP IN THE TRANSACTION

In dealing with the tax authorities" contention that CGP was interposed at a late stage in the transaction in order to bring in a tax-free entity and thereby avoid capital gains in India, the Supreme Court observed as follows:

Two routes were available, namely, the CGP route and the Mauritius route. It was open to the parties to opt for any of the two routes. The transaction of sale was structured at an appropriate tier (i.e. the CGP route), so that the buyer acquired the same degree of control as was hitherto exercised by HTIL.

Under the Indian Companies Act, 1956, the situs of the shares would be where the company is incorporated and where its shares can be transferred. In the present case, it was asserted that transfer of CGP shares were recorded in Cayman Island and this was not disputed by the tax authorities.

Considering the entirety of the facts of the case, the Supreme Court held that the sole purpose of CGP was not only to hold shares in subsidiary companies but also to enable a smooth transition of business. Therefore, it could not be said that CGP had no business or commercial substance.

Additionally, the Supreme Court also rejected the argument of the Revenue that since CGP was a mere holding company, the situs of its share was situated in India where its underlying assets were located.

[1] Hutchison Asia Telecommunications.

RIGHTS AND ENTITLEMENTS

The tax authorities had contended that the transfer of the CGP share was not adequate in itself to achieve the object of consummating the transaction between HTIL and VIH and that intrinsic to the transaction was a transfer of other „rights and entitlements". It was further contended that such "rights and entitlements" constituted „capital assets", gains from the transfer of which were liable to tax in India. On this issue, the Supreme Court concluded that:

As a general rule, in a case where a transaction involves transfer of shares, such a transaction cannot be broken up into separate individual components, assets or rights. The present transaction was „a share sale" and not an „asset sale" and concerned sale of an entire investment.

A controlling interest is an incident of ownership of shares in a company, which flows out of the holding of shares and hence is not an identifiable or distinct capital asset independent of the holding of shares.

In essence, the Supreme Court concluded that the character of the transaction was an alienation of shares, and that when parties had agreed on a lump sum consideration, there was no question of allocation of such consideration for transfer of any other rights or entitlements.

HOLDING AND SUBSIDIARY STRUCTURES

Adverting to the issue of "substance" in a subsidiary company, the Supreme Court observed as follows:

It is a common practice in international law, which is the basis of international taxation, for foreign investors to invest in Indian companies through an interposed foreign holding or operating companies, such as a Cayman Islands or Mauritius based company for both, tax and

business purposes.

If a Non-Resident makes an indirect transfer through abuse of the organisation form/ legal form and without a reasonable business purpose, which results in tax avoidance or avoidance of withholding tax, then the tax authorities may disregard the form of the arrangement or the impugned action through use of holding companies and may re-characterize the equity transfer according to its economic substance and impose tax.

The Supreme Court also went on to conclude that the corporate business purpose of a transaction is evidence of the fact that the impugned transaction is not undertaken as a colourable or artificial device.

HIGHLIGHTS OF THE SUPPLEMENTAL CONCURRING JUDGMENT PASSED BY JUSTICE K S RADHAKRISHNAN

Justice Radhakrishnan gave a separate judgment, concurring with the views of the Chief Justice on all major issues.

Some of the key additional observations of Justice Radhakrishnan in his judgment are summarized below:

On incorporation of a company, the corporate property belongs to the company and members have no direct proprietary rights to it, but merely to their "shares" in the undertaking and these shares constitute items of property which are freely transferrable in the absence of any express provision to the contrary.

In the absence of LOB Clause and the presence of CBDT Circular No. 789 of 2000 and Tax Residency Certificate (TRC), on the residence and beneficial interest/ownership, the tax department cannot at the time of sale/disinvestment/exit from such Foreign Direct Investments (FDI), deny benefits to such Mauritius companies of the Treaty by stating that FDI was only routed through a Mauritius company.

LOB and look through provisions cannot be read into a tax treaty but the question may arise as to whether the TRC is so conclusive that the tax department cannot pierce the veil and look at the substance of the transaction. India-Mauritius tax treaty and CBDT Circular No. 789 dated 13 April 2000 would not preclude the Income tax department from denying tax treaty benefits, if it is established, on facts, that the Mauritius company has been interposed as the owner of the shares in India, at the time of disposal of the shares to a third party, solely with a view to avoid tax without any commercial substance.

The tax authorities, notwithstanding the fact that the Mauritian company is required to be treated as the beneficial owner of the shares under Circular No. 789 and the Treaty, are entitled to look at the entire transaction of sale as a whole and if it is established that the Mauritian company has been interposed as a device, it is open to them to discard the device and take into consideration the real transaction between the parties, and subject the transaction to tax.

Even though the TRC can be accepted as conclusive evidence for accepting status of residents as well as beneficial ownership for applying the tax treaty, it can be ignored if the treaty is abused for the fraudulent purpose of evasion of tax.

Revenue‟s stand that the ratio laid down in the McDowell case is contrary to what has been laid down in Azadi Bachao Andolan case is unsustainable, and therefore, does not call for any reconsideration by a larger Bench.

In trans-national investments, provisions are usually made for exit route to facilitate an exit on account of good business and commercial reasons such as dispute between partners, uncertain political situations, etc.

Transfer of shareholding in CGP, on facts, was not the fall out of an artificial tax avoidance scheme or an artificial device, pre-ordained, or pre-conceived with the sole object of tax avoidance, but was a genuine commercial decision to exit from the Indian Telecom Sector.

Section 9 of the Act covers only income arising from a transfer of a capital asset situated in India and it does not purport to cover income arising from the indirect transfer of capital asset in India. Section 9 of the Act has no "look through provision" and such a provision cannot be brought through construction or interpretation of a word „through" in Section 9 of the Act. Shifting of situs can be done only by express legislation.

The SC, while deciding on the matter, took a holistic view of the entire transaction, and also commented on the effects of this controversy in matters relating to public policy in taxation. Interestingly, while this case was with respect to the controversy regarding India"s jurisdiction to tax offshore transfers, other important aspects like eligibility of benefits under the India- Mauritius tax treaty, international corporate law principles, etc. were also dealt with comprehensively in this judgment. The SC ultimately decided the case in Vodafone"s favor based on extensive reliance to the facts of its case, while laying down important legal principles with respect to inter alia tax avoidance, tax planning, situs of capital assets and Indian withholding tax provisions.

Based on facts of the case, the SC decided that the legal form of the Cayman entity could not be disregarded simply because it was a holding company. Under international corporate law, holding company structures ordinarily need to be respected. Such a structure can be collapsed or looked through only in the event that the holding structure abuses the legal form without any reasonable business purpose. There is a difference between a pre-ordained transaction and one which has been in existence for a substantial period of time. In the given facts the Cayman structure had been in place for more than a decade, and hence there was no reason to ignore the holding structure.

A more important principle which has been laid down by the SC is that the burden to prove that there has been an abuse of the legal form of the transaction, or that the transaction is a sham, would lie on the tax authorities. This principle gains relevance in the Indian context whereby it may not be feasible for a taxpayer to discharge the negative burden of proving that no abuse of the legal form exists.

The SC ruled that the Indian tax law does not contain any specific „„look through"" provisions, and to read such a provision into the law would transform the entire concept of chargeability to tax under the Indian law. The SC also put its stamp of approval for the Parliament to prospectively enact statutory general anti-avoidance rules („„GAAR"") in the Indian context. It stated that tax avoidance is a problem faced by almost all countries following civil and common law systems and all share a common broad aim, i.e. to combat it. Many countries are taking various legislative measures to increase the scrutiny of transactions conducted by non-resident enterprises. The judgment co-authored by the Chief Justice of India, while propounding the rule of law, stated that the Vodafone

Case is an eye-opener of what India lacks in regulatory laws and what measures India has to take to meet the various unprecedented situations, that too without

sacrificing national interest. In this context, certainty is integral to the rule of law.[2]

Certainty and stability form the basic foundation of any fiscal system. Tax policy certainty is crucial for taxpayers (including foreign investors) to make rational economic choices in the most efficient manner.

In all, the Vodafone decision is not limited to taxation aspects of offshore transfers. The SC has really expounded a „„look at"" approach by delving into matters concerning national interest, stability to foreign investors, and above all, certainty in law – which is the ultimate principle of the rule of law. The judicial principles should help allay concerns of the several investors who have been troubled in relation to taxation of their overseas transfer of share involving downstream Indian entities.[3]

Moreover, as the taxman has been unable to succeed with the judiciary in upholding his claim to tax offshore transactions, it is quite likely that he will seek instead to amend the tax laws. Three possible amendments present themselves – firstly the proposal in the Direct Taxes Code („„DTC"") to bring taxing rights on defined offshore transfers could be enacted in the Union Budget of 2012 itself.

Secondly, the withholding tax provisions are likely to be explicitly widened to include compliance by non-residents and thirdly, anti-avoidance rules, popularly known as General Anti-Avoidance Regulations, are likely to be rapidly legislated.

The Supreme Court concluded that:

"FDI flows towards location with a strong governance Infrastructure which includes enactment of laws and how well the legal system works. Certainty is integral to rule of law. Certainty and stability form the basic foundation of any fiscal system. Tax policy certainty is crucial for taxpayers (including foreign investors) to make rational economic choices in the most efficient manner."[4]

The judicial logic is just a categorical syllogism. The major premise is: that which promotes the economic policy of FDI promotion is good. The minor premise is that the Department"s view of the tax law, as adopted in the Vodafone Case, does not (or is unlikely) to promote the economic policy of FDI promotion. The conclusion follows: the Department"s view is not good.

The Hon"ble Court overlooked both our Constitution and the Income-tax Act in adopting its core reasons which appears to be at the heart of the judgment. There is a miscarriage of justice because the effect of the Judgment is to promote extraneous purpose. Justice Radhakrishnan, in his concurrent

[2] GokulChaudri, The Rule of Law isthe Law of the Land, TPIR, Vol.2 (2012).

[3] Shiva Kant Jha, The Reasons For Which The Vodafone Need Not Be Accepted: Remedies Against The Decision To Be Explored, available at http://www.shivakantjha.org/critiquevodafone.pdf, last accessed on 20th August 2015.

[4] Vodafone International Holdings v. Union of India (2008) 220 CTR (Bom) 649.

judgment has reiterated the need for FDI, and the propriety for promoting that through corporate structuring from the Off-shore centres.

Throughout the main and the concurrent Judgments the most dominant concern is to facilitate FDI. Whatever promotes it is good. Off-shores centres are good, corporate structuring is good, minimal government supervision is good; everything is good that that facilitates FDI. The Vodafone Judgment clearly states that our Government knows full well wherefrom investment is coming to India, and how it is coming.

The Hon‟ble Judges cast aside their judicial robe of detachment, and virtually turned to play the role of economic advisors with the neoliberal commitments. They did not realize that inviting FDI is not a judicial quest. They judges are seldom competent to decide the legality and propriety of policy-loaded issues. Joseph Stiglitz is of opinion is that FDI is often not good for the country. He said in his Globalization and its Discontents:

"There is more to the list of legitimate complaints against foreign direct investment. Such investment often flourishes only because of special privileges extracted from the government. While standard economics focuses on the distortions of incentives that result from such privileges, there is a far more insidious aspect: often those privileges are the result of corruption, the bribery of government officials.[5]

The foreign direct investment comes only at the price of undermining democratic processes. This is particularly true for investments in mining, oil, and other natural resources, where foreigners have a real incentive to obtain the concessions at low prices."

In conclusion, the court has grossly overstepped its jurisdiction by entering into the field of policy making, which is the field of the legislature.

CONCLUSION

Cross-border acquisition of Indian companies has been a focus of the Tax Authority over the last couple of years. It is fairly well-established that if the acquisition involved a direct transfer of shares of an Indian company, the same would trigger taxable capital gains under the ITL. However, there have not been precedents in the past where Tax Authority has attempted to tax capital gains arising on transfer of shares of a foreign holding company of an Indian subsidiary on the basis that such transfer involves an indirect transfer of the underlying Indian assets. The ruling of the SC would set a binding precedent for other similar transactions, as well for those transactions which are currently being investigated by the Tax Authority or are in various stages of litigation.

An issue that was extensively argued before the SC was on the concept of tax avoidance and an attempt was made by the Tax Authority to dilute the principle laid down in the SC‟s Azadi Bachao

[5] Joseph Stiglitz, Globalization and its Discontents, Edn. 1, 2001 pp. 71-72.

ruling on an alleged ground that the said ruling was inconsistent with the decision of the larger bench of the SC in the McDowell‟s case. The SC has clarified that there is no conflict in the decisions and has sought to reiterate that while tax planning is legitimate, structures thatare subterfuges or colorable devices, need not be respected for tax purposes.

The ruling also acknowledges that use of holding companies and investment structures as well as use of offshore financial centers, can often be driven by business/commercial purpose and the use of these elements in international structures, does not imply tax avoidance.

One of the concerns expressed by several foreign investors in the context of the Vodafone case is the uncertainty created by the approach of the Tax Authority. The SC order echoes these concerns of theinvestor community. The SC has observed that certainty and stability form the basic foundation of any fiscal system and they are integral to the rule of law. One would hope that the Government gives due consideration to these observations while framing its tax policy and legislative proposals.

The decision of the SC is a milestone development in the taxation of international transactions and on the judicial approach to tax avoidance. This case is, perhaps, the first in the world where the issue of taxation on indirect transfer of shares was being litigated before a country‟s highest judicial forum. The principles emanating from this ruling could, therefore, have ramifications beyond India. It could also be of relevance in shaping India's tax policy on international taxation and tax avoidance in the future.

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ARTICLES

UNION OF INDIA V. ASSOCIATION FOR DEMOCRATIC REFORMS

- Shivani Mane

INTRODUCTION

"At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper--no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of the point.

If we may add, the little large Indian shall not be hijacked from the course of free and fair election by mob muscle methods, or subtle perversion of discretion by men 'dressed in little, brief authority'. For 'be you ever so high, the law is above you'.

The Moral may be stated with telling terseness in the words of William Pitt: "Where laws end, tyranny begins', Embracing both these mandates and emphasizing their combined effect is the elemental law and politics of Power best expressed by Benjamin Disraeli [Vivian Grey, BK VI Ch 7]:

I repeat ... that all power is a trust that we are accountable for its exercise -- that, from the people and for the people, all springs, and all must exist."

- Sir Winston Churchill as referred in Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi[1]

Fundamental Rights which are enshrined in Part III of the Constitution of India and are based on the assumption that Part III of the Constitution is not a collection of rules of personal conduct but it is rather an incorporation of certain values that can lead to a civilized governance. It is helping to awaken the people about their new rights which the rulers have taken a long time to understand. It is here that the judiciary has played a very commendable role. The Courts have also been gradually broadening the scope of the rights. After all the articles embody the liberty and equality values and their meaning and scope is elastic with immense potentialities. Some short-sighted skeptics have been very critical of this judicial role and have branded it as judicial activism. They forget that it is this activism which has saved the people from despondency and disillusionment in the midst of all the abominable things that they hear about, see and experience quite often. It is this issue that is addressed in *Union of India v. Association for Democratic Reforms.*

"Democracy expects openness and openness is concomitant of a free society and the sunlight is a best disinfectant".[2]

The expression "freedom of speech and expression" in Art.19(1)(a) has been expounded by various Supreme Court judgements. This particular case deals with how the right to freedom of speech and expression has also included in it, the right to receive information about a political candidate's personal life. It has been held since then that, a voter "expresses" his opinion in the form of casting his vote and hence this final stage of voting attracts Art.19(1)(a)[3]. Hence, the right to receive information is a part of Art.19(1)(a) and is of great significance for elections.

Various reports have confirmed the existence of criminalization in politics[4]. The mafia, under-world and numerous such criminals seek to enter politics at the State and Union level. There have been several reports on such practices, but nothing has been done about it so far by the Parliament. This evil in today's democratic government in India exists and uprooting it is a difficult task that nobody seems to want to take at hand. The Parliament did not enact a law to curb such practices and when the matter was brought to notice to the Delhi High Court, it decided to cleanse the electoral process through the mechanism of the right of people to know. In this judgement, several rules were laid down so that the voters could know more about the history of the person they would want to vote. This

[1] AIR 1978 SC 851
[2] Supreme Court in Dinesh Trivedi, M.P, and Others v. Union of India (1997) 4 SCC 306
[3] People's Union for Civil Liberties (PUCL) v, Union of Inida, (2003) 4 SCC 399
[4] Para 6.2 of the Vohra Committee Report of the Government of India Ministry of Home Affairs of 1993

decision of the High Court was challenged in Union of India v. Association for Democratic Reforms[5]. As the court observed " ….since the future of the country depends upon the power of the ballot, the voters must be given an opportunity for making an informed decision." And hence, disclosing of personal information by candidates seeking to stand for elections was made mandatory by bringing about changes in the Representation of People's Act, 1951.

FACTS OF THE CASE

A petition was filed by The Association for Democratic Reforms with the High Court of Delhi to make certain recommendations binding on the electoral process in India. They did this with the intention to make the electoral process more transparent, fair and equitable. On the request of the Government of India, these recommendations had been presented by the Law Commission in its 170th Report and to make necessary changes under Rule 4 of the Conduct of Election Rules, 1961[6]. The recommendations were as follows:

a. The candidates contesting elections should disclose personal background information to the public which included criminal history, educational qualification, personal financial details and other information necessary for judging a candidate's capacity and capability.
b. To debar a candidate from contesting an election if charges have been framed against him by a Court in respect of certain offences
c. A candidate must provide details of any pending criminal cases against him if he wished to contest elections.
d. Correct and true statement of assets of the candidate and his/her spouse should be disclosed, etc.

The Vohra Committee Report was also relied upon which enlisted criminalization of politics as a growing evil in today's society. Para 6.2 of the Vohra Committee Report acknowledged the growing presence of mafias and criminals in politics- directly and indirectly and contended that despite these reports, the Government of India had failed to take any progressive action to curb these menaces. High Court of Delhi upheld that the candidate's background cannot be kept in the dark as it is not for the best interest of democracy. It also noted that it was the function of the Parliament to amend the Representation of People's Act 1951. The Court ordered the Election Commission to obtain such information so that the voters can make a prudent choice. This decision by the High Court of Delhi was challenged by the Union of India through an appeal to the Supreme Court of India saying that the High Court of Delhi acted ultra vires and that the voter's did not have this right to know the personal details of candidates they would consider voting for, in an election.

[5] JT 2002(4) SC 501
[6] Law Commission of India 170th Report on Reform of the Electoral Laws, May 1999

ISSUES INVOLVED

1. Whether, before casting their votes, voters are entitled to know the relevant particulars of a candidate?
2. Whether the High Court of Delhi had jurisdiction to issue directions in a writ petition filed under Article 226 of the Constitution of India?

ARGUMENTS

BY RESPONDENTS REPRESENTED BY MR. HARISH SALVE (UOI)

The High Court should have waited for the necessary amendments to take place in the Representation of People's Act, 1951 by the Government and should not have given the directions to the Election Commission. He cited various Sections of the Act and submitted that provisions for disqualification of a candidate were already laid down in several sections and hence, there is no need for an amendment. It is his submission that it is for the political parties to decide whether such amendments should be brought and carried out in the Act and the Rules. He further submitted that as the Act or the Rules nowhere disqualify a candidate for non-disclosure of the assets or pending charge in a criminal case and, therefore, directions given by the High Court would be of no consequence and such directions ought not to have been issued.

BY RESPONDENTS ASHWINI: BEHALF OF INC – INTERVENER

He referred to the debates by the Constituent Assembly and contended that the grounds of educational qualification recommended in the Report were already deliberated upon in these debates. The Constituent Assembly reached a conclusion to not include it as a criterion as most of the population was illiterate. Hence, he submitted that it is not at all relevant to check the assets or educational qualifications of a candidate. He also submitted that maintaining a delicate balance between the jurisdiction of the Parliament and the Court is essential and the High Court's decision was ultra vires.

BY K.K. VENUGOPAL- COUNSEL FOR ELECTION COMMISSION

The suggestions made by the Election Commission were that except certain modifications, Election Commission virtually supported the directions issued by the High Court and that candidates must be directed to furnish necessary information with regard to pending criminal cases as well as assets and educational qualification.

BY RAJINDER SACHHAR, LEARNED SENIOR COUNSEL APPEARING ON BEHALF OF THE PETITIONERS

It was presumed that High Court did not have any power to direct the Election Commission, as stated by the petitioners of the appeal. But, he advanced an argument saying that the Supreme Court could do so by exercising its powers under Article 142 which would have the effect of law. He relied upon

the decision given by the Supreme Court in Vineet Narain and Ors. v Union of India[7] and submitted that considering the widespread illiteracy of the voters, and at the same time their overall culture and character, if they are well-informed about the candidates contesting election as M.P. or M.L.A. they would be in a position to decide independently to cast their votes in favor of a candidate who, according to them, is much more efficient to discharge his functions as M.P. or M.L.A.

BY COUNSEL MRS. KAMINI JAISWAL

Referred to the decision in Kihoto Hollohan v. Zachillhu and Ors.[8] where in the Court observed "democracy is a part of the basic structure of our Constitution; and rule of law, and free and fair elections are basic features of democracy. One of the postulates of free and fair elections is provisions for resolution of election disputes as also adjudication of disputes relating to subsequent dies-qualifications by an independent authority". She, therefore, contended that for free and fair elections and for survival of democracy, entire history, background and the antecedents of the candidate are required to be disclosed to the voters so that they can judiciously decide in whose favour they should vote otherwise, there would not be true reflection of electoral mandate. For interpreting Article 324, she submitted that this provision outlines broad and general principles giving power to the Election Commission and it should be interpreted in a broad perspective as held by this Court in various decisions.In these matters, questions requiring consideration are- Whether Election Commission is empowered to issue directions as ordered by the High Court? Whether a voter - a citizen of this country - has right to get relevant information, such as, assets, qualification and involvement in offence for being educated and informed for judging the suitability of a candidate contesting election as MP or MLA?

It is an established fact that a member of All India Service is required to disclose his/her assets including that of spouse and the dependent children.[9] It is also submitted that even the Gazetted Officers in all government services are required to disclose their assets and thereafter to furnish details of any acquisition of property annually.

DECISION OF THE COURT

The Court decided that the Election Commission had plentiful power to fill the void where the Constitution is truant. It is the obligation of the official to dispatch the vacuum by official requests on the grounds that its field is coextensive with that of the governing body, and where there is inaction by the official, for reasons unknown, the legal must stride in, in activity of its established commitments to give an answer till such time the assembly demonstrations to perform its part by authorizing fitting enactment to cover the field. The antagonistic effect of absence of fidelity out in the open life prompting a high level of debasement is complex. Consequently, if the hopeful is coordinated to

[7] AIR 1998 SC 889
[8] AIR 1993 SC 412
[9] Rule 16 of All India Service (Conduct) Rules, 1968

proclaim his/her mate's and dependents' benefits unfaltering, moveable and significant articles it would have its own particular impact.

The confinement on entire character of force is the point at which the Parliament or State Legislature has made a substantial law identifying with or regarding decisions, the Commission is obliged to act in similarity with the said procurements. On the off chance that where law is quiet, Article324 is a supply of energy to represent the admitted reason for having free and reasonable decision. Constitution has dealt with leaving degree for activity of residuary power by the Commission in its own particular perfectly fine animal of the Constitution in the unending mixed bag of circumstances that may rise up out of time to time in an extensive majority rules system, as every possibility couldn't be predicted or foreseen by the instituted laws or the tenets. By issuing vital bearings Commission can fill the vacuum till there is enactment on the subject.[10]

"Elections" incorporates the whole procedure of decision which comprises of a few stages and it grasps numerous strides, some of which have a critical bearing on the procedure of picking a hopeful. Reasonable race mulls over divulgence by the competitor of his past including the advantages held by him to give a legitimate decision to the hopeful as per his reasoning and feeling. As expressed before, in Common Cause case, the Court managed a discord that decisions in the nation are battled with the assistance of cash influence which is accumulated from dark sources and once chosen to influence, it turns out to be anything but difficult to gather huge amounts of dark cash, which is utilized for holding force and for re-race. In the event that on affirmation a competitor is obliged to unveil the benefits held by him at the season of decision, voter can choose whether he could be re-chosen been on the off chance that where he has gathered huge amounts of cash.

To maintain the purity of elections and in particular to bring transparency in the process of election, the Commission can ask the candidates about the expenditure incurred by the political parties and this transparency in the process of election would include transparency of a candidate who seeks election or re-election. In a democracy, the electoral process has a strategic role.

The right to get information in democracy is recognized all throughout and it is natural right flowing from the concept of democracy. At this stage, we would refer to Article 19(1) and (2) of the International Covenant of Civil and Political Rights which is as under:-

(1) Everyone shall have the right to hold opinions without interference.

(2) Everyone shall have the right to freedom of expression; *this right shall include freedom to seek, receive and impart information and ideas of all kinds,* regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

[10] Kanhiya Lal Omar Vs. R.K. Trivedi & Others (1985) 4 SCC 628

(3) It is clear that if the field meant for legislature and executive is left unoccupied detrimental to the public interest, this Court would have ample jurisdiction under Article 32 read with Article 141 and 142 of the Constitution to issue necessary directions to the Executive to subserve public interest.

(4) Under our Constitution, Article 19(1)(a) provides for freedom of speech and expression. Voters's speech or expression in case of election would include casting of votes that is to say, **voter speaks out or expresses by casting vote.** For this purpose, information about the candidate to be selected is must. Voter's right to know antecedents including criminal past of his candidate contesting election for MP or MLA is much more fundamental and basic for survival of democracy. **The voter may think over before making his choice of electing law breakers as law makers.** It was held that The Election Commission can ask the candidates the following things-

1. Any criminal charges and convictions in the candidate's past,
2. Any pending cases in which the candidate is an accused,
3. All assets of a candidate including those of his/her spouse,
4. All liabilities of a candidate, and all educational qualifications of a candidate.

The Court hence held that there is no question of the citizens asking for personal details of a candidate. Instead, knowing these aspects about a candidate is a must in today's world, where corruption and criminal practices are on a rise. The above decision of the Court came with a directive to the Election Commission to issue necessary orders to obtain from each candidate for election to Parliament or State Legislature information on the following aspects of their background.

REASONING FOR THE DECISION BY SUPREME COURT

The Court issued two main rulings in this case-

WHETHER ELECTION COMMISSION IS EMPOWERED TO ISSUE DIRECTIONS AS ORDERED BY THE HIGH COURT?

If the legislature does not mention about a particular subject and an entity, like the Election Commission, has been authorized to implement laws with respect to such a subject, it will be assumed by the Court that the entity has the power to issue such directions or orders. This is done so that the entity can fill the void created by the absence of a legislative order. This could be an interim order until a suitable law on the particular subject is enacted. The Court affirmed that Art. 324[11] "operate in

[11] Art. 324 of Indian Constitution- Superintendence, direction and control of elections to be vested in an Election Commission
(1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission)
(2) The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President

areas unoccupied by legislation" and that "the silence of a statute has no exclusionary effect except where it flows from necessary implication". The Court relied upon Vineet Narain's[12] case, where it was observed that sufficient powers are given to the Supreme Court by the Constitution to remedy the defects that arise due to absence of legislatures either permanently, or until the time a proper legislative action is done. The Court contended that

"There are ample powers conferred by Article 32 read with Article 142 to make orders which have the effect of law by virtue of Article 141 and there is mandate to all authorities to act in aid of the orders of this Court as provided in Article 144 of the Constitution."

This decision was given in the backdrop of further such precedents that will be stated herein. In Erach Sam Kanga v. Union of India[13], the Constitution Bench laid down certain guidelines relating to the Emigration Act. In Lakshmi Kant Pandey v. Union of India[14], guidelines for adoption of minor children by foreigners were laid down. In State of W.B. v. Sampat Lal[15], K. Veeraswami, v. Union of India, Union Carbide Corporation. v. Union of India, Delhi Judicial Service Association v. State of Gujarat (Nadiad Case), Delhi Development Authority v. Skipper Construction Co. (P) Ltd. and Dines Trivedi, M.P. v. Union of India, guidelines were laid down having the effect of law, requiring rigid compliance. In *Supreme Court Advocates-on-Record Association* v. *Union of India (2nd Judges case)* a nine-Judge Bench laid down guidelines and norms for the appointment and transfer of Judges which are being rigidly followed in the matter of appointments of High Court and Supreme Court Judges and transfer of High Court Judges. More recently in *Vishaka* v. *State of Rajasthan* elaborate guidelines have been laid down for observance in workplaces relating to sexual harassment of working women. The Court in this case observed that- "The following principles were accepted by the Chief Justices of Asia and the Pacific at Beijing in 1995 (As amended at Manila, 28th August, 1997) as those representing the minimum the standards necessary to be observed in order to maintain the

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(3) When any other Election Commissioner is so appointed the Chief Election Commissioner shall act as the Chairman of the Election Commission
(4) Before each general election to the House of the People and to the Legislative Assembly of each State, and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President may also appoint after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by clause (1)
(5) Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine; Provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment: Provided further that any other Election Commissioner or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner
(6) The President, or the Governor of a State, shall, when so requested by th Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by clause (1)

[12] supra
[13] W.P. No. 2632 of 1978
[14] AIR 1984 SC 469
[15] AIR 1985 SC 195

independence and effective functioning of the judiciary. The objectives of the judiciary mentioned in the Beijing Statement are:

Objectives of the Judiciary:

(a) To ensure that all persons are able to live securely under the rule of law;
(b) To promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and
(c) To administer the law impartially among persons and between persons and the State."

Thus, an exercise of this kind by the court is now a well-settled practice which has taken firm roots in our constitutional jurisprudence. This exercise is essential to fill the void in the absence of suitable legislation to cover the field[16]." The Court's decision means that the Court's power to issue directions regarding Art. 324 is comprehensive. And thus, by extension, the Election Commission, as directed by the SC, can issue suitable directions to maintain the purity and transparency of the "entire process of election."

The Court accepted that it was impossible for the Court to give any directions for amending the Act or the statutory Rules. It is for the Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules. One of the basic structures of our government is its republican and democratic spirit. Any person with the necessary qualifications[17] can contest elections and educational or any other qualifications are not the criterion prescribed by the Constitution. However, the powers to make these decisions vests with the Election Commission[18] under Article 324, the superintendence, direction and control of the 'conduct of all elections' to Parliament and to the Legislature of every State vests in Election Commission. The phrase 'conduct of elections' is held to be of wide amplitude which would include power to make all necessary provisions for conducting free and fair elections. The voters are the most important aspect in a democracy and in the opinion of the SC, they should be well informed in deciding whom to elect and knowing such information that would include assets held by the candidate, his qualification including educational qualification and antecedents of his life including whether he was involved in a criminal case and if the case is decided--its result, if pending-- whether charge is framed or cognizance is taken by the Court? There is no necessity of suppressing the relevant facts from the voters.

The Court then went ahead to reject Mr. Salve's contention that because there was no provision under which the High Court could issue directions to the Election Commission does not mean that it cannot. In stating this, the Court relied on *Mohinder Singh Gill v. The Chief Election Commissioner, New*

[16] Beijing, Statement of Principles of the Independence of Judiciary in the LAWASIA region.
[17] Art. 326 of Constitution of India
[18] By the power vested in EC by Art. 324

Delhi[19]which held that in a democratic form of government, the voter has utmost importance and that they cannot be prevented from the course of free and fair elections by subtle perversion of discretion of casting votes. A voter can do a social audit about the person he is supposed to vote, and for doing so, he must be well informed about his candidate. Article 324 operates in areas left unoccupied by legislation and the words 'superintendence, direction and control' as well as 'conduct of all elections' are the broadest terms. The silence of statute has no exclusionary effect except where it flows from necessary implication. Therefore, Commission can cope with situation where the field is unoccupied by issuing necessary orders.

In an earlier precedent, it was established that the Election Commission could deal with the Constitutional validity of the Election Symbols (Reservation and Allotment) Order, 1968 which was issued by the Election Commission in its plenary exercise of power under Article 324 of the Constitution read with Rules 5 and 10 of the Conduct of Election Rules, 1961.[20] Thereafter, this Court in *Common Cause (A Registered Society) v.Union of India and others*[21] held that election in the country are fought with the help of money power which is gathered from black source and once elected to power, it becomes easy to collect tons of black money, which is used for retaining power and for re-election and that this vicious circle has totally polluted the basic democracy in the country. The Court held that purity of election is fundamental to democracy and the Commission can ask the candidates about the expenditure incurred by the candidates and by a political party and for this purpose. The Court, relying on all these decisions held that the Election Commission was hence, capable of deciding on matters relating to elections Constitution has made comprehensive provision under Article 324 to take care of surprise situations and it operates in areas left unoccupied by legislation.

WHETHER THE CITIZENS HAVE THE RIGHT TO KNOW ABOUT THE CANDIDATES CONTESTING ELECTIONS?

The citizens have a right to know about public functionaries. The concept of freedom of speech and expression imbibes within itself, the right to know about the background of candidates for public office. The expression “freedom of speech and expression” in Art.19(1)(a) has been expounded by various Supreme Court judgements. This particular case deals with how the right to freedom of speech and expression has also included in it, the right to receive information about a political candidate’s personal life. It has been held since then that, a voter “expresses” his opinion in the form of casting his vote and hence this final stage of voting attracts Art.19(1)(a) . Hence, the right to receive information is a part of Art.19(1)(a) and is of great significance for elections. The Court further advanced that a successful democracy strives towards an “aware citizenry” and

[19] AIR 1978 SC 851
[20] Kanhiya Lal Omar v. R.K. Trivedi and other AIR 1986 SC 111
[21] AIR 1996 SC 3081

misinformation or non-misinformation of any kind will create a "uniformed citizenry which makes democracy a farce."

The following cases were referred to while giving the judgment on this topic:

In State of Uttar Pradesh v. Raj Narain and Others[22]the Court observed that, "the right to know which is derived from the concept of freedom of speech, though not absolute , is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security". In *Indian Express Newspapers (Bombay) Private Ltd. and Others etc. v. Union of India and others*[23], the Court dealt with the validity of customs duty on the newsprint in context of Article 19(1)(a). The Court observed (in para 32) thus "The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic country cannot make responsible judgments..." In *Romesh Thappar v. State of Madras*[24], that the members of a democratic society should be sufficiently informed so that they may influence intelligently the decisions which may affect themselves and this would include their decision of casting votes in favour of a particular candidate. If there is a disclosure by a candidate as sought for then it would strengthen the voters in taking appropriate decision of casting their votes. In *Secretary, Ministry of Information and Broadcasting, Government of India and Others v. Cricket Association of Bengal and Others,* democracy cannot survive without free and fair election, without free and fairly informed voters. One-sided information, disinformation, misinformation and non-information all equally create an uninformed citizenry which makes democracy a farce. Therefore, casting of a vote by misinformed and non-informed voter or a voter having one-sided information only is bound to affect the democracy seriously. Freedom of speech and expression includes right to impart and receive information which includes freedom to hold opinions. Entertainment is implied in freedom of 'speech and expression' and there is no reason to hold that freedom of speech and expression would not cover right to get material information with regard to a candidate who is contesting election for a post which is of utmost importance in the democracy. *Dinesh Trivedi, M.P. and Ors. v. Union of India and Ors*[25]., the Court dealt with citizen's right to freedom of information and observed "in modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seek to formulate sound policies of governance aimed at their welfare". The Court also observed "democracy expects openness and openness is concomitant of a free society and the sunlight is a best disinfectant. In *P.V. Narasimha Rao v. State (CBI/SPE)*[26]it was established that an MP/MLA is a public servant. In *Vishka v. State of Rajasthan*[27] dealt with incident of sexual harassment of a woman at work place with resulted in violation of fundamental right of

[22] AIR 1975 SC 865
[23] AIR 1986 SC 515
[24] AIR 1950 SC 124
[25] (1997) 4 SCC 306
[26] AIR 1998 SC 2120
[27] AIR 1997 SC 3011

gender equality and the right to life and liberty and laid down that in absence of legislation, it must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of independence of Judiciary in the LAWASIA region. The decision has laid down the guidelines and prescribed the norms to be strictly observed in all work places until suitable legislation is enacted to occupy the field. In the present case also, there is no legislation or rules providing for giving necessary information to the voters. As stated earlier, this case was relied upon in Vineet Narain's case (supra) where the Court has issued necessary guidelines to the CBI and the Central Vigilance Commission (CVC) as there was no legislation covering the said field to ensure proper implementation of rule of law.

COMMENT

The Supreme Court's observation ceased to be mere rhetorics talking points when in Union of India v. Association for Democratic Reforms a threejudge seat of the Court issued certain mandates to the Election Commission of India to be actualized by it under article 324 of the Constitution obliging the competitors, looking for decision to the Parliament or to a State Legislature, to make certain revelations about them. By an alteration of the Representation of the People Act, 1951 the Government consolidated just piece of the mandates and further gave that an applicant couldn't be obliged to uncover much else. Quickly from that point, in PUCL v. Union of India, another three judge seat held that the Court's before orders couldn't be spurned on the grounds that they were gotten from article 19(1)(a) which epitomized the rule of the privilege to know. As I would see it, the Court's comprehension of the extent of article 19(1)(a) was imperfect. Still, since India is going through an impossible to miss stage in its working of the political procedure and since it needs some sort of legal oversight all the time in that circle for remaining immovably established in constitutionalism, progressivism, and standard of law, it is proposed that the Court can practice the force of legal oversight with a perspective to uphold the standards of responsibility to the individuals; however this force will be gotten from the essential structure of majority rule government in the Constitution. It might likewise be expressed that the Right to Information Act, 2005, is simply the administrative usage of the protected standard of the privilege to know accessible to the individuals against the Government as a piece of the equitable structure of the Constitution.

In substance, the suggestions set around the Court in the twin cases were that article 19(1)(a) privilege incorporated the privilege to know which the Court had made an interpretation of into specific orders to the Election Commission with a perspective to empower the voter to settle on an educated decision when he went to make his choice. Be that as it may, the disputable inquiry is whether these recommendations fit in the acknowledged importance of the privilege to the right to speak freely and expression typified in article 19(1)(a). The reality of the matter is that the privilege incorporates right to look for, get and bestow data. Be that as it may, it is constrained to such data as is as of now in general society area or as can be acquired from an eager speaker. Article 19(1) rights including the

privilege of discourse and expression contained in article 19(1)(a), are freedom rights and not guarantee rights.5 If somebody is willing to make certain divulgences, he can't be kept by the Government from doing as such with the exception of on the grounds said in condition (2) of article 19. In any case, article 19(1)(a) is completely restricted to the idea of pressured discourse or that of hostage gathering of people. In none of the cases refered to anything has been chosen in opposition to this. The very expression `right to know' is of American source and is seen in the setting of correspondence between an eager speaker and willing audience members. Mandatory divulgences can be requested, and are requested, in prosecution similar to the position in S.P.Gupta v. Union of India still the judge utilized the talk of right to know which was not the slightest pertinent there. Now that its out in the open, the expression is being utilized nowadays by willing speakers to add weight and respectability to their demeanors as in business discourse cases, or to assert the office of a gathering as when access to the press is guaranteed. What is highlighted is that the speaker was stating something for his own satisfaction as well as to convey certain things helpful to the individuals as far as anyone is concerned. Accordingly, it is consciously presented that the Court absolutely misconstrued the significance and import of the expression `right to know'. No commitment can emerge, unless the beneficiary of the data has a legitimate case to that data.

Second, in the setting of the case, the putative competitors were themselves qualified for the security of article 19(1)(a) which gives each individual the flexibility to talk or not to talk and the opportunity to choose what to talk and what not to talk. It is not that a hopeful can't be made to reveal certain things. In any case, that should be possible under a law went by Parliament under article 327. Since none has a crucial right to be a hopeful, this benefit can be given by law subject to sensible conditions. That Parliament decided to fuse just piece of the first orders issued by the Court can be discussed as an issue of legitimacy; at the same time, as I would see it was mistaken to hold that the Parliament was not equipped to do as such. In all actuality the Court has yielded to Parliament in decision matters even the ability to force confinements on race talks not allowed under article 19(2).

What the Supreme Court for this situation has strived to do is to set up an association between article 19(1)(a) and the privilege to vote. Then again, the Court appears to have fizzled in its grandiose goal. The reason is that the association tried to be built up was made in an unnatural path between slender lawful procurements. We all realize that article 19(1)(a), (b) and (c) ensures social equality as well as political rights. The privilege to make political discourse, right to sort out open meeting and political challenge, and the privilege to shape a political gathering constitute the quintessence of majority rule process. Every one of these exercises without a doubt encourage the activity of the privilege to vote in an important way. They are connected together naturally and bring into presence a vote based structure. Be that as it may, fruitful operation of majority rule government hypothesizes numerous things, just some of which are guaranteed by operation of the legitimate procedure. No vote based system can be pictured without enough space for play of political powers, and the amusement is not

generally played in a legitimate and sound way. In developed majority rules systems, numerous things are dealt with by cautious popular feeling. Be that as it may, our own is a developing majority rule government and law courts are assuming a pivotal part. Here, we need to discover a doctrinally faultless standard which can permit the better courts than keep on assuming their part following Indian popular government is still in its improvement stage. For that we need to find a general rule which gives sufficient part to the pinnacle Court. This general standard is the popularity based structure which the Constitution builds up, and every single other procurement are just appearances of that rule. The regulation of fundamental structure has effectively made us acquainted with the interpretive tenet that numerous standards can be gotten from the structure of the Constitution, and that everything need not be composed in the content. The heart of popularity based structure is equitable responsibility and that requires educated citizenry and flexibility of data. Be that as it may, the privilege to discourse and expression does exclude right to get data from an unwilling speaker, however an educated subject can all the more viably practice his entitlement to vote. Along these lines, that right we must situate in the majority rule character of the Constitution and not in article 19(1)(a) and when we discussion of the privilege to data we don't intend to constrain the reach to the minor matter of a few exposures by putative hopefuls; rather, we expect to incorporate in the extent the whole representing structure. Along these lines, the standard of vote based responsibility would respect people in general the right that the administering organizations and authoritative offices might not make counterfeit checks to shield their working from basic man's sight and that the distinctive offices should make accessible the data that is looked for by the general population. So comprehended, the Right to Information Act, 2005 can be seen as just giving a solid shape to that fundamental established standard in the same route as the Protection of Civil Rights Act, 1955 gives a solid shape to hostile to untouchability and non-segregation procurements of the Constitution.

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ARTICLES

N.B KHARE v. STATE OF DELHI

- Acharya Bhakti Shripad

STATEMENT OF FACTS

The petitioner who is the President of the All India Hindu Mahasabha since December, 1949, was presented with a request of externment dated for March, 1950.

By that request he is coordinated by the District Magistrate, Delhi, not to stay in the Delhi District, and instantly to expel himself from the Delhi District and not to come back to the District. The request was to proceed in power for three months. By another request of the Madhya Bharat Government he was coordinated to live in Nagpur. That request has been as of late drop. The candidate questioned the legitimacy of the first request on the ground that the East Punjab Public Safety Act, 1949, under which the order was made, is an encroachment of his fundamental right given under article 19 (1) (d) of the Constitution of India. He further battled that the grounds of the request served on him are ambiguous, inadequate and deficient. Concurring to him the object of the externment request by the District Magistrate, Delhi, was to smother political resistance to the strategy of the Government in appreciation of Pakistan and the Muslim League. It was affirmed that on the grounds that the solicitor and the Hindu Mahasabha were against the Government arrangement of mollification this request was served on him. It was in this way mala fide and illicit.

ISSUES RAISED

I. Whether provisions were empowering Provincial Government or District Magistrate to extern persons making satisfaction of externing authority final which might lead to unreasonable restriction on an individual's right and authorising externment indefinitely and directing authority to communicate grounds of externment at its discretion reasonable.

II. Whether the first order on the ground that the East Punjab Public Safety Act, 1949, under which the order was made, is an infringement of the fundamental right given under article 19(1) (d).

III. Whether the grounds of the order served are vague, insufficient and incomplete.

SUMMARY OF ARGUMENTS

The issues raised and their explanation by each party is as follows:

I. APPELLANTS

I. The provisions empowering Provincial Government or District Magistrate to extern persons making satisfaction of externing authority final which will lead to unreasonable restriction on an individual's right and authorising externment indefinitely and directing authority to communicate grounds of externment a choice of the externing authority is arbitrary and unjust as no court can review the decision after it has been made.

II. The first order on the ground that the East Punjab Public Safety Act, 1949, under which the order was made, is an infringement of the fundamental right given under article 19(1) (d) as Clause (c) of section 4(1) of the East Punjab Public Safety Act, 1949, authorises the Provincial Government or the District Magistrate to direct any person to remove himself from any area and prohibit him from entering the same. On the face of it such provision represents an interference with the fundamental right guaranteed by article 19(1) (d) of the Constitution. Petitioner believes that the impugned legislation would only be saved if it is within the permissible limits prescribed by clause (5) of article 19.

III. That the grounds of the order served are vague, insufficient and incomplete.

II. RESPONDENT

I. The provisions empowering Provincial Government or District Magistrate to extern persons making satisfaction of externing authority final which will not lead to unreasonable restriction on an individual's right and authorising externment indefinitely and directing authority to communicate grounds of externment at its discretion reasonable as the objective is to provide for special measures to ensure public safety and maintenance of public order. Under section 4(1)(c) of the Act, the Provincial Government or the District Magistrate may make an order directing the removal of a certain person from a particular area, if they are satisfied that such order is necessary to prevent such person from acting in any way prejudicial to public safety or maintenance of public order. Preventive orders by their very nature cannot be made after any judicial enquiry or trial. If emergent steps have got to be taken to prevent apprehended acts which are likely to jeopardise the interests or safety of the public, somebody must be given the power of taking the initial steps on his own responsibility; and no reasonable objection could be taken if the authority, who is given the power, is also entrusted with the responsibility of maintaining order and public peace in any particular district or province.

II. The first order on the ground that the East Punjab Public Safety Act, 1949, under which the order was made, is not an infringement of the fundamental right given under article 19(1)(d) as clause permits imposition of reasonable restrictions on the exercise of the right conferred by sub-clause (d) in the interests of the general public. The impugned legislation imposes reasonable restrictions on the exercise of the right

III. That the grounds of the order served are not vague, insufficient or incomplete as the reason given clearly mentioned that in the recent communal disturbances of Delhi feelings got roused between the majority and minority communities and that his presence and activities in Delhi were likely to prove prejudicial to the maintenance of law and order, due to which it was considered necessary to order him to leave Delhi.

JUDGEMENT

It was a 5 bench judge and the decision was of the majority of 3 is to 2.

Majority decision: Petition Dismissed.

Minority decision: Petition allowed and order of Externment quashed.

The order is made because the activities of the petitioner are likely to prove prejudicial to the maintenance of law and order and that abuse of the power given by a law sometimes occurs; but the validity of the law cannot be contested because of such an apprehension and that the satisfaction of the officer thus does not impose an unreasonable restriction on the exercise of the citizen's right.

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ARTICLES

SAMRESH BOSE V. AMAL MITRA

- Tanya Singh

INTRODUCTION

Samaresh Bose v. Amal Mitra case was one of its kinds. In this case the concepts of obscenity and vulgarity in text discussed in length.

INTERPRETATIONS OF THE TEXT

Samaresh Bose's 'Prajapati' had received various interpretations. Samaresh Basu said that the existence of Sukhen is a burning question in our society. He is a product of our society. He used first person narrative style so that he could portray Sukhen in a lively manner.

Amal Mitra's argument was that Prajapati has no literary value whatsoever. That only thing it could do was to corrupt the reader and cause moral degradation in them. In this novel he found Sukhen no more than ruffian. Another witness Kalaboron Ghosh said Prajapati was entirely obscene. There could be no reason except earning money as the possible reason behind writing this. No one can hand it over to his children or family member.

The trial judge and high court regarded the convicted passages as obscene because of the descriptions of female body and frequent use of slang.

The Supreme court freed the accused of the charges and concluded : "On a very anxious consideration and after carefully applying our judicial mind in making an objective assessment of the novel, we do not think that it can be said with any assurance that the novel is obscene merely because slang and unconventional words have been used in the book in which there have been emphasis on sex and description of female bodies and there are the narrations of feelings, thoughts and actions in vulgar language."

Finally it took 12 years and the verdict of the Supreme Court for the novel to be cleared of charges. Sagarmoy Ghosh, the working editor of Desh of that time noted this event as an historical landmark in Bengali literature. He said that there were some books that got banned and subsequently released from conviction from the local court. But he said that he did not know of any such event like Prajapati that had gone on to face conviction for seventeen years. The novel was published again.

FACTS OF THE CASE

Samaresh Bose, the first appellant, was a well-known writer of Bengali Novels and stories. He authored a novel under the caption "Prajapati", which came to be published in "Sarodiya Desh" (the-annual pooja number of the Bengali Journal 'Desh') for the Bengali year 1374 B.S.

The novel's protagonist was one Sukhen. The novel seeks to express the feelings, thoughts and actions of Sukhen and portray his character. In the novel Sukhen himself narrates his experience, feelings, thoughts and actions in his own words, what he has seen in others, what he despised and what he himself did and how he fell a victim to wine and women and slid into a life bereft of any love, affection and proper guidance.

"Desh" was a journal of repute with wide circulation and the pooja number was read by lovers of Bengali' literature of all age groups all over India. Sitangshu Kumar Dasgupta, the second appellant was the publisher and the printer of the journal containing the said publication.

On the 2nd of February, 1968, Amal Mitra, the second respondent, made an application in the Court of the Chief Presidency Magistrate at Calcutta complaining:

(a) That the said novel "Prajapati" contains matters which are obscene;

(b) That 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 "Sarodiya Desh" may fall and the reading public as well"; and

(c) That therefore, both the accused persons have committed an offence punishable under section 292 Indian Penal Code read with section 109 of IPC.

On the basis of the said complaint and in compliance with the necessary formalities, a criminal Case No. 353/68 was started against both the accused persons and disposed of by the then Chief Presidency Magistrate of Calcutta by his judgment. Both the accused were, therefore, found guilty by the Trial Judge under section 292 I.P.C. read with 109 I.P.C. The Trial Judge accordingly convicted both the accused and sentenced both of them to a fine of rupees 201 each and in default to undergo simple imprisonment for two months each. The Trial Judge also directed that the pages from 174 to 226 of the journal be destroyed under the provisions of section 521 Criminal Procedure Code after the period of appeal was over.

Against the judgment and order passed by the Trial Judge 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. The Calcutta High Court dismissed the appeals.

The author and publisher then filed an appeal in the Supreme Court. The question for consideration in this appeal was whether the two appellants could be said to have committed an offence under Section 292. In order to decide this, the court looked at whether or not the novel Prajapati was obscene[1].

ISSUES

1. Whether 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 "Sarodiya Desh" may fall and the reading public as well?

2. Whether references to kissing, descriptions of the body and the figures of female characters in the book and suggestions of sex acts by themselves have the effect of depraving and debasing, and encouraging lasciviousness among, readers of any age, and must therefore be considered obscene?

3. Whether both the accused persons have committed an offence under section 292 of Indian Penal Code read with section 109 of IPC (abetment)?

ARGUMENTS

FROM THE RESPONDENTS

1. The novel ‘Prajapati’ is obscene.

2. Prajapati has no literary value whatsoever.

3. The novel is likely to corrupt and deprave those whose minds are open to influence of this sort and into whose hands the book is likely to fall.

4. There could be no reason except earning money as the possible reason behind writing this.

[1] *Samaresh Bose v Amal Mitra* [1985] 4 SCC 289.

5. The two accused are liable under section 292 of the IPC.

FROM THE APPELLANTS

1. The appellants argued that the novel depicts the feelings, thoughts, actions and life of Sukhen, the hero of the novel and its main character; and that through the speeches, thoughts and actions of Sukhen the novel seeks to condemn and criticize various prevalent aspects of life in various strata of society.

2. They argued that if different kinds of words - cultured and sophisticated - were to be used for the thoughts, speeches and actions of Sukhen, the entire portrayal of Sukhen's character would become unreal and meaningless.

3. They argued that in literature there was a distinction between obscenity and vulgarity, and it was only obscenity in literature that attracts the provisions of Section 292.

4. They argued that the book had a social purpose to serve and had been written with the primary object of focusing the attention of persons interested in literature to the various ills and maladies ailing society and destroying the social fabric.

JUDGEMENT

HIGH COURT JUDGEMENT

The Criminal Appeal and the Criminal Revision of 1969 were heard together. It was disposed of by a Single Judge of the High court by a common judgement delivered on 27.6.1972.

The High Court discharged the rule in the Criminal Revision and dismissed the appeal affirming the conviction and sentences imposed on both the accused persons.

SUPREME COURT JUDGEMENT

Judges: Amarendra Nath Sen, R.S. Pathak

The Supreme Court allowed the appeal and dismissed the charges of obscenity in 1985.They directed that the fine, if paid by the appellants, shall be refunded to them.

RATIO DECIDENDI OF THE SUPREME COURT

The Supreme Court discussed the validity of sec.292 in this case and referred to *Ranjit D. Udeshi v. State of Maharashtra*[2], where it had to decide the question of constitutional validity of Sec. 292 I.P.C. and also had to interpret the word 'obscene' used in the said Section.

This court also quoted and applied the Hicklin's[3] test to discuss what can be considered as obscene as laid down by Cockburn. He laid down the test of obscenity in these words : '....I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt

[2] *Ranjit D. Udeshi v. State of Maharashtra* [1965] 1 SCR 65.
[3] *Regina v Hicklin* [1868] LR 2 QB.

those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.... it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character" was obscene, regardless of its artistic or literary merit.

It referred to Roth's case[4]. Mr. Justice Brennan, who delivered the majority opinion in that case observed that if obscenity is to be judged of by the effect of an isolated passage or two upon particularly susceptible persons, it might well encompass material legitimately treating with sex and might become - unduly restrictive and so the offending book must be considered in its entirety. Chief Justice Warren on the other hand made 'substantial' tendency to corrupt by arousing lustful desires' as the test. Mr. Justice Harian regarded as the test that must 'tend to sexually impure thoughts'. In our opinion, the test to adopt in our country (regard being had to our community mores) is that obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech and expression, and obscenity is treating with sex in a manner appealing to the carnal side of human nature, or having that tendency. Such a treating with sex is offensive to modesty and decency but the extents of such appeal in a particular book etc. are matters for consideration in each individual case.

In holding the book Lady Chatterley's Lover which had come up for consideration before this Court to be obscene the Court held that:

"There is no loss to society if there was a message in the book. The divagations with sex are not legitimate embroidery but they are the only attractions to the common man. When everything said in its favour we find that in treating with sex the impugned portion viewed separately and also in the setting of the whole book pass the permissible limits judged of from our community standards and as there is no social gain to us which can be said to preponderate, we must hold the book to satisfy the test we have indicated above."

It quoted *Chandrakant Kalyandas Kakodkar*[5] that "It is apparent that the question whether a particular Article or story or book is obscene or not, does not altogether depend on oral evidence because it is the duty of the court to ascertain whether the book or story or any passage or passages therein offend the provisions of S. 292. Even so as the question of obscenity may have to be Judged in the light of the claim that the work has a predominant literary merit, it may be necessary if it is at all required, to rely to a certain extent on the evidence ant views of leading litterateurs on that aspect particularly when the work is in a language with which the Court is not conversant. Often a translation may not bring out the delicate nuances of the literary art in the story as it does in the language in which it is written and in those circumstances what is said about its literary quality and worth by persons competent to speak may be of value, though as was said in an earlier decision, the verdict as to

[4] 354 US 476.
[5] *Chandrakant Kalyandas Kakodar v. State of Maharashtra* [1970] 2 SCR 80.

whether the book or article or story considered as a whole panders to the prurient and is obscene must be judged by the courts and ultimately by this Court.

The Supreme Court held that vulgar writing is not necessarily obscene. "Vulgarity arouses a feeling of disgust and revulsion and also boredom but does not have the effect of depraving, debasing and corrupting the morals of any reader of the novel, whereas obscenity has the tendency to deprave and corrupt those whose minds are open to such immoral influences." "We feel that the readers as a class will read the book with a sense of shock and disgust and we do not think that any reader on reading this book would become depraved, debased and encouraged to lasciviousness."

The court said that although, in some places in the book there may have been an exhibition of bad taste, it was up to readers of experience and maturity to draw the necessary inference. The court said that it was not sufficient to bring home to adolescents any suggestion that was depraving or lascivious. "We have to bear in mind that the author has written this novel which came to be published in the Sarodiya Desh for all classes of readers and it cannot be right to insist that the standard should always be for the writer to see that the adolescent may not be brought into contact with sex. If a reference to sex by itself in any novel is considered to be obscene and not fit to be read by adolescents, adolescents will not be in a position to read any novel and have to read books which are purely religious" [6].

COMMENT

This was a landmark case in India which adopted a very progressive approach and brought respite to authors for generations to come. It discussed in length as to what could be considered as an obscene writing and thus what could attract the penal provisions of section 292 of the IPC. It distinguished between Vulgar and Obscene writing. The judgement of the Supreme Court is appreciated. It was a necessary reasoning adopted by the court in question in keeping with the changing times.

Any writer cannot possible cater to the taste of each and every type of individual in the society. If a certain class of people do not wish to read a certain type of literature it is upon their discretion to not do so but a blanket ban just to accommodate a small portion's interest is inherently wrong. Every unconventional thing cannot be said to be unconstitutional. So, it is upon the masses to be more accepting and mature.

The judgement is more appreciated as the authors now have far more freedom of words and can bring in newer styles of writing for the masses without being penalized or banned (subject to certain conditions). Thus this judgement upholds the validity of article 19(a) of the constitution of India.

[6] Siddharth Narrain, 'Obscenity under the law: A review of significant cases' (2009) < http://indiatogether.org/uploads/document/document_upload/2141/blawobscenity.pdf> accessed 28th August

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ARTICLES

OM KUMAR & ORS V UNION OF INDIA

- Siddharth Nigotia

This case talks discusses when the court acts as a primary reviewing authority and when as a econdary reviewing authority, and the application of 'Wednesbury principles' and proportionality in the case relating to Article 14 of the constitution. The court discusses the reviewing authority of the court under Article 14 of the Constitution.

FACTS OF THE CASE

Skipper construction obtained possession from Delhi Development Authority (DDA) without paying the consideration in full, advertised and collected crores of rupees from would be purchasers. In that process, it collected amounts from more persons than there were flats. It was the case of the purchasers that the company also diverted funds elsewhere. The officers of the DDA who dealt with these matters at the relevant time here weld responsible in handing over the possession of the suit land before receiving the auction amount in full and also in "conniving" at the construction thereon as well as at the advertisements given by it for bookings in the building in question.

The court requested Justice O. Chinnappa Reddy to investigate into the conduct of the officials of the DDA. Justice Reddy submitted the report on 7.7.95. The Court accepted report and passed an order directing the Department of Personnel to initiate disciplinary proceedings against five officers (i) Sri V.S. Ailwadi IAS (retired), (ii) Sri K.S. Baidwan, IAS, (iii) Sri Virendra Nath IAS, (iv) Sri R.S. Sethi

IAS and (v) Sri Om Kumar IAS. Sri P.K. Gopinath was appointed as Inquiry Officer. Report of the Inquiry officers was received and sent to the officers, to which replies of the officers were received. AS regards, Sri V.S. Aliwadi, in view of expiry of four years as prescribed in All India Service rules the department did not take any action.

The cases of the four officers were referred to the U.P.S.C. The advice of the U.P.S.C was received by the department and was found to be favourable to the officers. Since there was difference in the tentative decisions of the competent authority and the advice of the UPSC, the matter was reconsidered by the Department of Personnel so far as Sri Virendra Nath and Sri Om Kumar. Similarly, the Ministry Of Home Affairs in the Cases of Sri K.S. Baidwan and Sri R.S. Sethi differed from a similar view of the U.P.S.C. Committee of Secretaries asked the UPSC to reconsider its advice. The reconsidered advice of the UPSC was duly received. The reconsidered advice of the UPSC was again in favour of the officers. The matter concerning the officers was placed again before the Committee of Secretaries and then before the respective competent authorities.

The Department of Personnel in its final order imposed a 'major' penalty on Sri Virendra Nath and 'minor' penalty of 'censure' on Sri Om Kumar. The ministry of Home Affairs imposed 'major' penalties on Sri K.S. Baidwan and Sri R.S. Sethi. The question raised by the counsel for Shri Om Kumar and Shri Virendera Nath are relevant to the principles enunciated by the Court.

ISSUES RAISED IN THE CASE

The issue of applicability of basic principles under administrative law, the doctrine of proportionality and Wednesbury principle was raised. When the court is to act as primary reviewing authority and when as a secondary reviewing authority.

ARGUMENTS BY APPELLANTS

Sri K. Parasaran, counsel for Sri Om Kumar and Sri Rajeev Dhawan for Sri Virendera Nath contended that the respective punishments awarded o their clients namely censure, reduction in pay and increments did not need any enhancement. They argued that the question as to the quantum of punishment to be imposed was for the competent authority and that the Courts would not normally interfere with the same unless the punishment was grossly disproportionate. The punishments awarded satisfied the Wednesbury rules.

ARGUMENTS BY RESPONDENTS

Government as respondents argued that the question of the quantum of punishment in disciplinary matters is primarily for the disciplinary authority and the jurisdiction of the High Courts under Article 226 of the Constitution or of the Administrative Tribunals is limited and is confined to the applicability of one or other of the well-known principles known as Wednesbury principles.

DECISION OF THE COURT

The Court after considering the facts and the legal principles that are discussed below, concluded that in Case of Sri Om Kumar, the choice of awarding 'censure' as punishment was not violative of the Wednesbury rules. There was no omission of relevant facts nor were irrelevant facts taken into account. The Court found no illegality committed by the administrative authorities.

In Case of Sri Virendara Nath court after considering the report of Justice Chinnappa Reddy, the report of Inquiry officer and the recommendation of UPSC the court concluded that the disciplinary authority did not violate Wenesbury principle

REASONS FOR THE DECISIONS

The Court discussed the 'primary' review by the Courts of validity of legislation which offended fundamental freedom. Then the court decided the issue contended in the present case based on the basic principles of applicable under administrative law, namely, Wednesbury principles and the doctrine of proportionality.

Lord Greene in Associated Provincial Picture Houses Ltd. v Wednesbury Corporation case in 1948 said that when a statute gave discretion to an administrator to take a decision, the scope of judicial review would remain limited. He said that interference was not permissible unless one or other of the following conditions were satisfied, - namely the order was contrary to law, or relevant factors were not considered, or irrelevant factors were considered; or the decision was one which no reasonable person could have taken.[1]

In 1983, Lord Diplock in Council for Civil Services Union v. Minister of Civil Service summarised the principles of judicial review of administrative action as based upon one or other of the following – viz. illegality, procedural irregularity and irrationality.[2] Court Defined 'Proportionality' as the question whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the Court will see that the legislature and the administrative authority 'maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve'. The legislature and the administrative authority are however given at area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the Court. That is what is meant by proportionality.

[1] [1948] 1 KB 223
[2] 1983 (1) AC 768

PROPORTIONALITY AND LEGISLATIVE ACTION

The Court observed that in India the principle of 'proportionality' was vigorously applied in India to the legislative action. While deciding the validity of legislations infringing Article 19(1) of the Constitution, Court had occasion to consider whether the restrictions imposed by legislation were disproportionate to the situation and were the least restrictive of choices. The burden of proof to show that the restriction was reasonable lay on the State. 'Reasonable restrictions' under Article 19(2) to (6) could be imposed on these freedoms only legislations. The Court relied on Chintaman Rao v. State of UP[3] , Madras v. Row[4] , A.P. v. Mc Dowell & Co. So far as Article 14 is considered, the Court observed that the validity of legislation action was examined whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of the legislation. The courts were examining the validity of the differences and the adequacy of the differences. The same is done under the principles of proportionality.

The court concluded that in India the principle that legislation relating to restrictions on fundamental freedoms could be tested on the anvil of 'proportionality' has never been doubted in India. This is called 'primary' review by the Courts of the validity of legislation which offended fundamental freedoms.

PROPORTIONALITY AND ADMINISTRATIVE ACTION IN INDIA

The Court observed that in cases where legislation gives the administrative authorities power or discretion while imposing restrictions in individual situations, the court has tested those actions on the principle of 'proportionality'. The court relied on R.M. Seshadri v. Dist. Magistrate Tanjore and Anr[5] , Union of India v. Motion Picture Association[6].

In S. Rangarajan v. Jagjivan Ram and ors. an order refusing permission to exhibit a film in relation the alleged obnoxious or unjust aspects of reservation policy was held violative of freedom of expression under Article 19(1)(a). The court cited a no cases such as Malak Singh and Ors. V. State of P & H and Ors.[7]

The Court relied on the law laid down by the Supreme Court of Israel were 'proportionality' is recognized as a separate ground in administrative law, different from unreasonableness. It consists of three elements. First, the means adopted by the authority in exercising its power should rationally fit the legislative purpose. Secondly, the authority should adopt such mans that do not injure the ndividual more than necessary. And third, the injury caused to the individual by the exercise of the power shouldnot be disproportionally to the benefit which accrues to the general public.

[3] [1950] 1 SCR 759.
[4] 1952 CriLJ 966.
[5] [1955] 1 SCR 60.
[6] [1999] 3 SCR 875.
[7] 1981 CriLJ 320.

In E.P. Royappa v State of Tamil Nadu, another test for the purposes of Article 14 was laid down. It as state that if the administrative action was 'arbitrary', it could be struck down under Article 14. This principle was then uniformly followed in all courts. Arbitrary action by the administrator is described as one that is irrational and not based on sound reason. It is also described as one that is unreasonable. If, under Article 14, administrative action is to be struck down as discriminative, proportionality applies and it is primary review. If it is held arbitrary, Wednesbury principle applies and it is secondary review by the Court.

The court in G.B. Mahajan vs. Jalgaon Municipal Council opined that, when an administrative actions is challenged as 'arbitrary' under Article 14, the question will be whether the administrative order is 'rational' or 'reasonable' and the test then is the Wenesbury test. The courts would then be confined only to a secondary role and will only have to see whether the administrator has well done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary.[8]

PROPORTIONALITY AND PUNISHMENTS IN SERVICE LAW

The court decided the present case by applying the principles of proportionality to determine question of 'arbitrariness' of the order of punishment is questioned under Article 14. In Ranjit Thakur vs. Union of India, the court referred to 'proportionality' in the quantum of punishment but the court observed that the punishment was 'shockingly' disproportionate to the misconduct proved.[9]

In B.C. Chaturvedi v. Union of India the court said that the Court will not interfere unless the punishment awards was one which shocked the conscience of the Court. Even then, the court would remit the matter back to the authority and would not normally substitute one punishment for the other. However, in rare situations, the court could award an alternative penalty.[10] It was also state in Ganayutham.

The court concluded that the punishment of 'censure' was not violative of the Wenesbury rules. No Relevant fact was omitted nor was irrelevant fact taken into account. There is no illegality. Nor the punishment was shockingly disproportionate. The administrator had considered the report of Justice Chinnappa Reddy Commission, the finding of the Inquiry officer, the opinion of the UPSC which was given twice and vies of the Committee of Secretaries. The court did not deemed it necessary to refer the matter to the Vigilance Commissioner for upward revision of punishment.

[8] AIR 1991 SC 1153.
[9] 1988 CriLJ 158.
[10] (1996) ILLJ 1231 SC.

In the matter of Sri Virendra Nath, on a Consideration of the report of Justce Chinnappa Reddy, the report of the Inquiry Officer, and the recommendations of the UPSC which were favourable to the officer on both occasions and the order of the disciplinary authority which accepted the finding as to misconduct, the court concluded that the administrator's decision in the primary role was not violative of Wednesbury Rules.

COMMENTS

In the present case, the court rightly decided the matter. Also, the court successfully explained the position of Wednesbury's principles and the principle of 'Proportionality'. This case explains the role of the Court as primary reviewing authority and as secondary reviewing authority.

The Court by following the principles given in the Past Cases came to the right conclusion. When legislative action imposing restrictions on freedom enumerated in Article 19(1), the validity of such legislation was tested on the principle of 'reasonableness'. 'Reasonable' implied intelligent care and deliberations, Legislation which arbitrarily or excessively invaded the right could not be said to contain the quality of reasonableness unless t struck a proper balance between the rights guaranteed and the control permissible under Article 19(2) to (6). This was nothing but the Principle of

'proportionality'. In the cases relation to Article 14, the courts in India examined whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of the legislation. The examined the validity of the difference and the adequacy of the differences. This is again nothing but the principle of proportionality.

Then regarding Administrative Action and principle of proportionality, the court said that when administrative action is attacked as discriminatory under Article 14, the principle of primary review is for the Courts by applying proportionality. However, where administrative actions is questioned as 'arbitrary' under Article 14, the principle of secondary review based on Wenesbury principles applies. Some of the important Judgements in this regard, as discusses in the case also, have followed the same principle. In Union of India v G. Ganayutham, The respondent who was working as the Superintendent of Central Excise was subjected to the punishment of withholding 50% of the pension and 50% of the gratuity. A writ petition was filed in the High Court which was later moved to the Administrative Tribunal. The tribunal holding the punishment too severe reduced the same. The matter then came before the Supreme Court by the way of appeal. The Court set aside the order of the Tribunal and restored the original punishment saying that the punishment was 'not' irrational according to the Wednesbury test. The Court observed:

"In Such a situation, unless the Court/Tribunal opines n its secondary role that the administrator was, on the material before him, irrational according to Wednesbury the punishment cannot be quashed."[11]

[11] Union of India v. G.Ganayutham, AIR 1997 SC 3387 : 1997 SCC (L&S) 1806.

In C.M.D United Commercial Bank v P.C. Kakkar, a Writ Petition was filed in the High Court by an employee of Bank who was alleged to have committed several acts of misconduct while he was the Assistant Manager in the Bank. Inquiry proceedings were initiated and several charges were found to be established against him. A punishment of dismissal was imposed on him. The High court held the punishment to be excessive. The matter then came in appeal before the Supreme Court. The Court considered at question of scope of judicial review of disciplinary punishments. The Court referred to the principles enunciated in Om Kumar & Ors v Union of India and held that where punishments in disciplinary cases are challenged as arbitrary under Article 14 of the Constitution the court would act as a secondary reviewer. The question before the court would be whether the administrative order is "rational" or "reasonable" according to the Wednesbury test.[12]

[12] Om Kumar & Ors v Union of India, AIR 2000 SC 3689

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ARTICLES

R. RAJAGOPAL V. STATE OF TAMIL NADU AIR 1995 SC 264

- Akshay Bhatia

BACKGROUND AND FACTS OF THE CASE

The following petition relates to the freedom of press vis-A-vis the right to privacy of the citizens of India. The Judgement was delivered by a single judge bench of the Supreme Court by B.P Jeevan Reddy, J. in 1995 also raises the issue as to the parameters of the right of the press to criticise and comment on the acts and conduct of public officials. The first Petitioner was the editor, printer and publisher a popular Tamil weekly magazine, Nakkheeran, which was published from Madras. The second petitioner in question was the associate editor of the magazine. The petitioners were seeking issuance of an appropriate writ, order or discretion under Article 32 of the Constitution, restraining the respondents, viz., 1. State of Tamil Nadu represented by the Secretary, Home Department, 2. Inspector General of Prisons, Madras and 3 Superintendent of Prisons (Central Prison), Salem, Tamil Nadu from taking any action as had been contemplated in a letter by the Inspector General of Prisons dated 15-6-1994 and further restraining them from interfering with the publication of the autobiography of the prisoner in question, Auto Shankar, in their magazine.

Auto Shankar. Alias. Gauri Shankar. Alias. Shankar was a notorious criminal involved in the murder of six women in and around Chennai between 1987 and 1988. Shankar started out as a painter, later driving auto rickshaws, transporting illicit arrack from coastal areas between Tiruvanmiyur and Mamallapuram to Chennai. His autos were used as transport of young women exploited in the booming flesh trade then. With his younger brother, brother-in-law and five other accomplices. Shankar had soon established himself as the uncrowned king of all criminal activities in Chennai. He also ran prostitution dens in various areas of the city with the connivance of the police. [1]

[1] The Hindu dated August 23, 2003

Shankar's influence peaked in the mid 1980's and lasted for a couple of years before his murders were exposed. This was during a time of political turbulence in Tamil Nadu with the passing away of former Chief Minister M.G Ramachandaran in December 1987, which resulted in Governor's rule being imposed between January 1988 and 1989. Several complaints by the parents of missing persons resulted in the police forming a special task force to look into the matter of missing women around the area. The police managed to rope in a constable named, Aari, who was well known to Shankar. With the help of his inputs, the police managed to rope in Shankar and his accomplices. After his arrest, the policemen made a thorough search of his property and found a diary containing photographs of Shankar with policemen of different ranks posing with him. This resulted in the suspension of multiple policemen who has served in Shankar's area of notoriety, however a bigger can of worms was to be opened soon. Shankar and his men were then transferred to Chennai central prison, from where he made an astonishing escape with the help of a woman. He was subsequently tracked down at Rourkela Steel City, Odisha brought back and hanged at Salem prison along with two of his accomplices.

Though not of utmost relevance to the petition at hand, this information gives us valuable and pertinent knowledge as to the exploits of Auto Shankar which would keep us in stead when we look at the case from an objective view. However, for the purpose of this case commentary, it would be wise for us to consider the timeline up to 5-4-1994, when his mercy petition against death sentence was dismissed by the Madras High Court.

In the following petition, the petitioners had come forward with the following issue: Auto Shankar had written his autobiography running into almost 300 pages while languishing in Chenglepat sub-jail during the year 1991. The autobiography had been handed to his wife, Smt Jagdishwari, with the knowledge and approval of the jail authorities, for being delivered to his advocate, Shri Chandrasekharan. Shankar had requested to his advocates that hism autobiography be published in a Tamil weekly magazine, Nakkheeran, published by the petitioners. Shankar had affirmed his desire in several letters written to his advocate and the first petitioner. The autobiography set out the close nexus between Shankar and several IAS, IPS and Government officials, some of whom had indeed been his partners in several crimes. Before the commencement of the serial publication of the autobiography in their magaizine, the petitioners announced the news that the magazine would be coming out with the sensational life story of the dreaded criminal Auto Shankar. Naturally, this announcement sent waves of shock and disbelief among numerous police and administrative officials who were afraid that their connections with Shankar would be exposed to the public. Some of these officials then, forced Shankar by using third degree methods inside his prison cell to write letters addressed to the Inspector General of Prisons and Editor of Nakkheeran, stating that he did not wish that his life story be published in the magazine. In relation to this letter, certain correspondence occurred between the petitioners and the prison authorities. Inspector General of Prisons write the

impugned letter dated 15-6-1994 to the Editor of the magazine, stating that 1) their suggestion that Auto Shankar had written his biography in jail in the year 1991 is false. 2) The fact that the biography had been handed over by Shankar to his wife with the knowledge and approval of the prison authorities is false. 3) That the power of attorney was not executed by Shankar in favour of his advocate, Shri Chandrasekaran in connection with the publication of the alleged book.. The letter also contended that prison records did not bear any entry as to the execution of any power of attorney in relation to Shankar.

The petitioners submitted that the contention of the Prison officials were untrue, the argument of jeopardy to Shankar's interest hollow and that they possessed a right to punish the said book in their magazine with the ascent of Shankar himself. The petitioners went ahead and published parts of the biography in the three issues of their magazine dated 11-6-1994, 18-6-994 and 22-6-1994. They stopped any further publication in lieu of the threatening tone of the letter dated 15-5-1994. They had reason to believe that the police authorities would swoop down upon their printing press, seize issues of the magazine, damage the press and their property with a view to terrorize them. Their assertions were not without a precedent, and they relayed a previous occasion where substantial damage was done to their press and properties after the magazine had published an investigative report of phone tapping by the State Government of opposition leaders. In that instance, the editor and publisher were arrested, jailed, paraded and subjected to third degree methods. They believed that this along with the letter gave them reason to be wary of the Police authorities. The petitioners assured that they had freedom of press guaranteed by Article 19(1)(a), which, according to them, entitled them to publish the autobiography. The petitioners claimed that Shankar also had a right to have his story published. They stated that they had approached the Madras High Court for similar relief but their petition the Court had raised objections in relation to the maintainability of the same. It was submitted that the writ petition in the High Court was dismissed by a Single Judge on 18-6-1994 stating that whether the Shankar had indeed written the autobiography and entitled the petitioners to publish the same was a disputed question fact. This is held in relation of the Petitioner's counsel's failure to produce the letter written by Shankar to the Petitioner authorising him to publish his story. The Court declared that it had genuine doubts over the veracity of the claim of the Petitioner's in relation to the author of the book. In this context the Court found that a disputed claim to the authencity as well authority to publish the book coupled with the contents of the book raised serious issues as to whether it would be prudent to allow such a relief. It was further submitted that since the book contained allegations that a number of IAS, IPS and public officials patronised and were aware of Shankar's criminal activities and such a contention had no basis and would tarnish the image of persons holding responsible positions in public institutions.

In the present petition, neither Auto Shankar nor his wife are parties. The honourable Supreme Court does not possess a copy of the autobiography in connection and does not wish to go into such disputed

question of fact. For the purpose of the present writ petition under Article 32 of the Constitution, the Court proceeded don the assumption that the prison had neither written the book nor gave permission to the petitioners to publish the same in their magazine. The Court also makes it clear that that is only an assumption for the purpose of the following petition ad not an undisputable finding of fact.

ISSUES RAISED IN 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 Article 19(1)(a) entitles the press to publish such unauthorised account of a citizen's life and activities and if so to what extent and in what circumstances??

2. (a) 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

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

(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?

(d) 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?

JUDGEMENT

In the judgement, B.N Jeevan Reddy,.J has discussed the freedom of press vis-A-vis the right to privacy of the petitioners specifically and citizens of India on the whole. The Right to Privacy is an independent and distinctive concept originating in the field of Tort law, under which a new cause of action for damages resulting from unlawful invasion of privacy was recognised. The right has two aspects (1) the general law of pivacy and (2) the constitutional recognition given to the right to privacy which protects personal privacy under unlawful governmental invasion. The first of these aspects has been exploited here, where for example, a person’s name or likeness has been used without his consent, for advertising or non-advertising purposes of for threat matter his life story has been written whether laudatory or controversial and published without his consent as explained below. This right has in recent times, acquired a constitutional status. However, the right to privacy has not been enumerated as a fundamental right in our Constitution but has been inferred from Article 21. The earliest decision dealing with this aspect is *Kharak Singh v. State of Uttar Pradesh*[2] however a more elaborate appraisal of the right took place in a later decision in Gobind, where Matthew. J. speaking for himself, Krishna Iyer and Goswami. JJ. Traced the origins of this right and also pointed

[2] 1963 AIR 1295

out the right how the right has been dealt with by the United States Supreme Court in two of its well-known decisions in Griswold v. Connecticut and Roe v. Wade[3] and *Roe v. Wade*[4] . Upon referring to Kharak Singh and the said American decisions, the learned Judge stated the law in the following words "... privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test. It must be mentioned here that privacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must there exist serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values. Any right of privacy must encompass and protect the personal intimacies of the home, the family, the marriage, motherhood, procreation nd child-rearing. This cataloguer approach to the question is obviously not as instructive as it does not give analytical picture of the distinctive characteristics of the right to privacy. Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been the asserting that a claimed right must be a fundamental right implicit in the concept of ordered liberty.

As Ely says:

There is nothing to prevent one from using the word 'privacy' to mean the freedom to live one's life without governmental interference. But the Court obviously does not so use the term. Nor could it, for such a right is at stake in every case. there are two possible theories for protecting privacy of home. The first is that activities in the home harm others only to the extent that they cause offence resulting from the mere thought that individuals might be engaging in such activities and that such 'harm' is not constitutionally protectable by the State. The second is that individuals need a place of sanctuary where they can be free from societal control. The importance of such a sanctuary is that individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted. The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.

Jeevan Reddy,. J has also relied on the European Convention on Human Rights, which came into dorce on 3-9-1953 represents a valiant attempt to tackle the new problem. Article 80 of the Convention is worth citing[5]

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

[3] 410 U.S. 113 (1973)
[4] 381 U.S. 479 (1965)
[5] European Convention on Human Rights, 1953

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

The Judge has further discussed some important decisions in the United States as right to privacy has been the subject matter of several decisions in the country.

The right to privacy was first referred to as a right and elaborated in the celebrated in the celebrated article by Warren and Brandies entitled "The right to privacy" [6] The expression "right to privacy" was first referred to in *Olmstead vs United States*[7], however it was first extensively discussed in *Times, Inc vs Hill*[8] . On a particular day in the year 1952, three escaped convicts intruded into the house of James Hill and held him and members of his family hostage for nineteen hours, where after they released them unharmed. The police immediately went after the culprits, two of whom were shot dead. The incident became prime news in the local newspapers and the members of the press started swarming the Hill's home for an account of what happened during the hold- up. The case of the family was that they were not ill- treated by the intruders but the members of the press were not impressed. Unable to stop the siege of the press correspondents, the family shifted to a far-away place. Life magazine sent its men to the former home of Hill family where they re-enacted the entire incident, and photographed it, showing inter alia that the members of the 6 See 26 Stanford Law Rev. When Life published the story, Hill brought a suit against Time Inc. The New York Supreme Court found that the whole story was "a piece of commercial fiction" and not a true depiction of the event and accordingly confirmed the award of damages. However, when the matter was taken to United States Supreme Court, it applied the rule evolved by it in New York Times Co. v. Sullivan10 and set aside the award of damages holding that the jury was not properly instructed in law. It directed a retrial. Brennan, J. held that

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

[6] Harvard Law Review 193, 1890
[7] 277 U.S. (1928
[8] 385 U.S. 374 (1967)

The next relevant decision Reddy,. J has relied upon is *Cox Broadcasting v. Cohn A Georgia*[9] . The facts of which were, A Georgia law prohibited and punished the publication of the name of a rape victim, the appellant a reporter of the newspaper obtained the name of the rape victim from the records of the court and published it. The father of the victim sued for damages. White, K recognised that "in this sphere of collision between claims of privacy and those of the free pres, the interests on both sides are plainly rooted in traditions and significant concerns of the society of our society" but chose to decide the case on the narrow question whether the press can be said to have violated the said statute or the right to privacy of the victim by publishing her name, having obtained it from public records. The learned Judge held that the press cannot be said to have violated the Georgia law or the right to privacy if it obtains the name of the rape victim from the public records and publishes it. The judge claimed that the freedom of press to publish the information contained in the public record is of critical importance to every system of Government in that country and that, may be, in such matters ""citizenry is the final judge of the proper conduct of public business".

Moving on from the American and Indian judgements on the issue of privacy, Reddy, J stated that nowhere in the counter-affidavit by the respondents it has been stated that Auto Shankar had requested or authorised the prison officials to protect his right to privacy or the Inspector General of Prisons, as the case may be, to adopt appropriate proceedings to protect his privacy. If so, the respondents cannot take upon themselves an obligation of protecting his right to privacy. No prison rule is bought to our notice which empowers the prison officials to do so. Moreover, the occasion for such action arises only on the event of the publication and not before, as indicated here.

Lastly, in relation to the objection raise by the respondent as to the maintainability of the present writ petition. 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.

Reddy, J has stated that the aforesaid rule 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. His is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency Article 19(2) an

[9] 420 U.S. 469 (1975

exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media. In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen, as explained in above. It needs no reiteration that judiciary, which is protected by the power to punish for contempt of court and Parliament and legislatures protected as their privileges are by Articles 105 and 104 respectively of the Constitution of India, represent exceptions to this rule.

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

CONTENT ANALYSIS OF THE JUDGEMENT

In the following petition, the Judges have made key observations about the freedom of press vis-à-vis the right to privacy of individuals. Reddy, J. has, for the purpose, of the present petition taken, fact that the autobiography had not been written by Auto Shankar and that the Editors of the magazine did not have the permission to publish the same. The judge has proceeded in delivering the judgement that, the Petitioners have a right to publish the autobiography and that members of the police and the administrative services have no right to interfere with the publication of the same. The press is an important tool of Democracy and has been right named, the Fourth Estate. Classic common law was the product of the conditions of the time and was bereft of investigative journalism and the press. Before the present case, there had the right to speech and expression guaranteed in article 19(1)(a) was ambiguous and unexplained at both legislative and judicial levels and so serious academic or judicial interpretation had gone to bring it in consonance with the constitution. The common law accepts the defence of qualified privilege which allows the defendant to plead that the publisher of the statement or story had made the communication in the performance of a duty or for the protection of

an interest and was made to persons who likewise had an interest to receive such communication. The Judge has noted and was not averse to the idea that in the changed circumstance of today, the press has a duty to inform the people and the people have an interest in receiving the information. The only consideration is that the precaution must not be abused and individual reputation must not become a casualty. For this, it must not be enough that the press forfeit the privilege on the proof of malice, a few more conditions had also to be tagged to ensure that the press had acted not only honestly but also reasonably.

The rule framed in *New York Times vs Sullivan* had been extended to public figures generally. The decision in this case is limited to public officials. It has become a prevalent feature of our society that, persons who hold nay office flaunt themselves everywhere and exercise considerable influence in arriving at decisions on public matters must come under the purview. The Supreme Court has expressly stated that the decision in this case has been limited to civil liability for defamation and not criminal liability for defamation provided in sections 499 and 500 of the Indian Penal Code.

The Court was also faced with the issue of balancing speech right with privacy interest here. The important aspect of privacy right here is that: THE RIGHT AGAINST UNWARRANTED PUBLICITY OF PERSONAL AFFAIRS. Privacy rights demand that people should not be unnecessarily inquisitive about the personal matters of an individual, there are situations when personal matters become legitimate concern of public and in that case the press has the right to inform the public about the same. While such an instance has arisen is the down to the discretion of the court. Privacy and reputation both claim protection against protection and compete against the speech right, there exist a basic distinction between the two. In a case where injury is done to reputation, the complaint is that the statement is false. When there is an interference with privacy, the complaint is not on the veracity of the statement, but whether the same is laudatory or condemnatory. The alleged nexus between the government officials and ministers with Auto Shankar come into the purview of the same.

Another facet of this judgement is the PERMISSIBILITY OF PRIOR RESTRAINT. As restrictions of the speech right that are permissible can be imposed punitively as well as preventively, the latter kind is called prior restraint. The exercise of this speech right carries extra importance, because it is practicable and in the context of media which can be simultaneously appeals to our aural and visual sense, it is also deemed necessary. [10] As far as print media is concerned, prior restraint or pre-censorship is seen as an anathema. In this respect, Blackstone's statement "The liberty of the press consists in laying no previous restraint upon publications and not in freedom of censure when criminal matter is published." Is considered a classic and has been quoted by Patanjali, J. in *Brij Bhushan v.*

[10] See K.A Abbas v. The Union of India (1970) 2 SCC 780

State of Delhi[11] . There has been almost an unwritten rule of presumptive invalidity against prior restraint upon publications and the Government has to discharge a very heavy burden of proving substantial loss of vital state interest. In the present case, Reddy, J. was rightly not persuaded even though there existed a risk the magazine's publication could harm the reputation of some Government officials and encroach upon the privacy of Auto Shankar.

The CHILLING EFFECT doctrine has also been introduced by the Supreme Court for the first time in this case. The doctrine, used regularly in the United States, Canada, South Africa and European Union talks about governmental laws and activities which are of a nature that results in self-censorship. While not directly censoring free speech, it results in censorship due to fear in the mind of publishers, scared of governmental crackdowns. John Milton had first talked about the doctrine in 1654 in his book "For to distrust the judgement and the honesty of one who hath but a common repute in learning and never yet offended, as not to count him fit to print his mind without a tutor or examiner, lest he should drop a schism or something of corruption, is the greatest displeasure and indignity to a free and knowing spirit that can be put upon him . Reddy, J. has explained that putting a stop on the publishing of the autobiography would result in such an effect. The Government and state officials, Madras police and the respective civil servants in question cannot use force or engage in harassment by damaging the Petitioner's press, physical intimidation, illegal detention or sending intimidator letters or any communication which would hinder the Petitioners from publishing their material or plant fear in their minds.

[11] AIR 1950 SC 129