

SCOPE OF THE FREEDOM OF SPEECH AND THE PRESS: NEW TRENDS IN JUDICIAL INTERPRETATION

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I. INTRODUCTION

The freedom of speech and expression of the individual and media does not confer an absolute right to speak and or disseminate without responsibility whatever one wishes. It is not an unrestricted or unbridled immunity for using any language. The importance and scope of a free press has been successively upheld by the Supreme Court. Recently, the Supreme Court widened the scope of this freedom, by firmly stating that there is no possibility of any prior restraint on the press freedom and included the commercial speech also within the ambit of the right to speech. At the same time the Courts restricted this right to free speech and expression saying that the press cannot refuse reply and should not publish unverified allegations recklessly against the judges. The Apex Court also restricted the freedom of expression with an emphatic no to forceful enforcement of *Bundhs* violating the fundamental rights of other citizens as a whole.

The right of freedom is restricted by the limitations imposed by a valid law. The restrictions shall be reasonable and for the purposes expressly mentioned in Article 19(2) of the Constitution of India. After three successive decisions of the Supreme Court, which liberally interpreted the freedom of the press, in *Cross Road Newspaper*¹, *Organiser Newspaper*² and *Bharati Press*,³ the then Government amended the Constitution for the first time. The first amendment to the Constitution in 1951 is intended to nullify the wide implications of these judgments. The amendment added to Article 19(2) the word "reasonable" in respect of legislative restrictions on the freedom of speech, and added three grounds that permit the legislature to impose restrictions, namely (i) friendly relations with foreign States; (ii) public order; and (iii) incitement to an offence. By Constitution (Sixteenth Amendment) Act, 1963 another ground "the sovereignty and

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1. *Romesh Thapper v. State of Madras*, AIR 1950 SC 124.

2. *Brij Bhushan v. State of Delhi*, AIR 1950 SC 129.

3. *State of Bihar v. Shailabala Devi*, AIR 1950 SC 329.

integrity of India” was added for curbing the freedom of speech. Thus, the restrictive legislation will not be *ultra vires* if it satisfies the test of reasonableness within the ambit of Article 19(2) of the Constitution. Such a restriction may be held unreasonable either because it, (i) is too stringent and, (ii) does not fall within one of the interests mentioned in Article 19(2).⁴

The British India Government tried to curb the press for its active role in freedom movement, by passing the India Press (Emergency) Act, 1931. With this law, the British Executive started trials for press offences and the licensing system in India. Earlier, the British democracy fought against these offensive measures and got them repealed. This Act imposed an obligation on the press to furnish a security, which stood to be forfeited if it published any matter that might (i) promote hatred or contempt for the Government; (ii) incite disaffection with the Government; (iii) incite feelings of hatred or contempt between two different classes of subject; or (iv) encourage a public servant to resign or neglect his duty. After the independence, the Supreme Court declared this Act of 1931 to be *ultra vires* under Article 19(2) of the Constitution.⁵

The Press (Objectionable Matter) Act of 1951 was passed in place of the Act of 1931, for a temporary period. It provided for judicial scrutiny by the sessions judge before security could be demanded, or forfeited from a printing press, and it conferred a right of appeal to the High Court. This Act was repealed in 1957. Another enactment came in 1975 to impose curbs on free press, during emergency. The Prevention of Publication of Objectionable Matters Ordinance 1975 imposed pre-censorship and provided for stringent action against the hostile press. However, this oppressive legislation which suppressed the voice for about two years was repealed after the Indira Gandhi Government was defeated in 1977 general elections. The new Government restored the Parliamentary Proceedings (Protection of Publications) Act 1956, and revived the Press Council, which were removed by Indira Gandhi government. Another draconian law, which was in existence since the British regime was Official Secrets Act 1923, despite the opposition as being a serious limitation on the freedom of press, it remains an obstruction to the right to information even today.

II. NO PRIOR RESTRAINT ON FREEDOM OF PRESS : *AUTO SHANKAR CASE*

The Supreme Court delivered a historic judgment in *R. Rajagopal v. State of Tamil Nadu*,⁶ stating that the Government has no authority to

4. N. Hunnings, *FILMS CENSORS AND THE LAW* (1967) at 226 .

5. *Srinivas v. State of Madras*, AIR 1951 Mad.

6. (1994) 6 SCC 632.

impose a prior restraint on publishing an autobiography on the ground that it would be defamatory or would result in a violation of a right to privacy etc. It cannot be said before hand that a publication is going to be defamatory to some public officials. If it is alleged to be defamatory after its publication, the authorities have a remedy under the ordinary law. This is a case which emphatically opposed any imposition of a prior restraint on press freedom based on the apprehensions of possible victims. The Court also held that the press could not be prosecuted if publication was based on the "public records". When a Tamil sensational weekly "*Nakheeran*" proposed to publish the autobiography of a condemned prisoner by name Auto Shanker, with an advance announcement about sensational revelations of nexus between criminals and the public officials like police and jail authorities, the Editor of the newspaper requested the court to direct the Tamil Nadu Government not to interfere with the publication of the autobiography written by the prisoner who was convicted in six cases of murder and sentenced with death penalty. The autobiography was delivered to the news weekly, for publication as a serial, through the advocate of the prisoner, with the knowledge of the jail authorities. As the autobiography contained a narration about the nexus between criminals and authorities especially, between the prisoner and several IAS, IPS and other officers, the newspaper decided to commence publication and announced that in advance. The Inspector General of Prisons, in a letter to the editor, asked him to stop the publication as the prisoner denied that he had written any such autobiography. The IG termed it as a false autobiography. The Editor sought a direction from the Court to prevent the interference in the freedom of the Editor to choose the contents of his newspaper as per his discretion. The Division Bench consisting of Justice B.P. Jeevan Reddy and Justice Subhas C. Sen agreed with the petitioners and held that the newspaper had every right to publish the autobiography of Auto Shankar. The Supreme Court said that the newspaper could publish the life story so far as it appears from the public records even without the consent of authority. But if they go beyond the public record and publish, they may be invading the privacy and causing defamation of the officials named in the publication. However, the Supreme Court said that even if, the apprehensions of the officials were true about the defamatory contents, they could not impose any prior restraint on the publication though they have right to take legal proceedings for defamation, after publication. The Supreme Court held that the remedy of public officials and public figures, if any, would arise only after publication and would be governed by the principles indicated therein. But there was no law under which they could prevent the publication of a material which was likely to be defamatory of them. Several broad principles were

evolved in this case.

A. Freedom of Press and Right to Privacy

The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21 of the Constitution. 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.

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

B. No Privacy for Public Activity

In the case of public officials, 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 with reckless disregard for truth. In such a case, it would be enough for the 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. Where the publication is proved to be false and actuated by malice or personal animosity, it would have no defence and would be liable for damages. In matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen. However, judiciary which has power to punish for contempt of court and members of Parliament and state legislatures having privileges under Articles 105 and 194 are exceptions to this rule.

C. State cannot Sue for Damages for Defamation

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

It does not, however, mean that Official Secrets Act, 1923, or any similar enactment or provision having the force of law does not bind the press or media.

According to the Court, these issues were not exhaustively dealt with. The concept of impossibility of State being defamed by a media has been a well established principle of law enunciated in an English decision of 1993, *Derbyshire County Council v. Times Newspapers Ltd.*⁷ In this case it was emphatically declared that an individual occupying a position in the State Government or local authority had only a private right to claim damages for defamation, if the publication involves adverse comments on his functioning with regard to discharge of public duties. But he cannot make the claim in the name of the office/authority and use the money of that authority for fighting the case.

The rule in *New York Times v. Sullivan*,⁸ found acceptance by the Division Bench with reference to the Defamation as a restriction on press freedom. It was held:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

The Division Bench in this case opined that the Supreme Court had to wait for a proper case to make this a rule after studying its impact on Article 19(1)(a) read with clause (2) thereof, and sections 499 and 500 of Indian Penal Code. Thus in this significant decision, the Supreme Court has prepared a ground for making new legal principles on the above concepts, which may enhance the scope of press freedom in relation to commenting on the official conduct and limiting that freedom with regard to the right to privacy of a citizen.

The Supreme Court gave a note of caution, stating that the principles above mentioned were only the broad principles. They were neither

7. (1993) 2 WLR 449; (1993) All ER 1011.

8. 376 US 254; 11 L Ed 686 (1964).

exhaustive nor all-comprehending; indeed no such enunciation was possible or advisable. The Supreme Court was of the opinion that such a law should evolve in a case-by-case development, as these concepts were still in the process of evolution.

III. TELEPHONE TAPPING : RIGHT TO PRIVACY

In yet another significant decision, the Supreme Court held that the telephone tapping was an invasion of right to privacy under Article 21 and freedom of speech and expression under Article 19(1)(a). In *Peoples Union for Civil Liberties v. Union of India*⁹, the petitioner challenged the validity of telephone tapping under the guise of exercising the legal authority under section 5(2) of the Indian Telegraph Act, 1885. This section permits interception of messages on the reasons of "occurrence of public emergency" or "in the interest of public safety". The Court held that in the absence of just and fair procedure for regulating the exercise of power under section 5(2) of the Indian Telegraph Act, it was not possible to safeguard the rights of the citizens guaranteed under Articles 19(1)(a) and 21 of the Constitution. Under the guidelines laid down by the Supreme Court, an order for telephone tapping can only be issued by the Home Secretary of the Centre or State Governments. This order is subject to review by a high power review committee and the period for telephone tapping cannot exceed two months unless approved by the reviewing authority which can extend it up to six months. This power is given to the three member committee of Cabinet Secretary, Law Secretary and Secretary Communications at the central level and Chief Secretary, Law Secretary and another member other than Home Secretary at the State level. Telephone tapping also violates Article 19(1)(a) unless the restriction falls under the grounds listed in Article 19(2). When two persons are having conversation with each other, both are exercising the freedom of speech and expression and mutually communicating the ideas. Tapping is a violation of this freedom.

The right to freedom of speech and expression is considerably widened by the Supreme Court in a historic judgement in *Secretary, Ministry of I & B v. Cricket Association of Bengal*.¹⁰ In this case the Supreme Court held that the Government had no monopoly on electronic media and a citizen had under Article 19(1)(a) a right to telecast and broadcast to the viewers/listeners through electronic media any important event. The Court directed the Union to establish an independent and autonomous body to supervise the electronic media, *Doordarshan* and All

9. AIR 1997 SC 568.

10. (1995) 2 SCC 161.

India Radio, so that this media would be free from the shackles of the Government control. The Supreme Court held that the fundamental right to freedom of speech and expression includes right to communicate effectively and to a large population not only in this country but also abroad. A citizen should have access to this electronic media for communication. It also warned that the airways must be used for the public good because they were the property of the members of general public. Justice B.P. Jeevan Reddy suggested relevant amendments to a century old Indian Telegraph Act as there was tremendous change due to scientific and technological advancement in the field of communication.

IV. RIGHT TO REPLY: *LIC* CASE

In *Life Insurance Corporation of India v. Manubhai D. Shah*,¹¹ it was held that Article 19(1)(a) includes the right to propagate one's view and to answer criticism levelled against his view through print media or electronic media. A study paper alleged that Life Insurance Corporation is charging unduly high premiums. The LIC published a counter to that allegation in its in-house journal *Yoga Kshema*. The trustee, who prepared the study paper wanted a rejoinder to be published in the in-house journal. But the LIC refused to do so. It was held that refusal to publish rejoinder to the counter in its magazine is both unfair and unreasonable and that it was an in-house journal was no excuse. The Supreme Court held that the print media had the duty to publish views and counter views. If the article written by a person was criticised in a Magazine, that writer had a right to get his counter to be published in that magazine. In this case, the Supreme Court took up the appeal from the respondent trustee on different facts on the same point of law, i.e., the scope of freedom of speech. The trustee challenged the order of *Doordarshan* refusing to telecast the documentary film "Beyond Genocide" produced by the trust based on the Bhopal Gas Tragedy. The documentary was adjudged as the best non-feature film and awarded the Golden Lotus. It was also declared that all award-winning films would be telecast over *Doordarshan*. It was held:

A film maker has a fundamental right under Article 19(1)(a) to exhibit his film, and therefore onus lies on the party which claims that it was entitled to refuse enforcement of this right by virtue of law made under Article 19(2) to show that the film did not conform to the requirements of that law.

The Supreme Court said that it was not proper on the part of the Government to refuse to telecast on the ground that there was a criticism

11. (1992) 3 SCC 637.

against the Government and a comment that the litigation was pending in courts for a long time. The Apex Court said that these were not grounds at all. The Supreme Court rejected the appeals of LIC, and held:

LIC is a state within the meaning of Article 12 and therefore it must function in the best interest of the community. The Community is entitled to know whether or not this requirement is complied with by the LIC in its functioning.... Freedom to air one's views is the lifeline of any democratic institution and any attempt to stifle, suffocate or gag this right would sound a death knell to democracy and would help usher in autocracy or dictatorship.

V. ADVERTISEMENT : A PART OF PRESS FREEDOM

In *Tata Press Ltd v. Mahanagar Telephone Nigam Ltd*,¹² the Supreme Court held that a commercial advertisement or commercial speech was also a part of the freedom of speech and expression, which could be restricted only within the limitations of Article 19(2). The Nigam permitted contractors to publish telephone directories in "yellow pages" and to raise their revenue from advertisements. These "yellow pages" used to be added to the directory published by the Nigam in white pages. The Bombay High Court allowed the appeal of the Nigam, which sought a declaration that it alone had exclusive right to publish the telephone directory and that the Tata press had no right to publish the list of the telephone subscribers without its permission as it would be violation of Indian Telegraph Act. The Tata press went in appeal to Supreme Court. Admitting the appeal, the court held:

The advertisement as a "Commercial Speech" has two facts. Advertising which is no more than a commercial transaction, is nonetheless dissemination of information regarding the product-advertised. Public at large are benefited by the information made available through the advertisements. In a democratic economy, free flow of commercial information is indispensable. There can not be honest and economical marketing by the public at large without being educated by the information disseminated through advertisements. The economic system in a democracy would be handicapped without there being freedom of "Commercial speech". The public at large has a right to receive the commercial speech. Article 19(1)(a) of the constitution not only guarantees freedom of speech and expression, it

12. (1995) 5 SCC 139.

also protects the rights of an individual to listen, read and receive the said speech.

Supreme Court emphatically held that the right under Article 19(1)(a) could not be denied by creating a monopoly in favour of the Government, it could only be restricted on grounds mentioned in Article 19(2) of the Constitution.

This is a welcome deviation from the judgment of the Apex Court in *Hamdard Dawakhana v. Union of India*,¹³ wherein it was held that the commercial advertisement did not fall within the protection of freedom of speech and expression as such an advertisement had an element of trade and commerce. It was also held in that case that a law which put restrictions on the publication, through the press or other means, of advertisements to promote the sale of certain good did not violate the right to free speech or the press. But the later developments where the commercial information also became indispensable, it was rightly held in the Tata Press case that the people have right to listen and receive the commercial speech.

VI. PRIOR RESTRAINT ON FILM MEDIA

The Supreme Court justified the pre-censorship of film under Article 19(2) on the ground that films have to be treated separately from other forms of article and expression because a motion picture was able to stir up emotions more deeply than any other product or article. The classification of films between categories like "A" (for Adults only) and "U" (for all), was held to be valid in *K.A. Abbas. v. Union of India*.¹⁴ This position remained unaltered.

In another case the petitioner filed a petition in the court to quash the certificate of exhibition given to the film "Bandit Queen" and to restrain its exhibition in India. The petitioner contended that the depiction of the life story of Phoolan Devi in this film was "abhorrent and unconscionable and a slur on the womanhood of India". He also questioned the way and manner in which the rape was brutally picturised suggesting the moral depravity of the *Gujjar* community. Delhi High Court held that the rape scene was obscene and quashed the order of Tribunal granting "A" certificate to the film. The Supreme Court allowed the appeal and held that issuance of "A" certificate by Tribunal was valid. The Supreme Court said that the film must be judged in its entirety from the point of overall impact. Where theme of the film is to condemn degradation, violence and rape on women, scenes of nudity and rape and use of expletives to advance the

13. AIR 1960 SC 554.

14. AIR 1971 SC 481; and *LIC v. Manubhai D Shah*, (1992) 3 SCC 637.

message intended by the film by arousing a sense of revulsion against the perpetrators and pity for the victim is permissible, held the Supreme Court in *Bobby Art International v. Om Pal Singh Hoon* case.¹⁵

VII. BANDH AND FREEDOM OF EXPRESSION

The Supreme Court gave another significant verdict¹⁶ on the aspect of the freedom of expression. Upholding the historic judgment of the Kerala High Court¹⁷, the Apex Court said that there was no right to call or enforce *Bandh* which interfere with exercise of fundamental freedoms of other citizens, in addition to causing national loss in many ways. The Supreme Court held:

We are satisfied that the distinction drawn by the High Court between a *Bandh* and *Hartaal* is well made out with reference to the effect of a "Bandh" on the fundamental rights of other citizens. There cannot be any doubt that the fundamental rights of the people as a whole cannot be subservient to the claim of fundamental right of an individual or only a section of the people.

Though the *Bandh* is an expression of protest of a section of the people, a forced enforcement of that *Bandh* violates the fundamental right of carrying on business, of movement and other related fundamental rights, which cannot be valid. Thus the right to freedom of expression in the form of calling for and enforcing the *Bandh* is rightly restricted by the set of fundamental rights of other citizen or a group of people. The fundamental rights of society in general could be a valid restriction on the fundamental right to an individual or a section of the people.

VIII. FREEDOM OF PRESS AND CONTEMPT OF COURT

Causing Contempt of Court is not part of the freedom of press. In fact, contempt of court is a ground on which the press freedom can be restricted under Article 19(2). A news item stating that two sons of senior judge of the Supreme Court and two sons of the Chief Justice of India were favoured with the allotments of petrol outlets from the discretionary quota by the Petroleum Minister was published in some newspapers. The concerned editors, printers and publishers admitted that the news item was false and was published inadvertently and without any malice to the judiciary. "The Sunday Tribune" in its issue dated March 10, 1996 published an item with

15. (1996) 4 SCC 1.

16. AIR 1998 SC 184.

17. AIR 1997 Ker 291.

a caption "Pumps for All". A similar item also was published in "Punjab Kesari". Contempt proceedings were taken up on the petition of K.T.S. Tulsi, Additional Solicitor General and other senior advocates. Supreme Court held that the newspaper did not take even ordinary care to verify the truth of the allegations and did disservice to the society by disseminating false information affecting the credibility of newspaper and causing embarrassment to the Supreme Court. The Court said that obviously this could not be regarded as something done in good faith. However, the Supreme Court accepted the apology tendered by the journalists. The Court held :

He (senior journalist) has no doubt, committed serious mistake but he has realised his mistake and expressed sincere repentance and has tendered unconditional apology for the same. He was present in the Court and virtually looked to be gloomy and felt repentant of what he had done. This sufferance in itself is sufficient punishment for him. He being a senior journalist and an aged person and, therefore, taking lenient view of the matter his apology was accepted.

The Court directed the contemners to publish in front page of their respective newspapers within a box their respective apologies specifically mentioning that the said news items were absolutely incorrect and false.¹⁸ However, the Supreme Court in this judgment, reiterated the importance of a vibrant free press in a democracy in the following words:

Freedom of Press has always been regarded as an essential pre-requisite of a democratic form of Government. It has been regarded as a necessity for the mental health and the well being of a society. It is also considered necessary for the full development of the personality of the individual. It is said that without the freedom of press truth cannot be attained. The freedom of the press is regarded as "the mother of all other liberties" in a democratic society. A free and healthy Press is indispensable to the functioning of a true democracy. In a democratic set-up there has to be an active and intelligent participation of the people in all spheres and affairs of their community as well as the State. It is their right to be kept informed about current political, social, economic and cultural life as well as burning topics and important issues of the day in order to enable them to consider and form broad opinion about the same and the way

18. *In re Harijai Singh and another; In re Vijay Kumar*, AIR 1997 SC 73.

in which they are being managed, tackled and administered by the Government and its functionaries.

IX. CONCLUSION

The Supreme Court has set an agenda for development of law on the press freedom in *Auto Shankar*¹⁹ case. It laid down certain foundations for making new principles of law on this subject at an appropriate time in future. It was in fact waiting for a right case to arrive to study the impact of Article 19(1)(a) on the provisions of criminal defamation in Indian Penal Code, i.e., section 499 and 500. In principle the Supreme Court welcomed the wider interpretation of press freedom in *New York Times rule*²⁰ of US Supreme Court and *Derbyshire*²¹ case in England. These judgments enhanced the scope of commenting on the public conduct of the public officials and reduced the scope of individuals occupying the public positions using the public office and public money for pursuing the actions for damages in defamation. While effectively providing for an individual civil remedy for defamation in favour of individuals there is need to review the continuance of the criminal defamation in present form.

Another gray area of development for law is the broadcast media. After holding that the state had no monopoly over the air waves²², the necessity to make statutes to regulate the electronic media by relieving it from the shackles of government control. Exercise of press freedom in a vibrant democracy and its interpretation by active judiciary is a continuous process.

19. *Supra* n. 6.

20. *Supra* n. 8.

21. *Supra* n. 7.

22. *Supra* n. 10.