IN THE SUPREME COURT OF INDIA

(CRIMINAL ORIGINAL JURISDICTION)

SUO MOTO CONTEMPT (CRL.) NO. 1 OF 2020

IN THE MATTER OF:

IN RE:

VERSUS

PRASHANT BHUSHAN AND ANR. .... ALLEGED CONTEMNOR/ APPLICANT

SUMMARY OF SENIOR ADVOCATE DR. RAJEEV DHAVAN'S SUBMISSIONS ON SENTENCING OF PRASHANT BHUSHAN

TABLE OF CONTENTS

S. N.	PARTICULARS	PAGE NOS.
I.	BACKGROUND	2
II.	FACTORS RELEVANT TO SENTENCING	4
III.	THE OFFENDER	5
IV.	THE OFFENCE	7
V.	THE CONVICTING JUDGMENT	10
VI.	STATUTORY AND THE CONSTITUTIONAL POWER AND OTHER DEFENCES	14
VII.	APPLICABILITY IN THIS CASE AND COMMENTS BY OTHERS	32
VIII.	CONCLUDING STATEMENT	35

I. BACKGROUND

1.1 At the very outset, it is submitted that sentencing is a continuation of conviction and the same principles apply to both.

1.2 On 14 August 2020, the Supreme Court adjudged Prashant Bhushan, Advocate, guilty of contempt for scandalizing the authority of the court and for creating disrespect and disaffection for the authority of the court. Prashant Bhushan was held guilty of making two tweets which in the Court's view (as defined in Section 2(c)(i) of the Contempt of Courts Act 1971) had an effect that "*scandalises or tends to scandalise, or lowers the or tends to lower the authority of, any court*".

1.3 In essence, the Court:

(a) refused to accept that Bhushan acted bona fide (pr.69 p.100)

(b) denied the defence of 'truth' which is mandatory in law (pr. 71 p. 102) while, nevertheless, holding that the "*tweets were based on distorted facts*" (pr.75 p.107)

(c) claimed that the conviction was in the larger public interest (pr.72 p.103)

(d) sought succour from judgments in National Lawyers Campaign for Judicial Transparency v. Union of India ***(2019) SCC Online 411*** and Vijay Kurle ***(2020) SCC SC 407*** as precedents without distinguishing their facts (pr.74 p.106);

(e) summarised Bhushan's failure as follows:

"The alleged contemnor No.1 is expected to act as a responsible officer of this Court. The scurrilous allegations. Which are malicious in nature and have a tendency to scandalise the Court are not expected from a person, who is a lawyer of 30 years standing. In our considered view, it cannot be said that the tweets can be a fair criticism of the functioning of the judiciary made bonafide in the public interest" (pr.70 p.101);

(f) refuted without examination Bhushan's claim that in recent years the Supreme Court, especially the last 4 Chief Justices have contributed to the destruction of democracy (pr 66 pp.98-99) even though a detailed affidavit was before the court.

1.4 **Since we are at the stage of sentencing after conviction, the judgment is not being critiqued, but merely referred for the purposes of sentencing which can only take place in the context of the reasons for the conviction.**

THE TWEET

1.5 The tweets as may be reproduced for easy reference:

Tweet I:

"*CJI rides a 50 lakh motorcycle belonging to BJP leader at Raj Bhawan Nagpur, without a mask or helmet at a time at a time when he keeps the SC in Lockdown mode denying citizens their fundamental right to access to justice*"

Tweet 2:

"*When historians in future look back at the last 6 to see how democracy has been destroyed in India*

even without a formal Emergency, they will particularly mark the role of the of the last 4 CJIs"

The Court issued suo motu (on its own) notice including to Bhushan and the Attorney General.

1.6 ***Who was the complainant?*** His name was Mahek Maheshwari who reportedly was associated for some time with a prominent BJP member. Under the law, Rule 6 (2) of the Rules to Regulate Proceedings for Contempt of the Supreme Court, 1975, framed under Article 145 of the Constitution, a copy of the complaint must be supplied to the alleged contemnor (in this case Bhushan). The Supreme Court failed to do so even after Bhushan filed an application for the same.

The implications of this are far reaching because Bhushan and the public are entitled to know whether the complaint was malafide or even personally or politically motivated.

II. FACTORS RELEVANT TO SENTENCING

2.1. The factors relevant to sentencing are as follows:

(a) The Offender

(b) The Offence

(c) The Convicting Judgment

(d) Statutory and other Defences relating to (i) substantial interference with justice, (ii) truth, (iii) bonafide (iv) public interest in disclosure.

(e) Applicability in this case and comments by others.

Annexure: The S. Mulgaokar guidelines

2.2 These are independently examined below

III. THE OFFENDER

3.1 Prashant Bhushan is a lawyer of 35 years standing who has fearlessly pursued public interest causes at some personal and professional cost which have been successful to a considerable measure and have got mention and appreciation by the Court.

3.2 In particular he has been fiercely involved in issues of corruption including those of the judiciary and is the founding member of the Campaign for Judicial Accountability (CJAR) which included senior counsels like Anil Divan, Ram Jethmalani, Ashok Desai, Shanti Bhushan, and many others..

3.3 Prashant Bhushan's record on judicial accountability and the public interest speaks for itself. A few of the cases where Mr. Bhushan has been involved can be divided as follows:

(a) Corruption cases and causes
(b) Public Interest Causes

These are delineated below.

(a) Corruption cases

3.4 These cases and campaigns included the following:

- Case concerning the impeachment of Justice V. Ramaswamy **(1991) 4 SCC 699**
- The Coal Mining case – (**2014) 9 SCC 614**
- The Goa Mining case **(2018) 4 SCC 218**

- Odisha Mining case **(2014) 14 SCC 155, (2017) 9 SCC 499**
- Karnataka Mining Case **(2013) 8 SCC 219**
- Price Waterhouse case on remittances abroad by foreign firms **(2018) 14 SCC 360**
- 2G case **(2012) 3 SCC 1**
- FCRA and funds to political parties **(2014) SCC Online Del 1321**
- Chief Vigilance Commissioner's appointment **(2011) 4 SCC 1**
- The SIT in CBI Director's case **(2014) 9 SCC 614**
- The Lokpal Case **(2017) 7 SCC 158**

(b) Public Interest Causes

3.5 The public interest causes and cases include:

- The Narmada case **(2011) 7 SCC 639**
- The Bofors case **(1992) 4 SCC 305**
- The Police Reforms case **(2006) 8 SCC 1**
- HPCL Privatization case **(2003) 7 SCC 532**
- The Passive Euthanasia case **(2018) 5 SCC 1**
- The Misuse of Government Advertisements case **(2015) 7 SCC 1**
- The Street Vendors case **(2014) 1 SCC 490**
- The Rickshaw Pullers case (**2012) 12 SCC 483**
- The Singur Land Acquisition case **(2017) 11 SCC 601**
- Drought Management case **(2016) 7 SCC 498**
- The Gram Nyayalas case **[W.P. (C) 1067/2019]**
- The Electoral Bonds case **[W.P.(C) 880/2017]**

This is not an exhaustive list and shows the time and effort put by Mr. Bhushan in advocating in Public Interest.

3.6 Mr. Bhushan's record goes to (a) background and (b) bonafides.

IV. THE OFFENCE

Fundamental Principle of Criminal Law.

4.1 **It is a fundamental principle of criminal law that**

(i) The offence must be clear without ambiguity

(ii) A potential offender must know and understand whether and when he is guilty of the offence.

4.2 The offence of 'scandalizing the court' is notoriously vague. It has not been defined anywhere by statute (Section 2(c)(i)) or by judgments. It has rightly been called a *'vague and wandering' jurisdiction.* Such offences where a person or citizen cannot know the nature of the offence should ideally be unconstitutional (See Shreya Singhal (2015) 5 SCC 1), however that is not the purpose of this submission.

The purpose of raising this is that an undefined or ambiguously defined offence has to be handled with care, and used only in extreme cases. As Justice Krishna Iyer put it in Baradakanta Mishra ***(1976) 3 SCC 327*** at pr. 49

> *"...the Court will proceed to exercise the jurisdiction with scrupulous care and in cases which are clear and beyond all reasonable doubt"*

This applies both to conviction and sentencing.

4.3 Words like 'scurrilous' or 'shocking the conscience' are meaningless and what CL Stevenson in an article in 1939 in Mind called exercises in 'persuasive definition' which do not define but cloud the mind with a definition.

4.4 Look at the inconsistency by way of following examples relevant to sentencing.

* In Namboodripad's case, ***(1970) 2 SCC 325,*** a politician was found guilty of contempt because he said that the judges have a class bias but greatly reduced his sentence to a token fine.

* In the P.N. Duda case (1988) 3 SCC 167, Minister Shiv Shankar had stated in a speech which was carried in a newspaper what was alleged to be slander cast against the court, both in respect of the judges and its working. Among other things he stated "Anti social elements i.e FERA violators, bride burners and a whole horde of reactionaries have found their haven in the Supreme Court." Yet, according to the Court, he was not guilty of contempt for the comments.

4.5 A more telling example is In Re Times of India and the Hindu ***(2013) Cr.L. J. 932, where*** Chief Minister Ms. Mamta Banerjee gave a speech in which she said that judgments were delivered in exchange for money and "*corruption has made inroads into the judiciary and democracy as a whole*". After counselling restraint to the Chief Minister, the Court did not indict her for contempt. ***Chief Justice Arun Mishra (as he then was) was part of the bench, the judgment of which was delivered by Justice Joymala Bagchi.***

The above shows inconsistency and latitude. There are even more remarkable cases about contempt for objecting to a judge using a red light on his car.

4.4 The very jurisdiction of contempt and scandalizing as enunciated in this case convicting Mr. Bhushan (hereinafter referred to as "convicting case") is vague and colonial.

(i) Contempt Jurisdiction is based on Justice Wilmot's judgment in R. v. Almon ***(1765) Wilm 243; 97 ER 94*** on summary procedures and scandalizing which was never delivered but published by his son in 1802 and remains the fountainhead of our law of contempt in this regard.

(see the Delhi Judicial Service Case ***(1991) 4 SCC 406)***

(ii) In Mcleod v. St Aubyn ***(1899) AC 549 (PC)***, the Privy Council stated that contempt for scandalizing was only for Britain's colonies.

(iii) Revived in R v. Gray (1900) till R. v Colsely (1931) after which no conviction or sentence has been made in England (This is firmly noted in Dhoorika v. DPP ***(2015) AC 875***). Thus, in the last century, this jurisdiction has been used only for 31 years and never after that in England since 1931.

(iv) In R v Blackburn ***(1968) 1 ALL ER 763*** Lord Denning refused to convict or sentence for contempt.

(v) In the Spycatcher affair, the Daily Mirror had a banner heading stating in bold "*YOU FOOLS*" and put the pictures of the Law Lords upside down. No contempt was initiated.

(vi) In 2019 in the Parliament suspension case the English Supreme Court judges were called "*enemies of democracy*". No action was taken.

(vii) In England and Australia the offence and its sentencing has been abolished

Thus, punishment for contempt seems to be an Indian phenomenon where the greatest and most powerful court in the world has to protect itself using an archaic law and ponder over sentencing to protect the institution from persons exercising free speech and opinions.

V. THE CONVICTING JUDGMENT

5.1 Sentencing follows the convicting judgment as to the nature of the offence and the findings.

5.2 The convicting judgment is 108 pages long with 77 paragraphs. The discussion on conviction is from p.93-108, prs. 60-77.

The discussion of the law held to "*be no more res integra*" (pr16) is 77 pages (pp.14-93, prs.16-60). Since a large part of the judgment is cut & paste for pages and pages, especially Vijay Kurle's case, which occupies 26 pages (pp14-40 pr.17), we need to look at ***what is said for guidance on sentencing*** from the following. That is, if the following elements are missing sentence should not follow conviction ***which can be suo-motu withdrawn***

(i) In SuoMotu cases relying on PN Duda's case (at pr. 18 p.38). The convicting judgment observed

> "*The only requirement is that the procedure to be followed is required to be just and in accordance with the principles of natural justice*"

(ii) Relying in Brahma Prakash and HiraLal Dixit (at pr.23 p.47 (quoting from the latter) :

> "*...it is not necessary that there should in fact be an actual interference with the course of the administration of justice but that it is enough if the offending publication is likely or if it tends in any way to interfere with the proper administration of law*"

(Note: After Section 13 was amended in 2006 this test is otiose because the test is "substantial interference with justice" and truth

Further there are other tests in the convicting judgment which are at odds with this test)

(iii) EMS Namboodripad ***(1970) 2 SCC 325*** (ref. at pr. 24-25 pp.) CK Daphtary ***(1971) 1 SCC 626*** are not relevant and are superseded by the Contempt of Courts Act, 1971, as amended in 2006. These tests for conviction and sentencing are now irrelevant and per incuriam. Besides Namboodripad is superseded by PN Duda v. Shiv Shankar (1988) 3 SCC 167

(iv) Almon (1765) Wilmot's Notes on Opinions 243 (97 ER 94) was never delivered and not a foundation and discarded elsewhere

(v) The real test referred to in in Baradakant Mishra ***(1976) 3 SCC 327*** at pr. 49 (quoted in the convicting judgment(at pr. 32 p.,61) is to

> ***"...excercise the jurisdiction with scrupulous care and in cases which are clear and beyond all reasonable doubt..."***

It is Akin to a public mischief which has an tangible effect on people's reactions or public order (Baradakant at pr.50 quoted at pr.32 p62)

This is the real test that cuts through the verbiage.

(vi) In Baradakant (supra) at pr.88 quoted in the convicting judgment at pr.36 p.64-5,

> ***"88.*** *Even so, if Judges have frailties — after all they are human — they need to be corrected by independent criticism. If the judicature has serious shortcomings which demand systemic correction through socially-oriented reform initiated through constructive criticism, the contempt power should not be an interdict. All this, far from undermining the confidence of the public in Courts, enhances it and, in the last analysis, cannot be repressed by indiscriminate resort to contempt power. Even bodies like the Law Commission or the Law Institute and researchers, legal and sociological, may run "contempt" risks because their professional work sometimes involves unpleasant criticism of judges, judicial processes and the system itself and thus hover perilously around the periphery of the law if widely construed. Creative legal journalism and activist statesmanship for judicial reform cannot be jeopardised by an undefined apprehension of contempt action."* *(emphasis added)*

This once again is the second test i.e. not to stifle research, criticism, and popular comment by ordinary men and women and especially by journalists.

(vii) The test laid down in the convicting judgment (at pr. 13 p39) is that,

> ***"criticism based on an obvious distortion or gross mis-statement and made in a manner***

which seems designed to lower respect for the judiciary and destroy public confidence in it, cannot be ignored"

Here the test is much more rigorous and objective, but was not applied. The words "obvious distortion" or "gross mis-statement" and "designed" are important.

(viii) The Mulgaonkar Guidelines (at pr, 26-39) quoted in full in the convicting judgment (at pr. 41 p.68-74) is summarised at pr 42-3 p.74 of the convicting judgment to counsel

"wide economy of use (where) justice is jeopardized by a gross and/or unfounded attack where the attack is calculated to obstructed or destroy judicial process... (and) scurrilous, offensive , intimidatory or malicious beyond condonable limits"

Note: This caution moves the Court away from subjectivity. The Mulgaonkar Guidelines are annexed

(ix) Quoting P.N. Duda at pr.44 p.76, the convicting judgment lays emphasis on the free market of ideas

(x) Advocates should be punished with extreme caution (pr. 46 p.75)

(xi) There must exist a tendency to create disaffection and disrespect to erode the judicial system pr.49 p.82)

(xii) The statements must not be actuated by malice (pr50 p84)

(xiii) Fair criticism of a judge if made in good faith in the public interest and

"for good faith the courts have to seen all the surrounding circumstances including the person responsible for comments, his knowledge in the fields regarding which the comments are made

and the intended purpose sought to be achieved" (pr.56 p.90)

Once again what is emphasized is all "circumstances" "the person" and the "purpose"

(xiv) Article 19 (1) (a) is applicable in all cases (pr.57 p.91)

5.3 Thus, it is submitted even in sentencing what is needed is objectivity in relation to the person and the actual effect. (See Murray & Co. V. Ashok Kr. Newatia ***(2000) 2 SCC 367***

5.4 ***The problem with a judgment which is cut paste with so many quotations is that it's true worth as ratio is lost and becomes unbalanced and contradictory.***

5.5 The 14 aspects culled above represents a framework which goes against the subjective approach in other paragraphs.

VI. Statutory and The Constitutional Power and Other Defences

(a) The Contempt of Court Act, 1971

6.1 There is no conflict between the constitutional jurisdiction under Article 129 and 215 and the Contempt of Court's Act 1971 (hereafter Act of 1971) and the two have to be reconciled so as to make the former less subjective and the latter more objective. Objectivity and a workable test is crucial.

- Pallav Sheth ***(2001) 7 SCC 549*** is a 3 judge judgement which clearly states that the power of punishment for contempt under article 129 has to be exercised in consonance with the Contempt of Court Act, 1975

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

decisions of this Court clearly show that this power cannot be abrogated or stultified. But if the power under Article 129 and Article 215 is absolute, can there by any legislation indicating the manner and to the extent that the power can be exercised? If there is any provision of the law which stultifies or abrogates the power under Article 129 and/or Article 215, there can be little doubt that such law would not be regarded as having been validly enacted. It, however, appears to us that providing for the quantum of punishment or what may or may not be regarded as acts of contempt or even providing for a period of limitation for initiating proceedings for contempt cannot be taken to be a provision which abrogates or stultifies the contempt jurisdiction under Article 129 or Article 215 of the Constitution.

31. This Court has always frowned upon the grant or existence of absolute or unbridled power. Just as power or jurisdiction under Article 226 has to be exercised in accordance with law, if any, enacted by the legislature, it would stand to reason that the power under Article 129 and/or Article 215 should be exercised in consonance with the provisions of a validly enacted law. In case of apparent or likelihood of conflict the provisions should be construed harmoniously."

- Maheshwari Peri ***(2016) 14 SCC 251*** at pr. 10 after invoking Pallav Seth observed:

  " Be it an action initiated for contempt under Article 129 of the Constitution of India by the Supreme Court or

under Article 215 of the Constitution of India by the High Court, it is now settled law that the prosecution procedure should be in consonance with the Act , as held by this Court in Pallav Seth"

This is relevant for lapses of procedure under the rules in not giving Bhushan the complaint and not examining who the complainant was.

(b) Section 13, Truth and Substantial Interference

6.2 Apart from Section 8 (other defences not affected which retain common law and other defences) and Section 9 (on not enlarging the scope of contempt), the new amended Section 13 in 2006 states:

> ***13. Contempt's not punishable in certain cases - Notwithstanding anything contained in any law for the time being in force -***
>
> ***(a) no court shall impose a sentence under this Act for a contempt of court unless it is satisfied that the contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice;***
>
> ***(b) the court may permit, in any proceeding for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is bona fide.***

<u>Substantial Interference</u>

6.3 Section 13 (a) requires that the Court "is satisfied that the contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice". The terms 'is satisfied' and 'substantially' are not mere incantations but place a responsibility on the Court to examine the extent of interference and be fully satisfied.

This is stated in full force in Murray & Co. V. Ashok Kr. Newatia ***(2000) 2 SCC 367*** at pr. 20

> ***20.*** *Incidentally, Section 13 of the Act of 1971 postulates no punishment for contemptuous conduct in certain cases and the language used therein seems to be with utmost care and caution when it records that unless the court is satisfied that the contempt is of such a nature that the act complained of substantially interferes with the due course of justice, the question of any punishment would not arise. It is not enough that there should be some technical contempt of court but it must be shown that the act of contempt would otherwise substantially interfere with the due course of justice which has been equated with "due administration of justice". Jenkins, C.J. in an old Calcutta High Court decision in the case of Legal Remembrancer v. Matilal Ghose observed:*
>
> *"Then this motion raises a question of high importance, which it would not be right for me to pass by without remark. I allude to the question — what circumstances ordinarily justify recourse to this summary process of contempt.*
>
> *It is not enough that there should be a technical contempt of court: it must be shown that it was probable the*

publication would substantially interfere with the due administration of justice."

(emphasis added)

After relying on other authorities (pr.21-22), the Court concludes at pr. 23)

"The statute therefore puts an obligation on to the Court to assess the situation itself as regards the factum of any interference with the course of justice or due process of law"

In Prashant Bhushan's case no such inquiry has taken place and the court has assumed that what he said was contempt as interfering with justice. This is a failure of the Court's obligation which goes towards denying the passage of any sentence.

6.4 This amendment to Section 13 of the Act came to be considered by this Hon'ble Court, in its judgment in Indirect Tax Practitioners' Assn. v. R.K. Jain, (2010) 8 SCC 281. This Hon'ble Court accepted the legislative mandate and dismissed with costs a contempt petition which was filed with the previous approval of the then Attorney General. This Hon'ble Court held:

"*39. The matter deserves to be examined from another angle. The substituted Section 13 represents an important legislative recognition of one of the fundamentals of our value system i.e. truth. The amended section enables the court to permit justification by truth as a valid defence in any contempt proceeding if it is satisfied that such defence is in public interest and*

the request for invoking the defence is bona fide. In our view, if a speech or article, editorial, etc. contains something which appears to be contemptuous and this Court or the High Court is called upon to initiate proceedings under the Act and Articles 129 and 215 of the Constitution, the truth should ordinarily be allowed as a defence unless the Court finds that it is only a camouflage to escape the consequences of deliberate or malicious attempt to scandalise the court or is an interference with the administration of justice. Since, the petitioner has not even suggested that what has been mentioned in the editorial is incorrect or that the respondent has presented a distorted version of the facts, there is no warrant for discarding the respondent's assertion that whatever he has written is based on true facts and the sole object of writing the editorial was to enable the authorities concerned to take corrective/remedial measures.

...

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

A Constitution Bench of this Hon'ble Court in *Subramanian Swamy v. Arun Shourie*, (2014) 12 SCC 344, approved the above judgment and stated:

> "*13.* ***The legal position with regard to truth as a defence in contempt proceedings is now statutorily settled by Section 13 of the 1971 Act (as substituted by Act 6 of 2006).***
>
> *...*
>
> *15. A two-Judge Bench of this Court in R.K. Jain [Indirect Tax Practitioners' Assn. v. R.K. Jain, (2010) 8 SCC 281 : (2010) 3 SCC (Civ) 306 : (2010) 3 SCC (Cri) 841 : (2010) 2 SCC (L&S) 613] had an occasion to consider Section 13 of the 1971 Act, as substituted by Act 6 of 2006.*
>
> *...*
>
> *Thus, the two-Judge Bench has held that the amended section enables the Court to permit justification by truth as a valid defence in any contempt proceedings if it is satisfied that such defence is in public interest and the request for invoking the defence is bona fide.* ***We approve the view of the two-Judge Bench in R.K. Jain*** *[Indirect Tax Practitioners' Assn. v. R.K. Jain, (2010) 8 SCC 281 : (2010) 3 SCC (Civ) 306 : (2010) 3 SCC (Cri) 841 : (2010) 2 SCC (L&S) 613]."*

(c) Truth

6.5 Truth is an absolute defence in the public interest. Thus, the 'truth value' of the tweets must be assessed.

(i) First Tweet

6.6 The following statements of the First Tweet are undeniably true:

(i) The CJI was sitting on a Harley Davidson worth 50 lakhs owned by a BJP person.

(ii) He was not wearing a mask

(ii) Some others around him were also not wearing a mask

(iii) This happened at a time when the Court was not functioning normally due to COVID

v) The convicting judgment states that during COVID from March to August 2020, the Court heard 12478 matters and 686 petitions. Taking these figures as true, two issues arise: a) what would have been the number of cases heard and decided during this period if the court had been normally functioning, since during virtual hearing far fewer benches were sitting and far fewer cases listed before each bench as compared to normal times; and

b) whether the court could hear during this period important cases such as challenge to the CAA , Kashmir (Article 370), Killings and atrocities, issues relating to livelihood and hunger, and habeas corpus matters, etc.

6.7 What is important is ***Chief Justice Bobde's own estimate of how the Court's work was affected***. This was also mentioned in Prashant Bhushan's reply affidavit to the contempt notice. In Suo Moto Writ Petition no. 8 of 2020, In Re: Financial aid for members of bar affected by pandemic, *vide* order dated 22nd July 2020, the Supreme Court has itself admitted that with the courts being closed, lawyers have been deprived of the sources of earning their livelihood. The order states:

"...We are conscious of the fact that the advocates are bound by Rules which restrict their income only to the profession. They are not permitted to earn a livelihood by any other means. In such a circumstance, the closure of the courts has deprived a sizable section of the legal profession of income and therefore livelihood. In these dire circumstances there is a constant demand to enable the resumption of the income from the profession by resuming the normal functioning of Courts in congregation..." *(emphasis added)*

6.8 Thus the first tweet was absolutely true and in public interest and that 'the truth' was a complete defence.

(ii) Second Tweet

6.9 This tweet is in three parts:

(a) The opinion that democracy has been substantially destroyed in the country in the past 6 years. This part the court did not go into.

b) The opinion that history will not look kindly on the role of the Court in protecting democracy in the last six years.

This opinion has been shared by many on a number of occasions which were quoted in the reply affidavit including four senior judges of the Supreme Court who dissented in public in January 2018 against the Chief Justice of India in a famous press conference

(c) Particularly the role of the last four Chief Justices

Bhushan's Affidavit in Reply clearly lays down answers based on facts and justifications especially:

(i) Role of the Supreme Court and the last four CJIs over the past six years (pp.55-62)

(ii) On Chief Justice Khehar (pp. 62-75)

(iii) On Chief Justice Mishra (pp.75-85)

(iv) Supreme Court Judges' Press Conference (pp.85-99)

(v) On Chief Justice Gogoi (pp99-117)

(vi) Chief Justice Bobde (pp117-134)

The affidavit is fully backed up by details and materials on how and why Bhushan came to this opinion.

6.10 Thus, the defence of truth was not examined at all in the convicting judgment, and needs to be examined at this state of sentencing in compliance with Section 13(b) which states that it can be raised "in any proceedings".

(d) *Free Speech*

Article (19)(1)(a)

6.11 Article 19(1)(a) guarantees the fundamental right to freedom of speech and expression.

Article 19(2) provides as follows:

"2 Nothing in sub-clause (a) shall affect the operation of any existing law, or prevent the State from making any law, **in so as far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause** in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or

morality or in relation to contempt of court, defamation or incitement to an offence."

6.12 While Articles 129 and 142(2) give the power to the Supreme Court to punish for contempt of itself, it is submitted that it cannot be read to override Article 19(1)(a) read with Article 19(2) of the Constitution. Contempt can be both civil and criminal and it can arise by disobedience of court orders, interference with court proceedings or with administration of justice or by way of speech which may be held to "scandalize the court" or "lower the authority of the court".

It is submitted that any contempt arising from speech can only be restricted by way of reasonable restrictions under 19(2) framed by law, for contempt. The law on this is the Contempt of Courts Act, and therefore any punishment for contempt by speech, will necessarily have to be subject to the restrictions imposed by the Contempt of Courts Act.

To hold that Article 129 give a carte blanche to the Supreme Court to impose any punishment (different from or exceeding the maximum prescribed under the Contempt of Courts Act) would mean that the Supreme Court acting under 129 can ride rough shod over Article 19(1)(a) read with Article 19(2) which could never have been the intended. The only way to harmonize Article 129 with article 19 would be to say that while the Supreme Court as a court of record would enjoy inherent powers to punish for other contempt such as disobedience of courts order or interference with court proceedings and could possibly impose a punishment

different from what is prescribed by the contempt of courts Act, it cannot do so when it comes to punishment for contempt for speech. It would in fact make 19(1)(a) and 19 (2) otiose in respect of the Supreme Courts powers to punish for contempt. It is relevant that Article 142(2) also makes the power of the Supreme Court to punish for contempt, subject to a law made by Parliament.

6.13Free speech, though not absolute is a highly valued right.

(e) ***Freedom of the Press***

(a) <u>The Constitutional dispensation</u>

Free Speech is guaranteed by Article 19 (1) and subject to the limitations in Article 19 (2).

(b) <u>The Importance and priority of free speech</u>

6.14 Free Speech is essential to a democracy

- In Maneka Gandhi v. Union of India ***(1978) 1 SCC 248***, Bhagwati J. said:

  "Democracy is based essentially on free debate and open discussion, for that is the only corrective of Government action in a democratic set up. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently excercise his right of making a choice, free

and general discussion of public matters is absolutely essential"

The press and media as possessed of institutional rights to ensure it's effective functioning (see Sakai ***(1962) 3, SCR 842***, Bennem Coleman ***(1972) 2 SCC 788*** Express Newspapers (P) ltd. V. Union of India, ***(1959) SCR 12*** India Express Newspaper v Union of India, ***(1985) 1 SCC 641***, Secy. Ministry of Information and Broadcasting Govt of India Cricket Association of Bengal, ***(1995) 2 SCC 161***). The Supreme Court in the Odyssey Communications Pvt. Ltd. v. Lok Vidyan Sangatana, ***(1988) 3 SCC 410*** pr. 5 concerning the Hon-Anhoni film stated

"Freedom of expression it a preferred right which it always zealously guarded by the court"

It is fundamental to a democracy, as stated in S Rangarajan v. P. Jagjeevan Ram ***(1989) 2 SCC 574***, pr. 35, 36 and 39, that

"In a democracy it is not necessary that everyone should sing the same songs" *(emphasis added)*

Free Speech includes the right to circulate one's views. As early as 1950, in Romesh Thapar V State of Madras, ***1950 SCR 594***, a case of pre-censorship of a newspaper, the court stated

"Turning now onto merits, there can be no doubt that freedom of speech and expression include the propagation

of ideas and that freedom is ensured by freedom of circulation...."

Such a right includes the freedom of circulation

"...(F)reedom of speech and expression includes freedom of propagation of ideas which freedom is ensured by the freedom of circulation ..."

(Express Newspaper ***(1959) SCR 12*** at pp. 121)

As was reiterated in the famous Newspant case, Bennett Coleman ***(1972) 2 SCC 788***, pr. 34

"Publication means dissemination and circulation"

No less the right of free speech also includes the right of others to receive ideas. In the Broadcasting case ***(1995) 2 SCC 161***, the court stated:

"The freedom to receive and to communicate information and idea without interference is an important aspect of the freedom of free speech and expression." (pr. 36)

"..The freedom of speech and expression includes right to acquire information and to disseminate it .. The freedom of the press in terms includes right to circulate and also determine the volume of such circulation" (pr.43)

6.15 This right to know is a recognized part of the remit of Article 21 protecting the freedom of life and liberty of every person In Reliance Petrochemicals case ***(1988) 4 SCC 592*** it was observed:

"We must remember that the people at large have right to know in order to be able to take part in a participatory

development in the industrial life and democracy. Right to know it a basic right which citizens of free country aspire in the broder horizon of the right to life in this age in our land under Article 21 of our Constitution. That right has reached new dimensions and urgency. Taht right puts greater responsibility upon those who take upon themselves the responsibility to inform"

6.16 In Secy. Ministry of Information and Broadcasting Govt. of India vs. Crisket Association of Bengal, ***(1995) 2 SCC 161*** the Supreme Court observed:

"One-sided information, disinformation, mis-information will equally create an uninformed citizenry which makes democracy a farce.... Freedom of speech and expression includes right to impart and receive information which includes freedom to hold opinions." (pr.82, p. 229)

6.17 In Dinesh Trivedi, MP and Ors v. Union of India ***(1997) 4 SCC 306*** at pr. 19 it had been observed

"Democracy exacts openness and openness is concomitant of a free society and the sunlight is a best disinfectant".

6.18 In State of Uttar Pradesh v. Raj Narain ***(1975) 4 SCC 428***, at pr.74 it had been observed:

"In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearings. This 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"

(f) Free Speech as priority over other rights

6.19 In the Rangarajan case ***(1989) 2 SCC 574*** concerning the censorship of the film Ore Oru Gramathile, the court indicated how the balance is to be worked out at pr.45:

"There does indeed have to be a compromise between the interest of freedom of expression and special interests. But we cannot simply balance the two interests as if they are of equal weight. Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should has proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the ation contemplated like the equivalent of a "spark in a powder keg"

(g) Test in Pleading and good faith

6.20 In the test suggested for the press it fact on irrefutable evidence. No doubt restraint is are called for, Publication in "good faith" (as defined in Section 3(22) of the General Clause Act) should not be subjected to punitive or censorial action.

- Section 3(22) the General Clauses Act reads as follows:
  "Thing shall be also be done in "good faith" where it is in fact done honestly, whether it is done negligently or not."
- A similar sentiment is expressed in the Reynolds Case [HL], ***[1999] 4 All ER 609***, 615:

  " So much so, that the time has come to recognize that in this context the epithet 'fair' is now meaningless and misleading. Comment must be relevant to the fasts to which it is addressed. It cannot be used as a cloak for mere invective. But the basis of our public life is that the crank, the enthusiast, may say what he honestly thinks as much as the reasonable person who sits on the jury. The true test is whether the opinion, however exaggerated, obstinate or prejudiced, was honestly held by the person expressing it."
- This view has been further followed by the UK Supreme Court in Flood v. Times Newspapers Ltd. ***[2012 UKSC] 11***.

6.21 It should be valid that the General Clauses Act shall apply to constitutional interpretation including, perforce the exercise of power under Article 129 and 215. Article 367 reads

*367. **Interpretation** -(1) Unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under article 372, apply for the interpretation of this Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India.*

(h) Proportionality

6.22 Reasonable means proportionality in favour of the rights which are fundamental and not the limitations.

It is submitted that the key word in Article 19 (2) is "reasonable"

A mere reference to the categories (e.g. defamation) does not silence free speech

Reasonableness means both "substantive and procedural reasonableness and imports proportionality"

- State of Madras VG Rao ***(1952) SCR 597*** at p.607, 611.
- Chintaman Rao v. State of M.P., ***(1950) SCR 759*** at p.763
- Papanasam Labour Union ***(1995) 1 SCC 501*** at pr.15
- While legislation and Justice Jeevan Reddy in State of AP v. McDowells and co., ***(1996) 3 SCC 709***, at pg.737 questioned whether this applies to legislation and Justice Jagannath Rao left this open in Union of India v G. Ganayutham, ***(1997) 7 SCC 463***, at pr.22-31 in respect of administrative law. The better view is that it applies across the board
- On proportionality as the least invasive approach see Teri Oat Estates (P) Ltd. v. U.T., Chandigarh, ***(2004) 2 SCC 130*** at pr.40-53; Om Kumar v. Union of India. ***(2001) 2 SCC 386*** at pg.407; Anuj Garg v. Hotel Assn, of India, ***(2008) 3 SCC I*** at pg.19; All India Railway Recruitment Board v. K. Shyam Kumar, ***(2010) 6 SCC 614*** at pr.36, 40-42 (where both tests the wednesbury amd proper)

(i) Bonafide

6.23As stated earlier since under Article 367 the General Clauses Act applies to interpret the Constitution. The meaning of bona

fide must be taken from Section 3(22) of the General Clauses Act 1897

(22) a thing shall be deemed to be done in "good faith" where it is in fact done honestly, whether it is done negligently or not;

There can be little doubt that the opinions of Prashant Bhushan were bona fide and devoid of malice.

6.14 Thus a case is made out for recalling the conviction order and not inflicting or awarding punishment.

VII. APPLICABILITY IN THIS CASE AND COMMENTS BY OTHERS

7.1 Many comments have been made in the past about corruption in the Supreme Court and that things do not augur well for the Court

These include ex-Chief Justice Bharucha , indeed, the Attorney General himself.(attach Attorney's statement)

On this basis, the Attorney General has counselled against punishment.

7.2. Retired Justices M B Lokur, Kurian Joseph and AP Shah and many jurists, journalists and others stand by Prashant Bhushan's statement.

We need to ask whether they are also guilty of contempt as also others in the press because repeating or supporting a statement is also a publication.

Justice Lodha has also criticised the Court's order

(a) Other comments

7.3 It is necessary to reiterate Lord Atkin's statement in Ambard ***(1936) 1 All ER 704***

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

(emphasis added)

(b) Contempt action against an Advocate

7.4 This Hon'ble Court has also cautioned against debarring any advocate from appearing and said that this should be done only in very rare cases as a last resort, only after giving a specific notice for the same. In its judgment in R.K. Anand v. Delhi High Court, ***(2009) 8 SCC 106***, this Court had held:

"241. Lest we are misunderstood it needs to be made clear that the occasion to take recourse to the extreme step of debarring an advocate from appearing in court should arise very rarely and only as a measure of last resort in cases where the wrongdoer advocate does not at all appear to be genuinely contrite and remorseful for his act/conduct, but on the contrary shows a tendency to repeat or perpetuate the wrong act(s).

242. Ideally every High Court should have rules framed under Section 34 of the Advocates Act in order to meet with such eventualities but even in the absence of the rules the High Court cannot be held to be helpless against such threats. In a matter as fundamental and grave as preserving the purity of judicial proceedings, the High Court would be free to exercise the powers vested in it under Section 34 of the Advocates Act notwithstanding the fact that rules prescribing the manner of exercise of power have not been framed. But in the absence of statutory rules providing for such a course an advocate facing the charge of contempt would normally think of only the punishments specified under Section 12 of the Contempt of Courts Act. He may not even imagine that at the end of the proceeding he might end up being debarred from appearing before the court. ***The rules of natural justice, therefore, demand that before passing an order debarring an advocate from appearing in courts he must be clearly told that his alleged conduct or actions are such that if found guilty he might be debarred from appearing in courts for a specific period. The warning may be given in the initial notice of contempt issued under Section 14 or Section 17 (as the case may be) of the Contempt of Courts Act. Or such a notice may be given after the proceeded is held guilty of criminal contempt before dealing with the question of punishment.****"*

VIII. CONCLUDING STATEMENT

8.1 From this it is clear that

(i) Bhushan's comments were opinion made in good faith founded on true facts.

(ii) Similar opinions were made before as demonstrated by the Attorney General

(iii) In the present controversy similar comments are made by Justices Lokur, Kurian Joseph and A.P. Shah, Arun Shourie and others in the public domain and reported by newspapers and TV. It would follow that they were all in contempt

(iv) There should not be any attempt to coerce the contemnor into making on apology on the basis that nothing else would be acceptable.

8.2 It is submitted

(a) the convicting judgment should be recalled suo motu.

(b) In any event no sentence be imposed.

Filed by:

KAMINI JAISWAL
ADVOCATE FOR THE RESPONDENT NO. 1

Date: 24.08.2020
New Delhi

ANNEXURE: Observations of Krishna Iyer, J. in ***Re: S. Mulgaokar; (1978) 3 SCC 339***

The following observations of Krishna Iyer, J. in ***Re: S. Mulgaokar***:

> ***"26.*** *What then are the complex of considerations dissuasive of punitive action? To be exhaustive is a baffling project; to be pontifical is to be impractical; to be flexible is to be realistic. What, then, are these broad guidelines not a complete inventory, but precedentially validated judicial norms?*
>
> ***27.*** *The first rule in this branch of contempt power is a wise economy of use by the Court of this branch of its jurisdiction. The Court will act with seriousness and severity where justice is jeopardised by a gross and/or unfounded attack on the Judges, where the attack is calculated to obstruct or destroy the judicial process. The Court is willing to ignore, by a majestic liberalism, trifling and venial offences — the dogs may bark, the caravan will pass. The Court will not be prompted to act as a result of an easy irritability. Much rather, it shall take a noetic look at the conspectus of features and be guided by a constellation of constitutional and other considerations when it chooses to use, or desist from using, its power of contempt.*
>
> ***28.*** *The second principle must be to harmonise the constitutional values of free criticism, the Fourth Estate included, and the need for a fearless curial process and its presiding functionary, the Judge. A happy balance has to be struck, the benefit of the doubt being given generously against the Judge, slurring over marginal deviations but severely proving the supremacy of the law over pugnacious, vicious, unrepentant and malignant contemners, be they the powerful press, gang-up of vested interests, veteran columnists of Olympian establishmentarians. Not because the Judge, the human symbol of a high value, is personally armoured by a regal privilege but because "be you — the contemner — ever so high, the law — the People's expression of justice — is above*

you". Curial courage overpowers arrogant might even as judicial benignity forgives errant or exaggerated critics. Indeed, to criticise the Judge fairly, albeit fiercely, is no crime but a necessary right, twice blessed in a democracy For, it blesseth him that gives and him that takes. Where freedom of expression, fairly exercised, subserves public interest in reasonable measure, public justice cannot gag it or manacle it, constitutionally speaking A free people are the ultimate guarantors of fearless justice. Such is the cornerstone of our Constitution; such is the touchstone of our Contempt Power, oriented on the confluence of free speech and fair justice which is the scriptural essence of our Fundamental Law. Speaking of the social philosophy and philosophy of law in an integrated manner as applicable to contempt of court, there is no conceptual polarity but a delicate balance, and judicial "sapience" draws the line. As it happens, our Constitution-makers foresaw the need for balancing all these competing interests. Section 2(1)(c) of the Contempt of Courts Act, 1971 provides:

> *"Criminal contempt' means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which—*
>
> > *(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of any court"*

This is an extremely wide definition But, it cannot be read apart from the conspectus of the constitutional provisions within which the Founding Fathers of the Constitution intended all past and future statutes to have meaning. All laws relating to contempt of court had, according to the provisions of Article 19(2), to be "reasonable restrictions" on the exercise of the right of free speech. The courts were given the power— and, indeed, the responsibility— to harmonise conflicting aims, interests and values. This is in sharp contrast to the Phillimore Committee Report on Contempt of Court in the United Kingdom [(1974) bund. S. 794. paras 143-5, pp. 61-2] which did not

recommend the defence of public interest in contempt cases.

29. *The third principle is to avoid confusion between personal protection of a libelled Judge and prevention of obstruction of public justice and the community's confidence in that great process. The former is not contempt, the latter is, although overlapping spaces abound.*

30. *Because the law of contempt exists to protect public confidence in the administration of justice, the offence will not be committed by attacks upon the personal reputation of individual Judges as such. As Professor Goodhart has put it [See Newspapers on Contempt of Court, (1935) 48 Harv LR 885, 898]:*

> *"Scandalising the court means any hostile criticism of the Judge as Judge; any personal attack upon him, unconnected with the office he holds, is dealt with under the ordinary rules of slander and libel"*

Similarly, Griffith, C.J. has said in the Australian case of Nicholls [(1911) 12 CLR 280, 285] that:

> *"In one sense, no doubt, every defamatory publication concerning a Judge may be said to bring him into contempt as that term is used in the law of libel, but it does not follow that everything said of a Judge calculated to bring him into contempt in that sense amounts to contempt of court".*

Thus in the matter of a Special Reference from the Bahama Islands [1893 AC 138] the Privy Council advised that a contempt had not been committed through a publication in the Nassau Guardian concerning the resident Chief Justice, who had himself previously criticised local sanitary conditions. Though couched in highly sarcastic terms the publication did not refer to the Chief Justice in his official, as opposed to personal, capacity. Thus while it might have been a libel it was not a contempt.

31. *The fourth functional canon which channels discretionary exercise of the contempt power is that the fourth estate which is an indispensable intermediary between the State and the people and necessary instrumentality in strengthening the forces of democracy, should be given free play within responsible limits even when the focus of its critical attention is the court, including the highest Court.*

32. *The fifth normative guideline for the Judges to observe in this jurisdiction is not to be hypersensitive even where distortions and criticisms overstep the limits, but to deflate vulgar denunciation by dignified bearing, con-descending indifference and repudiation by judicial rectitude.*

33. *The sixth consideration is that, after evaluating the totality of factors, if the Court considers the attack on the Judge or Judges scurrilous, offensive, intimidatory or malicious beyond condonable limits, the strong arm of the law must, in the name of public interest and public justice, strike a blow on him who challenges the supremacy of the rule of law by fouling its source and stream."*

(emphasis added)